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THE RIGHT TO HOUSING

"It is always a difficult task to balance the interests of those seeking to enforce their constitutional right to housing, as set out in Section 26 of the Constitution, against those seeking to enforce their constitutional right not to be deprived of property, as set out in Section 25 of the Constitution," observes Barry Lewis of LLI's property department.

"In terms of Section 26 of the Constitution, everyone has the right to have access to adequate housing, with the State being obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Section 25 of the Constitution, however, provides that no-one may be deprived of property... and no law may permit the arbitrary deprivation of property," he explains.

The South Gauteng High Court was recently called upon to decide on these issues when a privately-owned property became home to 62 illegal occupiers. The owner of the property issued a notice in terms of the Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE) with a view to evicting the occupiers to enable it to redevelop the property.

The occupiers, in defending the action, admitted that they were illegal occupiers but argued that they could not be evicted before the Municipality provided them with alternative accommodation.

With regard to its duty to progressively provide access to land, the Municipality's stance was that, while it is implementing housing and emergency accommodation programmes for occupiers of State-owned land, it has neither the funds nor the obligation to extend the programme to occupiers of privately-owned land.

SOME INTERESTING FINDINGS:

- That the private land owner cannot be indefinitely deprived of the bundle of rights that come with ownership of immovable property and that the owners were entitled to an eviction order, the only question being when the order should be implemented. (In this case three months was regarded as adequate.)
- That the owner had been deprived of its entitlement to use and develop its prop

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IMPLEMENTATION OF COMPANIES ACT AND CONSUMER PROTECTION ACT POSTPONED

Owing to delays in the publication of Regulations, the passing of amendments to the legislation, and the establishment of administrative bodies, the Department of Trade and Industry has announced that the implementation date of the Acts (save for limited provisions of the Consumer Protection Act which came into operation during April 2010) has been postponed until 1 April 2011. This delay will give additional time to the government to ensure the efficient and effective implementation of the Acts, and to business to prepare so as to ensure compliance on implementation.

The noose tightens for traffic offenders

"Most of us have heard or read about the 'demerit points' system which is to be implemented in respect of traffic offences in South Africa," observes Roy Monk of LLI's litigation department.

"Many, however, do not appreciate the extent to which the introduction of the relevant legislation will affect the rights of road users and the extent of the progress made towards implementing the system."

In the past, the enforcement of traffic laws commenced with the issue of a traffic 'ticket' specifying the offence in question and stipulating a fine be paid within a certain time. These tickets, more often than not, were and still are, simply ignored.

Thereafter, usually a considerable time later, a summons would be issued, calling for the payment of a fine by a given day, failing which the recipient had to appear in court on the date stated in the summons. This system has proved highly ineffective since in many cases the summons could not be delivered personally to the alleged offender, which is a prerequisite for a court to issue an arrest warrant. Consequently, the majority of traffic offenders have escaped justice.

Until now, traffic offences could really only be enforced through the voluntary payment of a fine. Failing that, the culprit had to be brought to trial in a criminal court and, if convicted, was sentenced, usually to a fine coupled with the alternative of a period of imprisonment. As a general rule, only the most serious traffic offences (such as drunken or reckless driving, usually involving the loss of life) were considered to deserve an endorsement, suspension or, in extreme cases, the cancellation of a driver's licence.

The Administrative Adjudication of Road Traffic Offences Act (AARTO) signals the end of this rather 'hit and miss' system of judicial law enforcement and fundamentally changes the enforcement mechanism for traffic offences from a judicial function to a largely administrative one (the right to insist on going to court is retained, but only as part of a broader administrative enforcement system).

Under the AARTO system, the first step is to send an infringement notice to the driver, giving the option of paying only 50% of the fine, or of making representations to the authorities, or of electing to be tried in a court. If there is no response to that notice a second notice is issued, in terms of which the offender may choose to pay the full amount of the fine plus certain administrative charges, or to make representations to the authorities, or to apply to pay the full amount and administrative fee in instalments, or to elect to be tried in a court.

