

**CAPE TOWN ATTORNEYS ASSOCIATION**

**LIBRARY CIRCULAR – 4 December 2013**

**A. NEW BOOKS**

Otto, J M. The National Credit Act Explained. 3<sup>rd</sup> ed. LexisNexis, 2013.

**B. NEW ACTS**

**Protection of Personal Information Act 4 of 2013 (date of commencement to be set)**

To promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000; to provide for the issuing of codes of conduct; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; to regulate the flow of personal information across the borders of the Republic; and to provide for matters connected therewith.

**Commission on Gender Equality Amendment Act 17 of 2013 (w.e.f. 26.11.2013)**

To amend the Commission on Gender Equality Act, 1996, so as to align it with the Constitution of the RSA, 1996; and to provide for matters connected therewith.

**Electoral Amendment Act 18 of 2013 (w.e.f. 26.11.2013)**

To amend the Electoral Act, 1998, so as to amend and insert certain definitions; to revise provisions relating to registration as a voter; to revise provisions relating to special votes in election for the National Assembly and provincial legislatures and the procedure related thereto; to revise provisions relating to the number of party agents at a voting station; to correct certain important technical aspects in the text of the Act; and to provide for matters connected therewith.

**Rates and Monetary Amounts and Amendment of Revenue Laws Act 23 of 2013 (w.e.f. 2.12.13)**

To fix the rates of normal tax; to amend the Income Tax Act, 1962, so as to amend rates and monetary amounts; to amend the Customs and Excise Act, 1964, so as to amend rates of duty in Schedule 1; and to provide for matters connected therewith.

**Division of Revenue Amendment Act 29 of 2013 (w.e.f. 2.12.2013)**

To amend the Division of Revenue Act, 2013, in accordance with the Money Bills Amendment Procedure and Related Matters Act, 2009 and to provide for matters connected therewith.

**C. REGULATIONS AND GOVERNMENT NOTICES**

**Broad-Based Black Economic Empowerment Act (53/2003):** Notice regarding Qualifying Small Enterprises (QSEs) Scorecard for the Financial Services Sector published

GN 1135      GG 37058      22.11.2013

Justices of the Peace and Commissioners of Oaths Act (16/1963): Item 66C inserted:  
Southern African Institute of Government Auditors: Registered Government Auditors  
GN 909 GG 37063 29.11.2013

Liquor Act (59/2003): Amendment of regulations (w.e.f. 3.12.2013)  
GN 928 GG 37091 3.12.2013

National Road Traffic Act (93/1996): Draft amendment of regulations published for  
comment  
R.917 GG 37076 27.11.2013

#### D. JOL JUDGMENTS

**Konsult One CC v Strategy Partners (Pty) Limited [2013] JOL 30206 (WCC)**  
19 / 03 / 2013

**Keywords:** Contract – Partnership agreement – Proof of – Tacit agreement

**Mini summary:** The applicant sought a declaration that it and the respondent had entered into a partnership agreement in respect of seven agricultural projects. There was no direct evidence of such agreement, and the applicant relied on an alleged tacit partnership agreement contract which it contended should be inferred from the conduct of, and the written and oral communications between, the parties' representatives. **Held** that in order to succeed in the application, the applicant bore the onus of establishing that a partnership contract was entered into by the parties. The legal principles relevant to this case were those pertaining to partnership agreements and the proof of tacit contracts. The three *essentialia* of a partnership agreement are that each of the parties brings, or binds himself to bring, something into the partnership, whether it be money, labour or skill; that the business should be carried on for the joint benefit of the parties; and that the object should be to make a profit. The mere presence of the *essentialia* of a partnership in an agreement is not, however, sufficient to establish a partnership if the parties did not in fact intend to create a partnership. There must be a clear intention to establish a partnership. Based on the evidence, the court found that the applicant had failed to discharge the onus of proof resting upon it. The application was thus dismissed.

**N&Z Instrumentation and Control v Trolex SA (Pty) Limited [2013] JOL 30735 (GSJ)**  
04 / 06 / 2013

**Keywords:** Contract – Existence of – Assessment of evidence

**Mini summary:** Relying on an alleged agreement between itself and the respondent, the appellant sought payment of commission in respect of the sale of goods by the respondent to a third party. The agreement alleged to be binding upon the parties was said by the appellant to entitle it to a commission of 40% should the respondent sell its products to customers within a region in which the appellant had been given exclusive distribution rights. The respondent denied the existence of such an agreement. **Held** that examining the sequence of events as reflected in the evidence before the Court, the Court had to decide whether the facts pointed towards the existence of the alleged agreement. It was held that they did not. The Court also confirmed the trial court's adverse credibility findings in respect of two of the appellant's witnesses. In the absence of corroboration for the contention that an agreement had come into existence, the Court dismissed the appeal.

