



HAPPY 110th BIRTHDAY STBB

In the year 1900 our founders set up shop a stone's throw from where our St George's Mall office is today. Little did they know that this small office would grow into one of the biggest law firms in South Africa over the next century.

Henry Ralph Harris Buchanan opened his offices as a Solicitor and Notary Public on the 23rd day of August 1900. Edgar James Boyes was admitted as Attorney on the 13th day of October 1902 and so the firm's founders commenced practice in partnership as Buchanan & Boyes in Wale Street, Cape Town.

Ralph was educated at SACS and came from an illustrious legal background. His father, James Buchanan, was a former Attorney General of the Transvaal Republic and later the Judge President of the High Court of Griqualand West. His older brother was the well known Cape Town Barrister, William Porter Buchanan KC.

Edgar's grandfather, Captain Robert Nairne Boyes of the 55th Westmoreland Regiment, had come to the Cape in 1825 and lived in Grahamstown for 33 years before returning to England on being

appointed a Military Knight of Windsor by Queen Victoria. Edgar's father was Robert Charles Rutledge Boyes, Civil Commissioner and resident Magistrate at Caledon for 25 years until his death in 1893. Edgar was educated at Diocesan College, Rondebosch and had 2 sons, both attorneys, who became members of the firm.

In 1905 Ralph's younger brother, Roderick Noble Ross Buchanan, a junior lawyer, was commissioned to open a branch office in Church Street, Wynberg. Fourteen years later he purchased the business from the partners. Louis Eli Berman joined him in 1924 and the firm of Buchanan & Berman came into being. In 1953 Roderick's son, James Leslie Buchanan, was admitted to the partnership.

Robert Charles Rutledge Boyes, Edgar's nephew, became the second member of the Boyes family to join the partnership. The Boyes family continued

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STBB:
Healthy body,
healthy mind



to play a prominent role in the firm, with no less than 4 family members practicing together: RCR "Bobs" Boyes, a great sportsman in his day, was blunt, emphatic and intolerant of opposition; his son Robert Edward, a sound all-round lawyer, was also an exceptional sportsman playing both rugby and cricket for Western Province; Allan Wilfred, the gregarious horse-breeding enthusiast; and his eccentric but affable brother Charles Edgar.

World War Two precipitated changes and Buchanan & Boyes acquired a new partner, a retired Lieutenant-Colonel John Conrad Reginald Sampson. In 1950 the firm became known as Buchanan Boyes & Sampson.

Arthur Norman Weaver Thompson practiced for a time with Fritz Sonnenberg as Sonnenberg & Thompson. Even as far back as 1929 decentralisation in the Peninsula was a factor and so Thompson moved from the city to set up a practice in Wynberg with his cousin, Eugene Baron Thompson. The firm of Thompson & Thompson was sadly short lived as eighteen months later Eugene was tragically killed when he was run down by a motorcycle in Woodstock in 1931. His position was filled by Frederic Arthur Smithers, an avid sailor who purchased the practice from Thompson in 1937 and the firm became known as Thompson & Smithers.

James Matheson Klosser started his firm in Cape Town in 1935. A doyen of the Mountain Club of South Africa, he was primarily a litigator. The firm's name

changed from time to time as new partners were invited to join and in 1978 the firm adopted the name of Klossers.

1979 saw the amalgamation of Buchanan Boyes & Sampson with its erstwhile Wynberg cousin, Buchanans (formerly Buchanan & Berman). Thus the name of Buchanan Boyes was restored after a lapse of thirty years. In 1987 Buchanan Boyes merged with Klossers. By this time Buchanan Boyes & Klossers had established offices in Cape Town, Wynberg, Bellville, Claremont and Fish Hoek.

In 1992 Buchanan Boyes & Klossers and Thompson Smithers & Bradley merged to form Buchanan Boyes Thompson Smithers Incorporated.

