STBB | SMITH TABATA BUCHANAN BOYES

BUCHANAN'S Brief

MAY 2010 | ISSUE 02

A YEAR IN PROGRESS

2010 is proving to be an exciting year for STBB - with the World Cup pending and the economy on the up we have a lot to look forward to. In the following pages we touch on a few current affairs and give you tips on how to stay on top of your game.

INSIDE

In the property game? We can help with the legal issues.

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Focus on marriage: What happens when your spouse has an affair?

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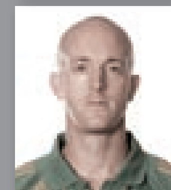
PLAYING OUT OF HIS BOOTS

As the kick-off to the 2010 FIFA World Cup steadily edges closer, STBB shares in the excitement of the build-up and enthusiastic support for our team Bafana Bafana, but nowhere more so than at our Fish Hoek branch where Matthew Booth's proud mother, Anthea Booth, has worked for many years as a conveyancing paralegal. Matthew, a central defender, has over 20 caps for Bafana Bafana and has recently returned from the Bafana Bafana training camp in Germany. He grew up in Fish Hoek where his dad Paul, a keen amateur footballer, played for Fish Hoek AFC. Matthew followed in his footsteps, turning out for the side at junior level and the rest, as they say, is history. STBB is holding thumbs that Matthew will be chosen for the final Bafana Bafana squad to play in the World Cup. STBB Fish Hoek says "BOOOOTH!"

DOB: Objection!
Height: 170 cm
Shirt number: Always 14
Position: Super Mom
Current club: Fish Hoek



DOB: 14-03-1977
Height: 198 cm
Shirt number: 14
Position: Defender
Current club: Mamelodi Sundowns

STBB

PURCHASERS AND SELLERS TAKE NOTE OF THE PRINCIPLES OF APPOINTING AN ESTATE AGENT:

AN UNMANDATED AGENT CAN STILL BE THE EFFECTIVE CAUSE OF A SALE!

Purchasers and sellers engaging the assistance of an estate agent when they seek to sell or purchase a home often misunderstand the principles that apply with regard to the earning of commission. Generally, where it can be shown that the agent introduced the property to the interested party, brought the parties together and through further conduct effectively made the sale happen, then the agent is entitled to earn commission. It does not necessarily matter that the agent's mandate was terminated shortly before the contract itself was concluded.

A judgment in November last year by the Pretoria High Court demonstrated how these considerations find application in practice. The facts were that the sellers gave an estate agent a mandate to sell their farm, Hartbeeshoek, which mandate was valid and irrevocable until 30 April 2005. The agent met a potential purchaser, one Annandale, and introduced him to the property. Some time later, the relationship between the sellers and the agent soured to the extent that the latter's mandate was terminated. However, at this time, the agent was also mandated to sell the adjacent farm and therefore concentrated her efforts on selling this property to Annandale. She was successful and Annandale took transfer of the adjacent farm. He however remained interested in Hartbeeshoek since he was eager to develop both properties together. At this time the agent learnt that Hartbeeshoek was still on the market and contacted the seller for permission to show the property to Annandale.

Then Annandale apparently had a change of heart and advised the agent that he was no longer interested in buying Hartbeeshoek or to make use of her services as agent. He then directly contacted the sellers with whom he subsequently concluded an agreement of sale in respect of the farm. On learning of the conclusion of the sale, the estate agent approached the Court and claimed commission on the ground that she introduced Annandale to Hartbeeshoek and as such was the effective cause of the sale.

In finding in favour of the agent, the Court noted that our law accepts that it is possible for an unauthorised agent to be the effective cause of a sale and thus be entitled to commission. In such a case the enquiry is whether the work done by the unauthorised agent is sufficiently significant to merit the award of commission despite the termination or absence of a prior mandate. Showing a property to a prospective purchaser and introducing the purchaser to the seller may, in the specific context, be causally significant and contribute sufficiently to the outcome in a way that would entitle the unauthorised agent to commission.

For more information, please contact your nearest STBB branch.

