

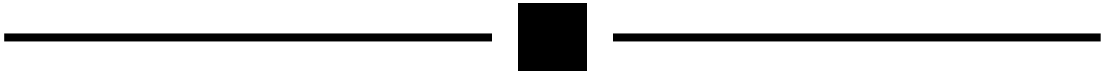


LAW
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FAIRBRIDGES
ATTORNEYS
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This Summer edition of Law Letter has lessons from our courts for many readers – employees, employers, traders, accountants, financial advisors, banks, husbands and wives, even attorneys! Please remember that the contents of Law Letter do not constitute legal advice. For specific professional assistance, always ensure that you consult your attorney.

FROM THE COURTS



Trade Marks

■ A Red Card

THE IMPLICATIONS of ambush marketing on the impending World Cup soccer event were the topic of the FIFA/Metcash Trading Africa case discussed in the March 2009 edition of *Law Letter*. Judgment remained outstanding while many businesses waited anxiously to hear whether the court would deem the marketing in the circumstances of the case to be unlawful in the run-up to 2010.

The case dealt with the introduction of Section 15A to the **Merchandise Marks Act**. This Section renders the use of a legitimate brand in relation to a protected sponsored event unlawful, if it is calculated to derive a gratuitous promotional benefit from the event without the authority of its organiser.

Judgment has finally been delivered on 1 October 2009. FIFA contended that Metcash's trade mark gave the impression of it being officially associated with the World Cup that has been declared a "protected event" in terms of Section 15A. Metcash marketed lollypops under the name "2010 POPS" coupled with images of the South African flag and soccer balls. Metcash countered that its product was associated with soccer in general and not the World Cup in particular and that its marketing could not reasonably possibly be seen to allude to the event.

Judge Msimeki made short shrift of Metcash's arguments, including freedom of expression to use its own registered trade mark. In his interpretation, Section 15A is not complicated and Metcash's conduct clearly disclosed an intention to achieve publicity for its trade mark by deriving

special promotional benefit from the World Cup without the prior authority of FIFA.

In terms of this judgment, it would be advisable to steer clear from mentioning the year 2010 as such, especially in conjunction with depictions of soccer balls and/or the South African flag, on present marketing of any products or services.

Federation Internationale de Football Association (FIFA) v. Metcash Trading Africa (Pty) Ltd Case no. 53304/07 North Gauteng High Court, Pretoria (1 October 2009).



Marriages

■ Tea for Two

POLYGAMY HAS been receiving increasing publicity, especially since President Zuma has appeared publicly with more than one wife. The law has, so far, been slow to recognize the right to equality of each of these polygamous spouses. A recent, unanimous judgment handed down by the Constitutional Court represents the next step in the recognition of these rights.

Mr Ebrahim Hassam was married to both Mrs Mariam Hassam and Mrs Fatima Hassam according to Muslim rites. Mr Hassam died without a will and the executor of his estate refused to allow Fatima a portion of the inheritance on the basis that the **Intestate Succession Act** only recognizes one wife.

Fatima took the matter to court, arguing that the relevant section of the Intestate Succession Act was unconstitutional. The Constitutional Court agreed with her.

The effect of its judgment is that spouses to a polygamous marriage are now entitled to inherit in terms of the Intestate Succession Act. Essentially, each spouse will

receive a child's share (calculated by dividing the estate by the number of children plus the number of polygamous spouses) or the prescribed minimum of R125 000.

The judgment does not, however, make a ruling on whether polygamous marriages are legally valid. Justice Nkabinde specifically declined to do so as this issue was not placed before the court.

Interestingly, the judgment has retrospective effect to 27 April 1994, the dawn of our democracy. This is likely to open the courts and the Master's office to numerous claims from polygamous spouses who have been excluded from inheriting from deceased estates over the past 15 years. These estates may yet need to be recalculated and redistributed.

Hassan v. Jacobs NO and Four Others CCT 83/08.



Labour Law

■ Chuckle Buckle

"The marvellous thing about a joke with a double meaning is that it can only mean one thing."

– Ronnie Barker

HAVE YOU ever carelessly forwarded an email to friends or colleagues that you thought was funny? That email could cost you your job, so think twice before hitting the 'send' button!

The Labour Court recently had to consider just such a case. Ms A, an employee of Edgars, received an email from another Edgars employee. The email had racist connotations. Ms A did not consider the email as offensive – in fact she thought it was funny – and she in turn forwarded the email to family members and friends, none of whom were employed by Edgars.

The offending email was detected and Edgars instituted disciplinary action. Ms A was charged and, after admitting guilt, was dismissed. For unexplained reasons, no action was taken against the employee who had sent the offending email to Ms A in the first place.