**Pangbourne Properties Limited and another v Your Life (Pty) Limited and another [2013] JOL 30945 (GSJ)**  
03 / 09 / 2013

**Keywords:** Contract – Lease agreement – Action for payment – Effect of cession – Right to sue

**Mini summary:** The first plaintiff and first defendant entered into a lease agreement. When the first defendant failed to pay the agreed rental, the first plaintiff elected to cancel the agreement. The first respondent did not vacate the premises until about four months later. It became obliged to pay the first plaintiff arrear rental and damages, including for the period of holding over and the unexpired period of the lease. The plaintiffs sued the two defendants for payment. The first defendant had become insolvent and the action proceeded only against the second defendant, as surety and co-principal debtor for the obligations to the landlord. **Held** that the issue was whether or not the plaintiffs each had a cause of action against the defendants and whether those causes of action had arisen prior to institution of action. On cancellation a single claim arises for the arrear rental and damages. The landlord is required

to sue for all its damages in one cause of action. Thus, on the breach of the lease by the first defendant and the cancellation thereof, the first plaintiff (the landlord) became entitled to claim the arrear rental and damages. In terms of a mortgage bond passed over the leased premises prior to the conclusion of the lease agreement, the first plaintiff had ceded to the bank, all its rights arising out of the lease agreement. The consequence of that cession was that the right to sue did not vest in first plaintiff at the time the action was instituted by the first plaintiff. The bond was cancelled when the property was transferred to the second plaintiff. At that moment the rights ceded to the bank became vested in the first plaintiff and remained with the first plaintiff until transfer to second plaintiff. The second plaintiff also ceded its rights to the bank as set out above. The consequence of that cession was that the rights to sue did not vest in the second plaintiff at the time of its joinder to the action. In its order, the Court identified which entity was the first defendant's landlord at each particular time in respect of the claim due by the first defendant to its landlord.

**Astral Operations Limited v Nambitha Distributors (Pty) Limited; *In re* Astral Operations Limited v O'Farrell NO and others [2013] JOL 30946 (KZD)**

15 / 10 / 2013

**Keywords:** Civil procedure – Counter-claim – Exception

**Mini summary:** In each of the two matters before the Court, the plaintiff sued for goods sold and delivered pursuant to a written contract. In a counterclaim, it was alleged that the plaintiff engaged in three kinds of practices prohibited under the Competition Act 89 of 1998 ("the Act"). It went on to allege that, in terms of section 58(1)(a)(vi) of the Act, the Competition Tribunal has the power to declare the whole or any part of an agreement void and that it would be appropriate that it should do so in respect of two clauses of the contracts (the impugned clauses). It alleged that the three issues and the binding effect or invalidity of the impugned clauses were competition issues and would require the Court hearing the action to refer them to the Tribunal in terms of section 65(2)(b) of the Act. In the first matter before the Court, the plaintiff raised an exception to the counter-claim. The second matter was an application by the defendants to amend their counterclaim. **Held** that this being an exception, the plaintiff was required to persuade the Court that, on every interpretation which the counterclaim could reasonably bear, no cause of action was disclosed. Having regard to the facts in the dispute between the parties, the Court was driven to the conclusion that no case had been made out that the trial court would refer the three issues to the Competition Tribunal. Therefore, the counterclaim failed to disclose a cause of action and the exception had to be upheld.

**Viking Inshore Fishing (Pty) Limited v Mutual & Federal Insurance Company Limited [2013] JOL 30953 (WCC)**

30 / 10 / 2013

**Keywords:** Civil procedure – Interlocutory application – Separation of issues

**Mini summary:** The applicant and respondent were respectively the plaintiff and defendant in a pending admiralty action in which the applicant sought an indemnity from the respondent in respect of loss sustained on the sinking of its vessel. The present application was an interlocutory one for a separation of issues. **Held** that rule 33(4) of the Uniform Rules of Court provides that a court may make an order directing the disposal of a question which may conveniently be decided either before any evidence is led or separately from any other question, and may order that all further proceedings be stayed until such question has been disposed of. The Court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately. The interests of expedition and finality of litigation are ordinarily best served by the disposal of the whole matter in one hearing. The Court is required to weigh the *pros* and *cons* of the order sought and to decide, as best it can, where the balance of convenience lies. In the present case, the Court could not find that the balance of convenience favoured the granting of the separation, and therefore dismissed the application.