Failure to respond to the second notice results in an enforcement order being issued by the traffic authorities without recourse to any court. Such an order obliges the offender to pay the full amount of the fine plus administrative costs and can only be set aside by a court, on application of the recipient, on good cause shown. If this enforcement order is ignored the authorities may issue a warrant of execution without further notice, which directs the Sheriff of the Court to attach the property of the offender and sell it by public auction. The funds are then used to settle the fine and administrative costs incurred in the process.

Furthermore, each traffic offence results in the allocation of a pre-determined number of points (determined by the seriousness of the offence) to the offender. Once an offender has accumulated more than 12 points, an automatic driving ban ensues for a period equivalent to three times the number of points by which 12 is exceeded. For example, a driver who has reached 14 points will be banned from driving for a period of six months.

Fortunately, drivers are able to redeem themselves: points allocated can be reduced at the rate of one for each three-month period during which no additional demerit points are incurred. Hence, a driver on 11 points who does not commit a traffic offence for three months, calculated after the allocation of the last point, will have his points reduced to 10, and so on. However, if an offence is committed during the three-month period, further points are allocated for the offence concerned and no reduction takes place.

Finally, a driver has who has been disqualified from driving under this system on two occasions will, on the third occasion, have his/her licence permanently revoked. He/she must then reapply for a learner's licence and begin the process from scratch, but may do so only once the disqualification period has expired.

The system (with the exception of the points system) has been in place in the Johannesburg Metro and the Tshwane Metro on an introductory basis for a number of months, but has not been introduced in other areas due to certain glitches which have been experienced. However, there is no doubt that whatever wrinkles there might be in the system at present will be ironed out and this system of administrative justice will apply nation-wide in the foreseeable future.

NCA updates

"Consumers, seeking to delay the judicial process, have approached High Courts around South Africa to consider whether the provisions of the National Credit Act (NCA,) and particularly the demanding provisions set out in Section 129 of the NCA, are applicable to specific transactions," reports Craig Anderson of LLI's litigation department.

In terms of Section 129 of the NCA, where the Act applies to a transaction if the consumer is in default under the credit agreement, the credit provider may not commence any legal proceedings i.e. issue summons, to enforce the agreement before first providing written notice to the consumer proposing that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court, or ombud with jurisdiction, to resolve any dispute or agree on a plan of payment.

The High Court has found in the following instances that the NCA is not applicable and that a Section 129 notice need not be given:

- The imposing of a levy and the charging of interest on outstanding payments by a Body Corporate under the Sectional Titles Act, as this does not amount to an incidental credit agreement;
- Rental and utility charges in terms of an agreement of lease of immovable property do not result in the transaction becoming a credit agreement under the NCA;
- A common law lease (in this instance of a digital display board) as it does not involve the provision of credit either as defined in the NCA or as generally understood in commerce.

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erty and this was sufficiently linked to the Municipality's failure to implement a reasonable programme and include in its budget provision to accommodate indigent occupiers of privately-owned land.

- The Municipality was ordered to pay damages to the owner as a result of the breach of owner's constitutional rights.

Non-custodian parents are liable for school fees

"In over-ruling a decision of the Cape High Court and finding that non-custodian parents are equally responsible with custodian parents for the payment of school fees, the Supreme Court of Appeal has given state schools some much-needed clarity," comments Gordon Pentecost of LLI's litigation department.

The matter initially commenced in the Bellville Magistrate's Court when a school sued the non-custodian parent for the payment of outstanding school fees. The non-custodian parent successfully opposed the matter in both the Magistrate's Court and on appeal in the Cape High Court on the basis that the liability for payment of the school fees rested with the custodian parent only.

In looking to the non-custodian parent for payment the school relied on a provision in the South African Schools Act which states that 'A parent is liable to pay the school fees…'. The only question to be decided was whether or not the non-custodian parent fell within the Schools Act definition of 'parent'.