The new century saw the firm form an association with Smith Tabata in the Eastern Cape, establishing a nationwide footprint and resulting in its current name of Smith Tabata Buchanan Boyes.

Today the firm of STBB Smith Tabata Buchanan Boyes is very proud of its rich heritage, but it is the firm's focus on the future that has grown Ralph Buchanan and Edgar Boyes' small general practice into arguably the largest property practice in South Africa today.

This balance between a proud history and a modern approach is evident in the commitment, skill and passion displayed by attorneys carrying on the proud traditions of their predecessors.





'WE' HAD THE HOUSE IN A CLOSE CORPORATION...PERILS

Married couples, understandably, often refer to assets as 'ours', whilst the legal-factual situation may be that the asset belongs to the one spouse only.

For example, a couple (married out of community of property) may well decide that it would best suit their financial and tax planning goals to buy their home (or an investment property) in a close corporation. For such purpose they would acquire a close corporation and may choose to appoint the wife as sole member.

Such were the facts in a recent decision handed down by the Supreme Court of Appeal (*Northview Shopping Centre v Revelas Properties*). Here the couple received a profitable offer on a property 'they' held in a close corporation of which the wife was the sole member. They decided to sell the property and the husband signed the agreement of sale on behalf of the close corporation. Subsequently however, the purchasers experienced difficulties and sought a way out of the agreement.

WHAT IS THE LEGAL OBSTACLE?

To sell immovable property, a written agreement of sale must be concluded between the purchaser and seller, or their duly appointed agents. This is in order to comply with section 2(1) of the Alienation of Land Act. (The Act acknowledges that for most people, dealings with immovable

property constitutes one of the biggest financial investments they will be involved with in their lifetimes. As such, the Act aims to avoid disputes about the terms of agreements to exclude the possibility of fraud and to avoid unnecessary litigation.)

HOW DID THE COURT APPLY THE LAW?

The question that arose in the above matter was therefore as follows: where the spouse of the sole member of the close corporation (which was the registered owner of the property and as such the seller in the agreement) signed a sale agreement on behalf of the close corporation, can it be said that he had the necessary authority to do so in order to comply with section 2(1) of the ALA?

The Supreme Court of Appeal held that the answer was 'no' and that such a non-member required the **prior written** consent of the member/s of the corporation before a valid and binding agreement could be concluded. The purchasers accordingly successfully escaped liability under the agreement of sale.

A CAUTIONARY NOTE

When you transact with a close corporation, take care to obtain verification that the signatory is indeed a member of the close corporation or that he/she has been duly authorised to sign on behalf of the close corporation. The agreement is otherwise open to attack!





STBB FOCUS

CAN AN UNPAID TRAFFIC FINE LEAD TO YOUR ARREST IN A ROAD BLOCK?

Most of us have been stopped in a routine traffic road block and, with the holiday season approaching, will most likely be repeating this experience in the near future, making this a good time to remind readers that it is in fact possible to be arrested for outstanding traffic fines, as long as the police have followed correct legal procedures.

WHAT ARE THESE “CORRECT LEGAL PROCEDURES”?

In a nutshell, a motorist can only be arrested if he/she failed to appear in a court on a summons after a warrant of arrest was issued against him/her.

THE CORRECT PROCEDURE IS AS FOLLOWS:

You can get one of two kinds of fines, regardless of the traffic violation:

- A **Section 56 notice** is given to you by a traffic officer, usually for a moving violation. It has a date on it on which you must appear before the court.
- A **341 Traffic Ticket** is issued when a motorist is caught violating a traffic regulation by camera (for example, when speeding) or when a traffic officer issues a ticket when the motorist is not present (this is the pink ticket issued for parking violations, expired licence disks and so on).
- Depending on whether you have been issued a section 56 notice or a section 341 traffic ticket, you have between 30 days and four months to pay your traffic fine.
- A **section 56 notice** means you have about 30 days to pay before your case goes to court. If you pay the fine timeously, you will not need to appear in court.
- If you receive a **section 341 traffic ticket**, you have 30 days before the Traffic Department will issue a “Notice Before Summons”, after which you will have another 30 days before the summons will actually be issued. After the summons is issued, you have another 30 days to pay your fine to the Traffic Department. After the 30 days have passed, you have another 14 days of grace in which you can pay your fine at the court mentioned on the summons.