> **"It does not necessarily matter that the agent's mandate was terminated shortly before the contract itself was concluded."**

THE VOETSTOOTS CLAUSE

WHAT IS IT AND HOW DOES IT WORK?

A patent defect is a defect that is clearly visible to the naked eye, for example cracked gutters and tiles or dripping taps. If a purchaser buys a house and afterwards notices that there are certain obvious defects which would have been revealed by a reasonably careful inspection of the property, then the purchaser has no claim against the seller in respect of these defects.

Latent defects, on the other hand, are defects that are not clearly visible to the ordinary man - even if it would be apparent to an expert. These defects may be covered up or concealed and very often only become evident some time after the date of sale or transfer, for example a leaking pool or a leaking roof after heavy rains.

HOW THE 'VOETSTOOTS CLAUSE' WORKS

In terms of our law there is an 'implied term' in a contract of sale (in other words, this position prevails even where the agreement is silent about the topic) that the seller warrants to the purchaser that there are no latent defects in the property. As a result, if it appears after the conclusion of the agreement that a latent defect in a house exists, the seller is liable for those defects whether or not he or she knew about it.

Because this implied term (known as the seller's warranty against latent defects) places such a heavy burden on a seller, most sellers include a clause in the contract to counter this common law provision. This clause typically states that the seller shall NOT be liable for latent defects in the property, and that the purchaser buys the property "as is". This clause is commonly known as the voetstoots clause.

Therefore, if an agreement contains a voetstoots clause and latent defects manifested themselves after the sale which the seller did not know about, then the seller will rightfully be able to say to the purchaser. "Sorry, this is your problem, fix it at your cost. I am protected by the voetstoots clause".

However, if a seller knew about latent defects and did not bring it to the purchaser's attention before the sale or concealed the defects so as to induce the purchaser to enter into the agreement, the seller cannot hide behind the voetstoots clause. A voetstoots clause only protects a seller in respect of latent defects of which he was unaware; or, where he was aware of their existence, he did not deliberately conceal them from the purchaser.

Although this is some consolation for a purchaser, the burden of proof (proving that the seller did know about the defects and that he deliberately concealed them) remains on his shoulders and in practice, it is often difficult for purchasers to enforce their rights.

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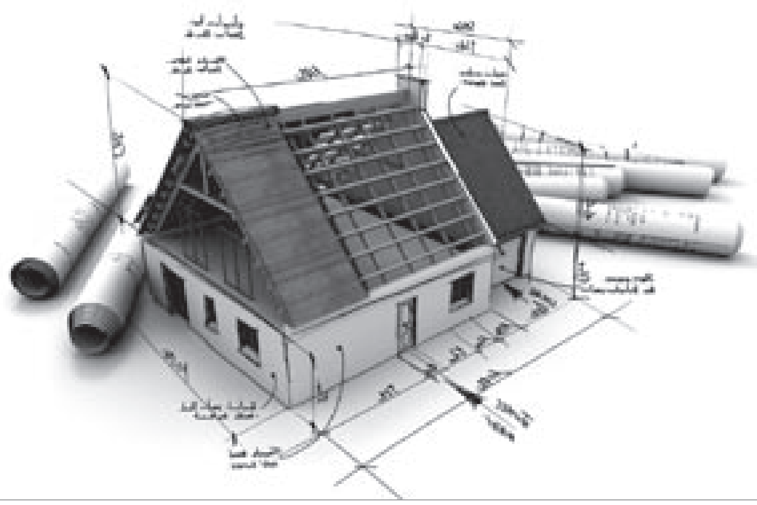
"This clause typically states that the seller shall NOT be liable for latent defects in the property, and that the purchaser buys the property "as is". This clause is commonly known as the voetstoots clause."



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CAVEAT EMPTOR:

UNAUTHORISED BUILDING WORKS AND THE VOETSTOOTS CLAUSE

In the matter of Odendaal v Ferraris our Supreme Court of Appeal dealt with the question whether a seller of **property on which buildings have been erected without local authority approval is liable to the purchaser for these defects.**

The facts in this judgment were that Odendaal put her house on the market and Ferraris, after visiting the property, decided to buy it. At the time of inspecting the property Ferraris could not access the outbuilding as it was locked but the estate agent assured him it was in faultless condition, that the pool was in working condition and that the Jacuzzi was functioning perfectly.