Ms A felt that dismissal was an excessively harsh sanction for her conduct and she referred a claim for unfair dismissal to the CCMA. The Commissioner decided that the email

was not derogatory and was meant as a joke. Taking into account the absence of malice, the employee's length of service and her clean disciplinary record, Ms A should have received a final written warning. The Commissioner noted that dismissal should be a last resort and he ordered that Edgars reinstate Ms A.

Edgars was not having any of this and took the CCMA on review to the Labour Court. Review proceedings are limited in scope – a CCMA award may only be overturned if the judge concludes that the decision reached by the Commissioner was not one that a reasonable decision-maker could reach. The court may not set aside an award if the award is merely open to some criticism.

The court noted that the Commissioner's decision was based on his conclusion that Ms A had not acted maliciously, but had perceived the email as a joke. Other factors taken into account were Ms A's length of service, her clean disciplinary record and her admission of guilt. The court concluded that a reasonable decision-maker could have made the Commissioner's award. As a result, the award would have to stand.

The court also observed that Edgars' failure to discipline the initial sender of the email was sufficient grounds, in itself, to dismiss the review. Employers must be consistent when disciplining employees.

The lesson for employees? Delete questionable emails; they are just not worth the trouble that may ensue. And employers? Be consistent when taking disciplinary action and use dismissal as a last, carefully-considered resort.

Edgars Consolidated Ltd (Edcon) v. CCMA & Others [2009] 1 BLLR 56 (LC).



Contracts

■ What you see is what you get

SECUREFIN was on the brink of concluding a complex business deal, in terms of which it was considering 'buying' a large number of insurance policies.

Securefin appointed accountants KPMG to advise it whether the proposed purchase price of the policies was fair. KPMG, instead of independently examining the policies, accepted at face value information provided

by the seller. This information turned out to be false and Securefin ended up overpaying for the policies. Securefin sued KPMG for breach of contract.

In the North Gauteng High Court in Pretoria, both parties led extensive expert evidence on the interpretation of the contract and what exactly KPMG had been tasked to perform. This testimony lasted for 14 days and resulted in a record consisting of 6600 pages of evidence and exhibits.

The dispute eventually came before the Supreme Court of Appeal in Bloemfontein, which found it necessary to comment on the issue of expert evidence when it comes to the interpretation of contracts.

Judge Louis Harms emphasised that our law provides that, where parties have decided that an agreement should be recorded in writing, the written agreement is accepted as the sole evidence of the terms of their agreement. You cannot introduce outside evidence – like experts – to tell you what the written agreement means. Interpretation is a matter of law, to be decided by the court and not the witnesses. The increasing practice of allowing experts to testify as to the meaning of a contract, said the court, is undesirable. No witness, expert or otherwise, is entitled to offer an opinion as to what a contract means.

If you conclude a written agreement, make sure that its terms are readily understandable, clear and unambiguous. If a dispute arises, you will not be allowed to explain to a court what the agreement really means, or what it was intended to mean, or what you thought it meant.

KPMG Chartered Accountants (SA) v. Securefin Ltd and Another 2009 (4) SA 399 (SCA).



A Court will not lightly infer that a contract excludes liability for gross negligence.

Banking

■ They took their Commission

“The weak have one weapon: the errors of those who think they are strong.”
– George Bidault (1899 - 1983)

AN EARLIER generation was taught from a young age to save for a rainy day. Conventionally, that meant depositing money with a bank. Investment vehicles have multiplied

and, with the relaxation in exchange control regulations, it became possible for South Africans to invest up to R750 000 in overseas markets.

Mr Page, an Eastern Cape farmer, had R750 000 tucked away in a money market account. His bank’s financial advisor suggested that he invest the money offshore. Page followed this advice, but was paid out only R580 000 when he redeemed his investment a year later.

Page instituted an action against the bank and the financial advisor for his losses. He argued that the bank had held the financial consultant out to the public as a competent financial consultant and investment advisor, and had placed his services at the disposal of the public for reward. In doing so, both the financial advisor and the bank owed Page a duty of care. He claimed that the bank had been grossly negligent in advising him to make the offshore investment. These types of investments are generally regarded as long-term, while Page might need to cash in within a relatively short period of time.

The bank argued that Mr Page was aware, or ought to have been aware, that it was not advisable to invest funds offshore on a short-term basis. An ‘exclusion of liability’ clause in the investment agreement – providing that “we do not assume responsibility for the performance of investments” – was also highlighted.



Judge Dambuzza confirmed that our law permits parties to contract out of responsibility for gross negligence. It was theoretically possible for the investment agreement to exempt the bank from liability for grossly negligent investment advice. However, any exclusion clause must be restrictively interpreted, meaning that a court will not lightly infer that the parties intended that the contract would exclude liability for gross negligence. In this case, another part of the agreement contained a confirmation that the bank was insured against claims for professional negligence. The exclusion clause made no sense in the light of this statement and the court held that the clause could not be read to exempt the bank from liability for gross negligence.