So, in total, you have approximately four months to pay your traffic fine after receiving a section 341 ticket.

- Failure to pay the traffic fine will result in a summons being issued and served on you, either to you personally, or to any person over the age of 16 also resident at your place of residence. The summons will indicate when and in which court you must appear.
- Failure to attend the court or pay/contest the fine will result in a warrant being issued for your arrest.
- If you are stopped in a traffic road block while there is a warrant out for your arrest, traffic officers will indeed have the right to place you under immediate arrest.

IF YOU ARE ARRESTED, STAY CALM AND FOLLOW THESE GUIDELINES:

- Do not resist arrest. The legal issues can be attended to later, at the police station.
- You have the right to ask for a copy of the warrant for your arrest. If a copy can not be provided, the arrest and subsequent detention becomes illegal, even if the warrant is valid.
- The warrant should state the details of the offence, such as the time and place it was committed.
- If you are arrested, you must be taken to a South African Police Station or the place stipulated on the warrant and not to a Metro office.
- Traffic officials are not allowed to detain you in a vehicle or bus while carrying on with their duties at the road block. After arrest you should be taken to a South African Police Services Station immediately.
- Make an effort to take note of all the details surrounding your arrest, such as the time and place and the name of the arresting officer, as these could be important in your defence later.

“ A motorist can only be arrested if he/she failed to appear in court on a summons, and a warrant of arrest was issued against him/her. ”





NOT SO SILENT NIGHT

**There was a Christmas light display
In a town called Jeffrey's Bay;
They made a noise,
She threw her toys...
But what did the Courts say?**

Retired Ms Wingardt approached the Eastern Cape High Court for an order interdicting her neighbours (the Groblers) across the road, from displaying such dazzling Christmas lights so as to attract throngs of holiday makers and residents to their street to view 'the spectacle', as she called it. The show even included a live Christmas father who would, on Christmas Eve or Christmas Day, hand out gifts to children (that their parents had surreptitiously left with him earlier). The Groblers also asked the sightseers for donations which they gave to two local charities.

The increased traffic and noise levels resulting from the activities (which initially ran from 01 December to 14 January) disturbed Ms Wingardt and her pensioner husband's sleep and was otherwise very disturbing to their general peaceful and quiet enjoyment of their home.

In Court, Wingardt's neighbours explained that they managed to shut out any noise inconvenience by just drawing their curtains in the windows facing the street and as such, did not have a problem with the activities of the Groblers.

THE LEGAL FRAMEWORK

- although an owner (flowing from his rights of ownership) may by and large do as he pleases on his own land, this right is limited by (amongst other things) his neighbour's corresponding right to the enjoyment of his own land;
- if a neighbouring owner uses his land in such a way that a material interference with the other's rights of enjoyment results, the latter is entitled to relief.

THE QUESTION BEFORE THE COURT

Acknowledging that noise and traffic levels typically increased in the holiday town during December and January of each year and that the activities of the Groblers added to these levels, the issue for determination was whether the increased noise levels constituted an infringement of Ms Wingardt's property rights.

JUDGMENT

The Court found, on the facts of this matter, that the disturbances did not constitute an unreasonable infringement on Ms Wingardt's peaceful use and enjoyment of her property.