When Ferraris took occupation of the property (before transfer), the existence of defects became apparent: the staircase railing collapsed as it was not secured; the ceiling of the outbuilding had partially collapsed and had considerable water damage; there was a sewerage manhole cover in the middle of the laundry; the jacuzzi was faulty and the pool leaked. The local municipality informed Ferraris that Odendaal's predecessor in title had obtained approval for the outbuilding, but only as a storeroom and subject to the sewerage being re-routed. Ferraris then instructed his bank (which was financing the purchase) to put a hold on the transaction, pending settlement of the issues relating to the unauthorised building works. Odendaal then cancelled the agreement and instituted proceedings for Ferraris' eviction from the property.

The Court held that a voetstoots clause covers any hidden defect in property which prevents or hinders the owner from enjoying ordinary use of the property. The lack of building permission (for the manhole over the sewer and the carport's irregular structure) are defects which interfere with the ordinary use of the property.

Generally, in order to avoid the consequences of the voetstoots clause and to walk away from an agreement of immovable property as a result of latent defects, the purchaser will have to prove that the seller knew of the latent defect, did not disclose it, and deliberately concealed it with the intention to defraud. However, where a buyer has an opportunity to inspect the property before buying it, and proceeds to buy it with the defects, he will not have recourse against the seller. Therefore, the Court concluded, Ferraris could not hold his failure to inspect the outbuilding against Odendaal and therefore had no justification for instructing his bank not to proceed with the bond which put a halt to the transaction. This latter instruction amounted to a repudiation of the contract by Ferrarris, which in turn entitled Odendaal to cancel the agreement and claim damages. (Ferraris could also not prove any fraud on the part of Odendaal.)

The moral of the story is that a prospective purchaser has the duty to properly inspect all details relating to the immovable property he intends to purchase, including the municipal records. Alternatively, a purchaser can insist to include a term in the contract to the effect that the seller warrants, despite the voetstoots clause, that all buildings on the property has the required statutory approval.

(Note that where a purchaser buys property from a "service provider" (as defined in the Consumer Protection Act, 2008), e.g. a developer, the position with regard to the voetstoots clause will be different.)

For more information, please contact your nearest STBB branch.

ASK THE RIGHT QUESTIONS

BUILDING OR EXPANDING YOUR HOME?

KNOW YOUR RIGHTS AND PROTECT YOURSELF.

NHBRC stands for the National Home Builders Registration Council. It is a statutory body, created in terms of the Housing Consumer's Protection Measures Act No. 95/1988 and was established to regulate the home building industry and improve the quality of standards in the construction of residential dwellings by ensuring that the dwelling is constructed in a professional way, which is fit for habitation and in accordance with the building plans, specifications and the Building Agreement.

A residential dwelling is defined as a house, a sectional title unit or a maisonette.

In terms of Section 10 of the aforementioned Act, a "home builder" is defined as any person who carries on the business of a home builder or receives any consideration in terms of any agreement with a consumer in respect of either the sale or construction of a home.

WHAT THE ACT PRESCRIBES

All home builders are required to register with the NHBRC and failure to do so is an offence and subject to a fine and/or imprisonment. The home builder has to renew his enrolment certificate annually and must also enroll the residential dwelling before he can commence building. The home builder may also not commence construction if the homeowner-to-be is not yet the registered owner of the land.

In order to ensure compliance with the provisions of the Act, banks are not allowed to lend money to the homeowner-to-be if the builder is not registered with the NHBRC. A homeowner-to-be will be asked to provide the bank with his builder's NHBRC enrollment certificate when he applies for a bond with which to finance the building works.

An "owner builder" is defined as a person who builds a home for occupation by himself, or any person who is not a registered builder and who assists the owner builder in building his home. An owner builder may apply for exemption from registration with the NHBRC. The procedure is explained on their website at: www.nhbrc.org/builders/ownerb.asp.

The Act further requires that the Building Agreement for the construction or sale of a dwelling must be in writing and signed by all the parties. The material terms and financial obligations must be clearly stated and the specifications about the materials and plans must be annexed thereto.