The judge concluded that a careful analysis of Page’s financial needs would have shown that an offshore investment was not suitable for him, as he required the funds within a year. The bank and the financial consultant

had breached a duty of care towards Page and were ordered to pay the damages claimed by him.

Page v. First National Bank Ltd and Another 2009 (4) SA 484 (ECD).

Lawyers

■ Dishonourable Conduct

"All men are liable to error; and most men are, in many points, by passion or interest, under temptation to it."

– John Locke (1632 - 1704)

ATTORNEYS are bound by Law Society rules that govern many aspects of practice. One set of rules deals with accounting standards and are especially important because attorneys regularly hold money in trust on behalf of clients and other persons. Other rules deal with touting and prohibit an attorney from, amongst other things, paying a financial reward to a client or potential client to give that attorney work. Conveyancers, in particular, may not pay 'kickbacks' to estate agents who favour them with property transfers.

Attorneys are expected to be honest and show integrity and openness.

The Law Society of the Northern Provinces recently instituted proceedings against three attorneys. The Law Society alleged that the attorneys' accounts were in a shambles and that they were guilty of touting. The attorneys had, according to the Law Society, been making unexplained payments to various estate agents.

The High Court was satisfied that the attorneys had breached the rules and ordered that they be suspended from practice for a period of two years. The attorneys then made what turned out to be a very bad judgment call – they appealed to the Supreme Court of Appeal.



The attorneys admitted that their accounting system was non-compliant and offered a number of explanations, from bookkeepers on maternity leave to crashed accounting software. Significantly, they denied ever having made payments to estate agents as an inducement for work. The attorneys argued that the sanction imposed by the High Court was too harsh and that their suspension from practice should have been 'suspended'. In response, the

Law Society cross-appealed, asking for the attorneys to be struck off the roll. If an attorney is struck off the roll, the offending attorney is prohibited from practicing for an indefinite period of time, until a court can be convinced that the attorney has been reformed, and is again a fit and proper person to practice.

The Supreme Court of Appeal agreed that the attorneys' accounts were undeniably chaotic. However, the court was not satisfied that the attorneys had provided a full explanation for the chaos. The court noted that, when facing proceedings of this nature, attorneys were required to be frank and to provide full disclosure.

What really sunk the three attorneys, though, was the court's finding that the attorneys had lied in denying any illicit payments to estate agents. There was clear evidence that 'kickbacks' had indeed been paid to agents.

The court concluded that the attorneys had been dishonest, and had shown a lack of integrity and openness. Attorneys should not have these character traits. An order suspending the attorneys is only appropriate if the court has some basis to conclude that the attorneys will reform during the period of suspension. The court had no reason for such optimism in this case and the attorneys were struck off the roll, and ordered to pay costs.

Botha and Others v. Law Society, Northern Provinces 2009 (3) SA 329 (SCA).



Technology

■ Advancement or Retrogression?

"The Enlightenment view of mankind is a complete myth. It leads us into thinking we are sane and rational creatures most of the time, and we're not."

– JG Ballard

BIOWATCH, a public interest organisation, failed to obtain information from governmental authorities when monitoring the development of genetically modified foods. It approached the High Court which granted most of its requests on the basis that the non-disclosure infringed Biowatch's constitutionally entrenched rights of access to this information. Nevertheless, because of the lack of precision in Biowatch's claims, the court held that

the governmental authorities should not be ordered to pay its costs.

Monsanto, a large multinational conglomerate, had been developing these foods in South Africa. The court further concluded that Biowatch had compelled Monsanto to intervene to protect the confidentiality of information it had supplied to the authorities and so Biowatch should pay Monsanto's costs.

Biowatch appealed to the Constitutional Court against these cost orders. Even though appeal courts are reluctant to interfere with a lower court's discretion in awarding costs, Justice Albie Sachs found that not enough attention was given to the fact that the State had provoked the litigation by the substantial failure of government officials to meet their constitutional obligations. The general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs, unless the application is frivolous or vexatious or manifestly inappropriate. The sweeping nature of Biowatch's requests had not prevented the matter from being fully dealt with. The governmental authorities should accordingly pay Biowatch's costs.

Furthermore, the litigation was not about a dispute between Biowatch and Monsanto, but against the State. Biowatch had secured crucial information whose release

Monsanto had resolutely opposed. Monsanto succeeded in protecting the confidentiality of some of the data it had provided. In these circumstances, the costs award against Biowatch in favour of Monsanto should be set aside, and there should be no order as to costs.

This judgment has been welcomed by civic organisations defending public interest causes.

Biowatch Trust v. Registrar Genetic Resources and Others Case No CCT 80/80 (2009) (ZACC) 14 (Delivered on 3 June 2009).



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