The Supreme Court of Appeal reasoned that the legislature had defined 'parent' very broadly. In a literal and ordinary interpretation, a natural father is a parent and in terms of the plain meaning of the word, he is self-evidently the child's parent. There was thus nothing in the definition to suggest that a non-custodian parent or non-guardian parent is excluded from the meaning of the word 'parent'.

The Supreme Court of Appeal further observed that the interpretation accepted by the Cape High Court is inconsistent with the Constitution, which requires that a court 'must promote the spirit, purport and objects of the Bill of Rights when interpreting legislation'. Historically, in this country, mothers have been the primary care-givers of children. It is almost always mothers who become custodian parents and have to care for children on the breakdown of their marriage, which places an additional financial burden on them. Despite our constitutional promise of equality, the division of parental roles continues to remain largely gender-based. The courts need to be acutely sensitive to the possibility that differential treatment of custodian parents and their non-custodian counterparts often can and does constitute unfair gender discrimination. To interpret the provision in the Schools Act to exclude the non-custodian parent from its operation would thwart the realisation of that goal.

Moreover according to the Supreme Court of Appeal an interpretation that burdens both parents with the responsibility for paying school fees is consistent with the injunction in Section 28(2) of the Constitution that 'a child's best interests are of paramount importance in every matter concerning the child'. It is unquestionably in the best interests of a child that a non-custodian parent who is unwilling, yet has the means to pay his child's school fees, should be made to do so.

"Insofar as private schools are concerned, the obligation to pay fees is governed by the terms of the contract concluded at the time of admission of the child to the school and care should be taken to ensure that both parents accept responsibility for payment of the fees," concludes Gordon.

Rights of widows in polygamous Muslim marriages to inherit intestate

In a landmark ruling in the matter of Hassam v Jacobs NO and Others (CCT83/08) [2009] ZACC 19 (Hassam Judgment), the Constitutional Court extended the current definition of 'spouse' and 'survivor spouse', as set out in the Intestate Succession Act 81 of 1987 (ISA) and the Maintenance of Surviving Spouses Act 27 of 1990 (MSSA).

The Constitutional Court unanimously upheld the decision of the High Court that the distinction between spouses in polygamous Muslim marriages and those in monogamous Muslim marriages unfairly discriminates between the two groups. Effectively, the Court ruled that wives should be treated equally and that their right to inherit intestate must be recognized.

Prior to the Hassam judgment the Constitutional Court had held that, in terms of intestate succession and the maintenance of surviving spouses, the surviving spouse in a monogamous Muslim marriage qualifies as both a 'spouse' and 'survivor' in terms of the ISA and MSSA (Daniels v Campbell 2004 7 BCLR 735 (CC)). The Hassam judgment has served to extend this recognition to include surviving spouses of de facto polygamous Muslim marriages.

The Court held that the purpose of the Act would be frustrated if the current definition continued as widows of polygamous marriages would be excluded from the benefits of the Act simply because their marriages were contracted by virtue of Muslim rites. The Court ruled that the exclusion of these widows from the protection of the ISA is constitutionally unacceptable and held that Section 1 of the ISA is invalid in that it does not include more than one spouse in a polygamous Muslim marriage. The Court therefore ordered that wherever the word 'spouse' appears in Section 1 of the ISA it must be read as if it is followed by 'or spouses'.

"In effect, this ruling has economically and socially empowered a class of women who are ordinarily constrained and restricted by the tenets of their faith. Furthermore, the decision clearly represents the changing mores of society and the Courts' emphasis on the right to equality before the law and the protection of women," comments Prinashree Chetty, an associate in LLI's litigation department.

Change in phone number

As a result of an upgrade to our telephone system the contact number for our La Lucia Ridge office has changed to 031 536 7500.

The fax number will remain unchanged as 031 566 2470.

Welcome

The directors and staff of LLI welcomed our newest candidate attorney, Jadyne Devnarain, on 5 August 2010.

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