**Haviside v Heydricks and another [2013] JOL 30968 (KZP)**

17 / 10 / 2013

**Keywords:** Contract – Sale agreement – Sale of property – Defect – *Voetstoots* clause

**Mini summary:** In August 2008, the parties in this matter concluded a sale agreement in terms of which the respondents purchased immovable residential property from the appellant. The agreement contained a *voetstoots* clause. Subsequent to transfer, the respondents approached the municipality for authorisation to build a flat on top of the existing double garage and outbuildings on the property. They discovered that there were no building plans for the garage, and building regulations had not been complied with. The double garage was therefore an illegal structure which did not conform to municipal bylaws. It would cost the respondents in the region of R91 512 to obtain plans and to demolish and

reconstruct the double garage in accordance with the bylaws and building practices. The respondents therefore instated action against the appellant. The trial court held that there was a duty on the appellant to enquire whether plans had been obtained for the garage and to inform the respondents that it was an illegal structure, and that she had not disclosed that fact so as to obtain a higher price for the property. It was held that there was an implied term in the sale agreement that the structures on the property were lawful. Judgment was granted in respondents' favour. Held that while the structure in question was not authorised, the absence of statutory permission necessary to render them authorised were defects to which the *voetstoots* clause would apply. The Court confirmed that the absence of statutory approval was a latent defect. If a purchaser wants to avoid the consequences of a *voetstoots* sale, the onus is on him to show that the seller knew of the latent defect and did not disclose it; and that the seller deliberately concealed it with the intention to defraud. There was no evidence to suggest that the appellant was aware that the garage had contravened building regulations. The trial court erred in not addressing the issue of whether the non-disclosure was fraudulent. Had it addressed that question, it would have been constrained to conclude that fraud had not been proved. The appellant was therefore protected by the *voetstoots* clause and the appeal had to be upheld.

**Magidiwana and another v President of the Republic of South Africa and others [2013] JOL 30826 (GNP)**

18 / 07 / 2013

**Keywords:** Administrative law – Legal aid – State expense

**Mini summary:** The applicants brought an urgent application seeking relief in two parts. Urgent temporary relief was sought in Part A of the notice of motion and final relief was sought in the main application in Part B. The relief sought in both parts was of the same nature, namely that the first, second and third respondents must provide or ensure legal aid at State expense to the applicants in the proceedings before the fourth respondent, a commission of enquiry ("the Commission"). The Court had to decide only Part A. **Held** that the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive government function domain. The present Court could only grant such an order if there was proof of unlawfulness or fraud or corruption, which there was not in this case. The right to legal aid is not absolute. It is limited by section 36 of the Constitution. Legal aid at state expense is expressly mentioned in sections 28 and 35 of the Constitution, if substantial injustice will result. The Court therefore declared that the matter was urgent, it certified the class action, and dismissed the application in part A.

**Viking Inshore Fishing (Pty) Limited v Mutual & Federal Insurance Company Limited [2013] JOL 30972 (WCC)**

30 / 10 / 2013

**Keywords:** Civil procedure – Separation of issues – Court's discretion

**Mini summary:** The present application was an interlocutory one for a separation of issues in terms of rule 33(4) of the Uniform Rules of Court and Admiralty Rule 25. The applicant and respondent were respectively the plaintiff and defendant in a pending admiralty action in which the applicant sought an indemnity from the respondent in respect of loss sustained on the sinking of its vessel which was insured under a policy issued by the respondent in favour of the applicant. The applicant wished for four questions to be decided separately and before evidence is led, ie in a separate hearing in advance of the trial in the action. **Held** that rule 33(4) of the Uniform Rules of Court provides that a court may make an order directing the disposal of a question which may conveniently be decided either before any evidence is led or separately from any other question, and may order that all further proceedings be stayed until such question has been disposed of. Rule 33(4) enjoins the Court seized with an application for a separation of issues to make the necessary order "unless it appears that the questions cannot conveniently be decided separately". Where the application is opposed, it is incumbent upon the party resisting the separation to satisfy the court that the application should not be granted. However, the overriding rule is that the interests of expedition and finality of litigation are ordinarily best served by the disposal of the whole matter in one hearing. The court is required to weigh the *pros* and *cons* of the order sought and to decide, as best it can, where the balance of convenience lies. The balance of convenience did not favour the granting of the separation in this matter, and the application was dismissed.