REMEDIES

If you as a homeowner-to-be are unhappy with any work done by your builder, your first step is to notify the home builder of your complaints within the specified time periods and you must then allow the home builder access to the dwelling to fix the problems. You must also ensure that your home builder has been paid in terms of the Building Agreement. If the builder fails to respond to your complaints or to honour his obligations, you may lodge a complaint with the Council. If the builder is found guilty by the NHBRC's disciplinary committee it can have serious consequences for the builder, such as a R25,000.00 fine and/or a one-year imprisonment on each charge.

Moreover, in the event that the builder failed to rectify the defects, the homeowner-to-be may have a claim against the NHBRC fund to effect the necessary repairs. The fund however only covers the residential dwelling, drainage systems, garage, storeroom, any permanent outbuilding and retaining walls. It does not cover maintenance items, fencing or pre-cast fencing, any temporary structures, swimming pools, tennis court, lifts, any mechanical ventilation or air conditioning system, household appliances, horse stables, workshops, alterations and/or additions.

The fund will furthermore not pay for any consequential or economic loss and any costs, loss or liability wherein compensation is covered under a household insurance policy.

It must be understood that whilst the NHBRC does endeavour to regulate the building industry and provide a cost effective method of resolution, it is giving the consumer only a limited measure of protection.

For more information, please contact Bev I'Ons-Raeburn on 021 6734700.

"All home builders are required to register with the NHBRC and failure to do so is an offence and subject to a fine and/or imprisonment."

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STBB FOCUS

WHEN AN AFFAIR ENDS YOUR MARRIAGE

THE UNPLEASANT EXPERIENCE OF SUING OR BEING SUED FOR DIVORCE IS ALL TOO OFTEN DUE TO ADULTERY OR ENTICEMENT.

An innocent spouse usually opts to end the marriage because adultery is generally viewed as being irreconcilable with the continuance of a normal marriage relationship.

In South African law the Court must only be satisfied that the marriage has broken down irretrievably, no matter the reason, to dissolve the marriage. However, it is open to an innocent spouse to, simultaneously with filing for divorce, institute a separate action against the third party who was involved in an adulterous relationship with his/her spouse or who enticed the guilty spouse away from his/her spouse and marriage.

This action is based in our common law and centres around the unlawfulness of the third party's actions that results in the break-up of the marriage. A marriage is considered to be a personal relationship (in legal jargon referred to as 'consortium') in terms of which both spouses are entitled to companionship, love, affection and mutual services. Infringement by a third party on this consortium will have legal consequences if the innocent party can prove that the infringement caused the breakdown of the marriage.

HOW DOES IT WORK? The innocent spouse can issue summons against the third party for:

- **Loss of consortium, which includes patrimonial loss (for example loss of financial support or maintenance contribution); and**
- **Injured feelings (contumelia) in respect of which the innocent spouse may claim the payment of a certain amount of money (referred to as 'solariums').**

To succeed with a claim based on enticement by a third party, the innocent spouse must prove that the third party knew of the existence of the marriage and intentionally sought to infringe on the consortium that existed between the spouses. This infringement inevitably also results in an additional claim based on injured feelings ('contumelia').

IN AN EFFORT TO DEFEND SUCH CLAIMS, A THIRD PARTY MAY RAISE THE DEFENCE THAT:

- **The enticement was not intentional;**
- **That it was condoned by the guilty spouse; and/or**
- **That the third party was exercising his/her basic human right of freedom of association.**

THE SPECIFIC FACTS AND CHRONOLOGY OF THE ADULTERY OR ENTICEMENT BECOME PERTINENTLY IMPORTANT IN PROVING A CLAIM, FOR EXAMPLE:

- Where an innocent spouse was aware of the adultery or enticement for a period of time and tacitly condoned it, it may in certain circumstances be difficult to convince a

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> **"In South African law the Court must only be satisfied that the marriage has broken down irretrievably, no matter the reason, to dissolve the marriage."**

Court that it was the adultery that caused the breakdown of the marriage.