It reached this conclusion by weighing up the following considerations:

- the so-called 'nuisance law' is part of our law of delict;
- the five elements of a delict are (1) conduct; (2) which is wrongful and unlawful; (3) committed either negligently, or intentionally (fault); (4) which caused the harm or loss complained of (causation); and (5) resulted in actionable harm, loss or damage;
- the crucial issue here was the enquiry into the issue of wrongfulness, the presence of the other elements being acknowledged.
- reasonable use and enjoyment by an owner of his property, is lawful. When a neighbour complains that such use materially interferes with the use of his/her neighbouring property, a court is obliged to determine whether the use was wrongful;

“ The Court found, on the facts of this matter, that the disturbances did not constitute an unreasonable infringement on Ms Wingardt's peaceful use and enjoyment of her property. ”



■ wrongfulness (in a legal context) has its roots in the ethical and legal convictions and norms of society.

Against this background, the Court held that the disturbance and nuisance caused to Ms Wingardt must be balanced against any benefit or advantage experienced by the Groblers and the Jeffrey's Bay community from their conduct. Clearly there was no financial benefit – on the contrary, their expenses are probably not insignificant. The benefit was solely the gratification and enjoyment they experienced from creating a festive atmosphere and spirit during the Christmas period and from supporting two worthy charity organisations in the process.

In weighing up all these considerations, the Court held that the inconvenience and disturbance caused to Ms Wingardt was not such to deserve

the (legal) label of wrongfulness which would attract legal sanction.

AN ASIDE

The finding was based on the particular facts of this matter. As such, the Court was not presented with empirical evidence indicating what the actual decibel level of the noise was. Moreover, the finding was based on the evidence produced on affidavit, Ms Wingardt having chosen to run a trail on paper, i.e., not by giving evidence which could be cross-examined. Consequently, Ms Wingardt's allegations stood alone, her own neighbour refuting her allegations and supporting that of the Groblers.

This means that in different circumstances and depending on particular facts of a similar complaint, a Court may come to a different conclusion.

DO GRANDPARENTS HAVE TO SUPPORT THEIR GRANDCHILDREN?

“We be of one blood, thou and I” Mowgli answered... my kill shall be thy kill if ever thou art hungry.” **Rudyard Kipling**

“ In terms of our common law the maternal and paternal grandparents of a child born in wedlock are obliged to support him/her, if the child's parents are unable to do so. ”

In terms of our common law the maternal and paternal grandparents of a child born in wedlock are obliged to support him/her, if the child's parents are unable to do so. In the case of an extra-marital child whose parents are unable to support him/her, our common law provides that the maternal grandparents have a duty of support towards the extra-marital child, but not the paternal grandparents. The common law rule accordingly differentiates between children born in wedlock and extra-marital children on the ground of birth. This differentiation amounts to discrimination, as birth is a ground specified in section 9(3) of the constitution. In terms of section 9(5) of the constitution, discrimination on the ground of birth as a listed ground is presumed to be unfair unless it can be justified under section 36 of the constitution.

In a recent decision in the Cape Provincial Division of the High Court it was decided that the common law had to be developed, by looking at the requirements

of our constitution, to impose a legal duty on paternal grandparents to support their extra-marital grandchildren to the same extent to which maternal grandparents are liable. The judge pointed out that extra-marital children are a group who are extremely vulnerable and their constitutional rights should be jealously protected. This duty is not only in line with our constitutional principles, but also in accordance with public international law, which dictates that children shall not be allowed to suffer on account of their birth. The limitation imposed by the common law rule was thus clearly unreasonable and unjustifiable in an open and democratic society based on human dignity, equality and freedom. It followed that our common law rule had to be developed by the courts to promote the spirit, purport and objects of the Bill of Rights.

In this case, *Petersen v Maintenance Officer and Others*, the main issue before the court was whether the paternal grandparents had a duty to pay

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maintenance. The applicant (a single mother) was receiving an inadequate maintenance contribution from the father of her children. She requested the Maintenance Officer to summon the paternal grandparents for an enquiry to establish their ability to pay maintenance. The Court held that the common law rule which prohibited the calling of grandparents for an enquiry and subsequent payment of maintenance, if possible, was unconstitutional as it also failed article 36 of the constitution, being unjustifiable. The Court concluded that, in order to keep our common law in step with the values enshrined in the Constitution, it was necessary that a duty be imposed on paternal grandparents to support their extra-marital grandchildren to the same extent to which the maternal grandparents are liable to maintain their extra-marital grandchildren.