- Where the third party admits certain elements but denies that the adultery or enticement was wrongful because the guilty spouse encouraged it then the innocent's spouse's claim may fail because there then is no legal wrongfulness on the third party's side.

The constitutional colouring that this kind of claim attracts has not yet been decided by our courts. Therefore Courts may now, in the context of claims based on adultery or enticement, be asked to weigh the guilty person's right to freedom of association against the innocent spouse's entitlement to consortium.

Note that the innocent spouse must institute action within three years of becoming aware of the adultery or enticement and the size of the claim depends on the extent of the financial and emotional hardship endured by the innocent spouse.

Some legal writers suggest that claims of this nature are out of feeling with the modern approach to marriage in a modern society. However claims for damages as a result of adultery, enticement and the harbouring of a spouse by a third party are still available today and our courts entertain and grant remedies of this nature not too infrequently. In the case of Godfrey v Campbell 1997 1 SA 570 C, for example, a minor even sued for loss of financial support as a result of an extra marital affair that a third party had with one of his parents.

The recent Civil Unions Act 17 of 2006 affords same sex parties the right to enter into a union analogous to that of marriage and it follows that this kind of action would be available to partners in a civil union as well.

From a practical perspective, such a claim may have the effect of delaying finalisation of divorce proceedings, if instituted simultaneously. Since a divorcing spouse's primary concern is usually to finalise the divorce (on mutually agreeable terms) as soon as reasonably possible and to avoid costly and lengthy litigation, clients may be well advised to think carefully and seek legal advice before instituting a claim against a third party based on enticement.

For any information or assistance, contact Christel Beukes on 021 4069100.

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SEPARATE WILLS FOR ASSETS IN SEPARATE COUNTRIES

You own assets in South Africa - perhaps furniture, a car, money in the bank, possibly business interests as well, but your will has been prepared and signed by you in another country, possibly the one where you have lived most of your life, have accumulated the major portion of your wealth and where you still live for several months every year.

It is fairly safe to assume that this will applies to your worldwide estate which the executor you have nominated will be obliged to administer in the event of your death. Let's call this your "universal will".

Broadly speaking a "universal will" should ultimately be acceptable to the authorities in a foreign country where you own assets, such as South Africa, provided it is valid according to the laws in its country of origin. Theoretically therefore it is acceptable for you to only have a "universal will" but in practice unfortunately this can give rise to certain difficulties.

Each country has its own laws relating to the appointment of executors and the administration of deceased estates. A foreign executor has no authority to act in South Africa until he has been formally appointed by the Master of the High Court, the government department empowered by our Administration of Estates Act to ensure compliance with the law relating to the estate administration process. Various requirements have to be lodged with the Master in order to obtain this authority, one of which is a copy of your "universal will" endorsed by the equivalent of our Master in the foreign country concerned as having been accepted as valid according to the laws of that country.

Depending on the applicable legal processes it can take months before this copy of your "universal will" can be obtained and this will delay the appointment of an executor in South Africa and the commencing of the winding up of your estate here.

In addition there are circumstances in which the executor who you have appointed in your "universal will" may not be able to secure appointment to act in South Africa as well as the possibility that your "universal will" could contain provisions and structures perfectly in tune with the law in its country of origin but incompatible with South African law.

As a result it is strongly recommended that persons who find themselves in the above situation should have, in addition to their "universal will", a separate will dealing only with their assets in South Africa, prepared by a specialist in South African succession law. This will ensure that an executor can be appointed as quickly as possible to administer your South African estate and that technical problems will be avoided, thereby providing for the security and proper management of your assets in this country to the ultimate benefit of your heirs.

For more information and assistance, call June Theron on 021 6734700.

THE NEW COMPANIES ACT

THE FUTURE OF CLOSE CORPORATIONS ONCE THE NEW COMPANIES ACT COMES INTO OPERATION

The new Companies Act (the "Act") is due to come into operation during the course of 2010. One of the purposes of the new Act is to create "flexibility and simplicity in the formation and maintenance of companies" and to "reaffirm the concept of the company as a means of achieving economic and social benefits".

Up until now, close corporations (CC's) provided a small business mechanism for users who did not require the complicated and expensive structures of a company. The new Act however creates a simplified form of a private profit company which can service these needs in an accommodating manner and the need for the CC as a separate mechanism thus effectively falls away.

Once the new Act comes into being (the effective date), all CC's incorporated prior to this date will continue to exist, but no new CC's may be formed thereafter.

A CC may still convert to a company at any time in terms of both the current and the new Act. However, after the effective date, it will no longer be possible for a company to convert to a CC, as is currently the case.

The current Close Corporations Act, which governs the operations of CC's, will be substantially amended from the effective date of the new Act and many of the provisions of the new Act will apply to CC's, notably with regard to accounting provisions. Effectively this makes the differences between the operation of a CC and a private profit company in terms of the new Act academic to a large degree.

Members of existing CC's can continue to conduct their business in much the same way as before, however, if you currently own a CC, it is advisable to discuss the revised provisions relating to financial statements with your accounting officer and review your association agreements with your attorney.

For more information, contact Sheleigh Kaindl on 021 4069100.

"Once the new Act comes into being, all CC's incorporated prior to this date will continue to exist, but no new CC's may be formed thereafter."

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BAD NEWS FOR MOTORISTS AND ROAD ACCIDENT VICTIMS

The average South African is aware of the high incidence of accidents on our roads annually wherein motorists, pedestrians and an increasing number of cyclists are injured.

Prior to August 2008 we had legislation in place allowing for adequate compensation to be awarded to victims of motor vehicle accidents.

Sadly, this addressed the consequences of motor accidents but not the cause of motor accidents, which remains firmly in the hands of the authorities and individual responsibility. The Road Accident Fund Amendment Act came into force in August 2008. The practical result of the amendment is to deny adequate compensation for victims of accidents and in most cases any compensation whatsoever.

Prior to the amendment, innocent victims of accidents were entitled to recover all their medical expenses from the Road Accident Fund. This enabled accident victims to have the best medical treatment available irrespective of the cost. Moreover any loss of income resulting from an accident would be recoverable, as well as fair compensation for pain, suffering, discomfort, loss of amenities of life and disfigurement. To obtain compensation it is necessary to consult an attorney as the claims process is complicated, lengthy and requires expert knowledge regarding personal injury claims. At the end of the matter the Road Accident Fund was obliged to pay the party and party costs of the attorney as well. These costs included the very expensive and necessary expert reports as well as the costs of advocates if the matter went to trial. The only amount not recoverable from the Road Accident Fund was the attorney and client portion of the attorney's fee, a small price to pay to ensure just compensation.

The Road Accident Fund has various offices around the country, the idea being to expedite finalisation of matters. Unfortunately it became increasingly necessary to issue summons against the Road Accident Fund as fair offers were not forthcoming and in many cases offers were not made at all. The result was that many cases went to court. This necessitated the Road Accident Fund instructing its own attorneys and advocates and picking up the bill for their lawyers as well as the claimant's lawyers.

Due to the Road Accident Fund's increasing financial dilemma the new Act came into force in August 2008. In terms of the new Act very few people can claim for pain, suffering, discomfort, loss of amenities of life and disfigurement and the amount that can be claimed for medical expenses and loss of earnings has been severely capped. In essence one can only claim medical expenses on the state hospital rate and loss of earnings are capped to approximately R170,000.00 a year irrespective of the victim's actual loss. To make matters worse claimants are no longer allowed to claim the balance of their loss from the wrongdoer. So for example, if a cyclist is knocked over by a Golden Arrow Bus, the hapless cyclist will only be able to recover his medical expenses on a provincial hospital rate, (other than emergency medical expenses), will probably not be able to claim for pain and suffering, (unless his injury is of an extremely serious nature), and his loss of income will be limited. His right to claim the balance of his legitimate loss from the Golden Arrow company has been taken away by the new Act.

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“To obtain compensation it is necessary to consult an attorney as the claims process is complicated, lengthy and requires expert knowledge regarding personal injury claims.”

> "The Amendment Act is destined to create a huge burden on our social services and public hospitals."