WHAT ARE THE REQUIREMENTS FOR THE EXISTENCE OF THE MAINTENANCE OBLIGATION?

1. The person claiming maintenance must be in need thereof and must not be able to provide it her/himself.
2. The person carrying the burden of maintenance must be able to provide that maintenance.
3. The closest relative should be held responsible first.

Interestingly, the judgment implies that this obligation will rest on the grandparents of both the mother and father and then on the brothers and sisters, if the parents of their estates are unable to meet their maintenance obligation.

MENS SANA IN CORPORE SANO - A HEALTHY MIND IN A HEALTHY BODY

Increasing demands in our fast-paced professional lives need to be matched with a greater investment in our physical wellness and health.

The partners of STBB believe that a fit employee is a confident, energized and positive employee who knows something about setting and reaching goals, and adding value to a team.

They actively encourage employees to embrace fitness as a lifestyle choice by setting a healthy example and being involved in many different sporting disciplines, two of the most popular choices being cycling and mountain biking.

Many of our partners regularly take part in cycling and mountain biking races, notably the Karoo to Coast, the Cape Epic, Sani to Sea and Wines to Whales.

Pictured here f.l.t.r. are our managing partner Jonathan Steytler and directors Stoffel Ackermann, Philip Steyn and Hennie Mouton at the start of the Karoo to Coast mountain biking race recently.



STBB FOCUS

DO YOU SUFFER FROM ESCALAPHOBIA... THE PHOBIA OF GETTING HURT ON AN ESCALATOR?

One might be baffled by another person's fear of escalators and such person's choice rather to join an elevator queue than enjoy the convenience of travelling by escalator. Sometimes, however, the origin of such a fear is understandable. Consider, for example, the facts in the recent finding in *Skead and others v Melco Elevator* (Gauteng High Court):

Over the 2006 Easter weekend, two sisters and their cousin went shopping in the very busy Eastgate shopping mall. The expedition turned into a nightmare for them when the escalator they were travelling on malfunctioned and caused them to fall. It transpired that the left handrail came to a stop whilst the right handrail and the steps kept moving upwards. As a result, the two sisters lost their balance and fell.

THE PARTIES' ALLEGATIONS IN COURT:

- Having sustained injuries in the fall, they instituted action against the contractors appointed to maintain the escalators as well as the owner of the shopping centre, based on their negligence in ensuring that the escalator was fully operational and safe for use at all times.
- Both the maintenance contractor and the property owner denied negligence. The latter argued that it did not possess the necessary skill and expertise to maintain and repair its escalators; that it employed the maintenance contractor (a company with the required skill and expertise) to maintain the escalators; and, that in doing so, it had taken all reasonable steps to guard against injury or loss to its patrons.
- The maintenance contractor, on the other, led expert evidence to the effect that the malfunction was due to a sudden and unforeseen event that could not reasonably have been picked up even if a competent person had conducted a standard test a minute prior to the sisters stepping onto the escalator. The expert evidence further confirmed that the escalator in question was meticulously well maintained.

WHO WAS TO BLAME FOR THE MALFUNCTIONING?

In addressing this enquiry, the court posed the question whether a different course of conduct by the maintenance contractor and/or property owner could have prevented the malfunction. The reasoning being that if the malfunction would have occurred in any event, then the actual conduct was not the factual cause of the accident and as such, neither the maintenance contractor nor the property owner could be held liable for the injuries sustained by the sisters.

On the undisputed facts as presented by the escalator maintenance experts, the maintenance team and the property owner, the court held that the sisters failed to establish any causal link between the malfunction and any act or omission on the part of the maintenance contractor or owner.

HOWEVER, WHERE THERE IS AN 'APPARENT DANGER'...

The court distinguished the current case from the judgment in *Langley Fox Building Partnership (Pty) Ltd v De Valence* in which it was recognised that a duty may exist on an employer of an independent contractor to take steps to prevent harm to members of the public, *depending on the specific facts of each case*. In the *Langley Fox* case the court noted that the relevant factors which would be considered included:

- the nature of the danger;
- the context in which the danger may arise;
- the degree of expertise available to the employer and the independent contractor respectively to avoid the danger; and
- the means available to the employer to avert the danger.

The court distinguished the current matter from the facts in the *Langley Fox* case, because in the latter case there was an *apparent danger* which the property owner would have been able to guard against.

YOUR BEST IS GOOD ENOUGH

The judgment confirms that, where proper maintenance systems are in place and are administered with diligence and care, a property owner and maintenance contractor will not attract liability for injuries sustained as a result of unforeseen malfunctions.

However, property owners and contractors should remain cautious to maintain the highest standards of care – since every incident will be adjudicated on its own merits. Failing to properly maintain escalators, elevators, swinging doors and the like may cause injuries, the liability for which may leave a property owner (and contract) with a substantial bill to foot.





BUT I ORDERED THE 2006 MODEL BMW X5!

“If you don’t get what you want, you suffer; if you get what you don’t want, you suffer; even when you get exactly what you want, you still suffer because you can’t hold on to it forever.”

Dan Millman, The Peaceful Warrior

In December 2005 Mr Singh decided to buy a new BMW X5 which he had seen on display at SMG Auto (an agent of BMW Financial Services) in Durban. He was adamant that he wanted a model that would be first registered in 2006 and was duly assured by the salesman that the process of registering the vehicle would happen in January 2006 only. However, after the vehicle was delivered to Mr Singh, it transpired that it had been registered in 2005 already. SMG undertook to rectify the ‘licensing error’ with the licensing office by reversing the prior registration, but the issue remained unsolved.

Mr Singh then consulted his attorney who wrote to SMG demanding delivery of a vehicle which accorded with the description of the vehicle he had negotiated to purchase – in particular, one that was registered for the first time in 2006. No satisfactory response was furnished and Mr Singh ultimately issued summons against SMG. The court of first instance found in favour of Singh, holding that as the vehicle had been registered previously (on three occasions in 2005, it transpired) it was thereafter not capable of being ‘first registered’ in 2006. Moreover, because the registration requirement was an essential term of the sale agreement, it was evident that Mr Singh did not receive the vehicle for which he had contracted. It followed, the judge said, that as specific performance in terms of the agreement was no

longer possible (the matter being heard in 2007), Mr Singh was entitled to cancel the contract and claim restitution. However, when BMW appealed to a full bench of the Pietermaritzburg High Court, the court of first instance’s finding was overturned.

Singh thereupon appealed to the Supreme Court of Appeal which court confirmed that, in the specific circumstances of the agreement between AMG and Mr Singh, the term relating to the year of registration of the vehicle was an essential term. This meant that, if the seller did not comply with this term, it was in breach of the contract. Mr Singh was accordingly entitled to rescind from the contract and claim restitution of the payments he had made. It ordered BMW to repay Mr Singh the payments he had already made against the return of the motor vehicle by Mr Singh.

BELATEDLY

A feel-good end to a probably highly frustrating year for Mr Singh who, in all likelihood, no longer wished to own an X5. The facts indicated that after he cancelled the agreement with SMG (when he learnt that the vehicle was registered in 2005), he parked the car in his garage and never used it! It is commendable that he, as consumer, stuck to his guns and ensured that he received what he contracted for, or as alternative, fought for payment of the damages that accrued to him.