The legal fraternity brought an application to the High Court challenging the constitutionality and legality of a number of provisions of the Road Accident Fund Amendment Act and Regulations, *inter alia,* the removal of one's common-law right to sue the wrongdoer. Sadly the High Court gave judgment recently upholding the legislation and not finding the new legislation unconstitutional. Undoubtedly this will all end in the Constitutional Court in due course. In the interim the hapless victims of motor accidents will not be compensated adequately and in most cases, not at all.

The Amendment Act is destined to create a huge burden on our social services and public hospitals. As things stand there is further bad news for motorists in that there now becomes a need to self-insure. We foresee a bleak future in this regard as it will be necessary for motorists to ensure that they have adequate insurance for themselves and their family to cover medical expenses and loss of income occasioned by disablement. It is becoming abundantly clear that it is going to be very difficult and close to impossible to obtain any form of compensation, let alone adequate compensation from the Road Accident Fund in future.

Now more than ever it is necessary to consult a specialist attorney if you are the victim of a motor accident, in view of the ongoing challenges to the current legislation and the prospect of further legislative changes which may be imminent.

For expert advice in this regard, please contact Gerhard Kotze on 021 4069100.

MAKING A DIFFERENCE

Here at STBB Smith Tabata Buchanan Boyes we continue to embrace opportunities to make a difference in the lives of those around us and the plight of children from socially disadvantaged communities is particularly close to our hearts.

Our Helderberg branch, together with Bond Choice Somerset West, recently launched a community based project to adopt a local crèche called "Tiny Tots" based in Sir Lowry's Pass Village. Tiny Tots crèche cares for 45 children between the ages of 1 and 6 and does so with minimal government funding. The enthusiastic support and sponsorships from other businesses in the area like Woolworths, Michael Gatinho, Rooibos Tea Company and Talking Books has made this project possible and will continue to earn all involved bright smiles from happy tiny tots!

STBB

MALEMA-ISMS : HATE SPEECH OR NOT?

YOU BE THE JUDGE!

Mr Julius Malema, president of the African National Congress Youth League ('ANCYL'), is a formidable newsmaker whose public comments and actions dominate the headlines daily. Some of his observations have resulted in applications to Court on the basis that the words constituted hate speech.

WHAT IS HATE SPEECH, LEGALLY SPEAKING?

The legal definition of 'hate speech' is contained in the Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000 ('PEPUDA'). Section 10 of the Act defines hate speech as words that could reasonably be construed to demonstrate a clear intention to be hurtful or harmful in respect of one or more prohibited grounds (i.e., race, sex, gender or sexual orientation, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, language and birth).

It is clear that 'hate speech' requires more than just generally making hurtful or harmful statements about someone. It is speech that is intended to cause harm or be hurtful not just to one person, but to a group of people based on their race, sex, sexual orientation, religion or other prohibited grounds. If someone were to say that another is a religious fanatic or a racist fool, it might be rude and it might even be defamatory, but it would not constitute hate speech as the comment would not be saying anything based on the other person's race or religious beliefs.

DID MALEMA CONTRAVENE THE PROVISIONS OF PEPUDA?

The first hate speech complaint against Malema related to his comments with reference to President Jacob Zuma's rape accuser. He said that she enjoyed the intercourse because she did not leave first thing the next morning. "Those who had a nice time will wait until the sun comes out, request breakfast and taxi money. In the morning that lady requested breakfast and taxi money." The magistrate's court found him guilty of hate speech.

In light of the definition of hate speech, there is debate whether the judgment was correct and it is considered that Malema's appeal against the finding may succeed. The reason is that, although the words were gender insensitive and perpetuate harmful myths about rape, the statement cannot reasonably be seen to illustrate a clear intention to incite hurt on victims of rape generally.

The other hate speech allegations relate to his (and the ANC's) singing of a struggle song that contains the words dubula ibhunu ("kill the boer").

In March this year the South Gauteng High Court held that the words constitute hate speech and issued an interdict banning the singing of the song until such time as the Equality Court makes a finding on the matter. The ANC has in the meantime referred the matter to the Constitutional Court whose judgment will be the final say on the matter.

For more information, please contact your nearest STBB branch.

We welcome your feedback and invite you to contact us at info@stbb.co.za

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