“ SMG undertook to rectify the ‘licensing error’ with the licensing office by reversing the prior registration, but the issue remained unsolved. ”


**STBB
TIP**

PLACE YOUR BUILDER IN A POSITION TO PAY HIS SUBCONTRACTOR TIMEOUSLY, OR THEY MAY REFUSE TO VACATE THE SITE

What can a builder do to enforce a claim for payment of work done? One option is that he demands payment from the person who contracted with him to perform the building works and, if the latter remains in default, to issue summons and ultimately force the matter before a Court. More effortless, however, is the builder's option to exercise his so-called builder's lien by simply refusing to vacate the premises until such time as he has received the payment that is due to him.

A builder's lien gives a builder the right to retain possession of property (the building site and what is built thereon) belonging to another (usually the property owner) until the outstanding payment has been made.

Recently the Eastern Cape High Court was asked to adjudicate on a scenario in which a subcontractor stopped work and refused to leave the building site because of a dispute with the main contractor in respect of outstanding payments. As a result, the subcontractor suspended construction works but refused to vacate the premises by retaining its security guards on the sites during the day. In the meanwhile, the main contractor appointed new contractors to continue with the work. The initial subcontractor thereupon approached the Court and argued that the appointment of the new contractors in his place constituted spoliation of his (up until that time) undisturbed possession of the sites whilst exercising his right of lien. He accordingly sought an order reinstating him in undisturbed possession of the premises.

The Court granted him the order and confirmed that not only the main contractor, but also a subcontractor, may exercise such a lien. Where a subcontractor's undisturbed possession of a site was disturbed by new subcontractors subsequently appointed, a Court will grant an order returning undisturbed possession of the site to the original subcontractor.





IN THE BALANCE: THE SUSPECT'S RIGHTS & THE ATTORNEY'S DUTY

Attorneys are bound by rules of professional conduct which they are obliged to follow. They hold themselves to high standards and have a proud history of maintaining those standards, albeit sometimes under difficult circumstances.

THE RIGHT TO REMAIN SILENT

The right to remain silent has been part of the South African criminal justice system for many centuries and is rooted in the convictions that (i) a person is innocent until proven guilty; and (ii) that the onus to prove someone's guilt rests with the prosecuting authority, thereby ensuring that an accused need not assist his prosecutor in proving a case against him.

Attorneys are required to advise clients of their right to remain silent, the failure of which will attract sanction and a penalty from the Law Society. Such were the facts in a recent finding by the Law Society of the Western Cape in which an attorney was found guilty of bringing the profession into disrepute for failing to advise an accused of his right to remain silent. The attorney appealed to the High Court against the Society's finding.

LAW SOCIETY PENALISES ATTORNEY

The facts leading up to the matter concerned the disappearance of one Mr Groenewald, a Humansdorp business man. When he vanished, his wife not only contacted the police but also an attorney to assist her in tracing him. Mr Nel, her attorney, appointed a private investigator who then discovered telephone records that revealed contact between Mr Groenewald's cellular number and one Swanepoel. Nel thereupon contacted Swanepoel and set up a meeting at his office because he believed that Swanepoel could shed light on Groenewald's

disappearance. By that time the investigation by Nel and the private detective, indicated an involvement of two other persons in Groenewald's disappearance and Nel hoped to verify certain information with Swanepoel.

At the meeting (at Nel's offices) Swanepoel denied any involvement in Groenewald's disappearance. During the same interview, however, a police officer arrived unannounced and arrested Swanepoel.

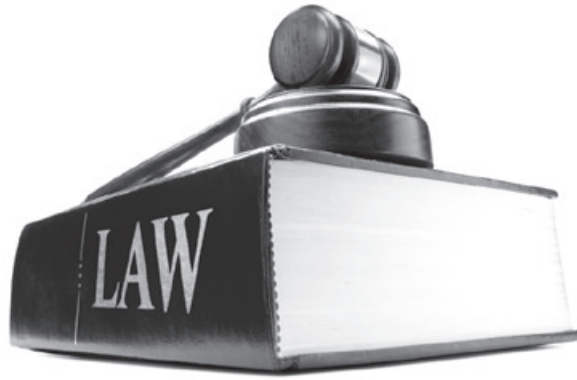
Later that day a police inspector phoned Nel and advised that Swanepoel wished to talk to him. When Swanepoel was thereafter put on the line, he asked Nel whether it would assist him in a bail application if he gave his full co-operation to the police. Nel said that "it could never be said that it would be harmful in a bail application if a policeman could stand up in court and confirm that he obtained the co-operation from the accused right from the outset".

Groenewald was later found murdered and Swanepoel (together with another person) was ultimately found guilty of the crime.

The court, in the criminal proceedings against Swanepoel, commented during its judgment that Nel's failure to advise Swanepoel of his right to remain silent left Swanepoel without representation and that, viewed in light of the fact that Nel was acting on behalf of the Groenewald family at the time, constituted a conflict of interest that required Nel to withdraw from the case.

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“ The right to remain silent has been part of the South African criminal justice system for many centuries... ”



As a result of these comments in the criminal court judgment, the Law Society of the Western Cape initiated disciplinary proceedings against Nel and eventually found him guilty of contravention of Rule 14.3.14 which determined that attorneys must "refrain from doing anything which could or might bring the attorneys' profession into disrepute."

ATTORNEY'S APPEAL

Nel appealed against the finding to the High Court. The Court held that the judgment delivered in the criminal trial could not be used as factual evidence against Nel, because in that matter, the court did not concern itself with Nel's actions and the relationship between Nel and Groenewald. (It was evidently rather intent on determining whether

Swanepoel was guilty of Groenewald's murder.) Therefore, because

- it appeared that the Society's conviction of Nel was based on the comments made by the judge in the criminal matter;
- the facts showed that Groenewald had obtained Nel's advices in the context of a bail application (and not as an accused in a murder charge) at a time when Nel did not know that Groenewald was implicated in the murder; and
- Nel argued that he at no stage considered himself to be Swanepoel's attorney, the High Court found that the Society incorrectly found Nel guilty of unprofessional conduct and bringing the profession into disrepute.

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CHOOSING A SERVICE ADDRESS: BETWEEN A ROCK AND A HARD PLACE

Written agreements usually include a clause dealing with the parties' domicilium citandi et executandi, the respective addresses where the parties agree to receive notices and accept service of documents issued by courts.

In the recent case of Firstrand Bank Limited v Gazu (KZN High Court, Pietermaritzburg), the bank issued summons against a Ms Gazu after she defaulted on her mortgage payments to the bank. The mortgage loan agreement identified the mortgaged property, which was a vacant site, as the service address. The Sheriff accordingly served the summons by simply placing it under a rock on the vacant land, this being the chosen domicilium et executandi.

In *Amcoal Collieries Ltd v Truter* 1990 (SA) 1 (A), the Supreme Court of Appeal held that that service at the chosen domicilium address "will be good, even though it be a vacant piece of ground, or the defendant is known to reside elsewhere", because this was the address that the parties by agreement chose

as domicilium et executandi address.

The court, in Ms Gazu's case, however noted that the aforementioned principle did not mean that the court did not retain its discretion with regard to the provision of service. Here the bank was in possession of sufficient personal information to have made an effort to contact her. Moreover, acknowledging that there was an inherently unequal bargaining position between her and the bank, it was unfair for the bank to have served summons at the vacant site when Ms Gazu was unaware that such drastic steps were being taken against her.

The court accordingly exercised its discretion in favour of Ms Gazu and held that such service was unfair in the circumstances.

Circumstances will not always be such as to rely on the court's discretion. The moral of the story is to choose a service address mindful of being able to receive documents and notices so as not to be caught unawares of steps the other party to your agreement may be taking.