The Law of Estoppel in South Africa

by the Hon PJ Rabie
Butterworth Publishers (Pty) Ltd 1992
Soft cover R70,40 incl. VAT

In a difficult branch of the law the learned author has compressed into a compact form (the text itself runs to no more than 113 pages) a pithy and closely-reasoned treatment of the main principles of the doctrine of estoppel in South African law. The monograph concludes with a short bibliography, a table of decided cases, and a skilfully presented index.

Throughout the work a sure touch is displayed. While bringing to bear a searching analysis of the leading South African decisions, amplified where necessary by reference to English and American writings, the author’s approach is steadily matter-of-fact; and the text is couched in simple and direct language. The nine chapters are methodically arranged, and each is divided into sub-sections bearing headings which facilitate reference by the reader. This is a scholarly work which may be read with profit and pleasure.

In the second chapter the author shows that the doctrine of estoppel by representation was borrowed by South African courts from English law, but by analogy to certain rules of Roman law. Here one digresses to say that the pervasiveness of Roman law is hardly surprising. Not only does it represent the greatest product of Roman genius, but it gave Europe and England a legal vocabulary. Goethe is said to have likened Roman law to a duck. Sometimes it is visible, swimming prominently on the surface of the water; at other times it is hidden, divin­ing amid the depths. But always it is there.

In the fourth and fifth sections of the second chapter there is examined the rigorous condemnation by Steyn CJ in the case of Trust Bank van Afrika v Eksteen 1964 3 SA 402 (A) of earlier judicial decisions by South African courts, including the Appellate Division, concerning the

introduction locally of the English doctrine of estoppel. The balanced conclusion at which the author arrives is likely to commend itself to most South African lawyers who have had to grapple with the problems of estoppel. At pages 28 - 29 he states:

This criticism [by Steyn CJ] cannot, however, alter the fact that the doctrine, as recognized and applied in South Africa over a long period, has become part of the law of South Africa. The Appellate Division did not in any of the judgments given by it in 1920 and 1921 suggest that the English doctrine of estoppel replaced, or would replace, any principles of Roman-Dutch law. On the contrary, the court’s view was that the doctrine was in accord­ance with the principles of Roman-Dutch law. It has not been held by any court in South Africa that the doctrine may be applied in a manner that would not be in conformity with the principles of Roman-Dutch law. Nor has it ever been suggested by any court that the doctrine as originally received in South African law has to be maintained in unaltered form and that it cannot be adapted or developed as required by circumstances in South Africa.
What is further put in a proper perspective is the local implication for the doctrine of estoppel, of the decision in Bank of Lisbon & South Africa v De Ornelas 1988 3 SA 580 (A) in which the Appellate Division held that the Roman law exceptio doli mali had never formed part of Roman-Dutch law. The learned author points out that in cases such as Baumann v Thomas 1920 AD 173 and Union Government v National Bank of South Africa 1921 AD 121 waht was invoked was the trine of estoppel, of the decision in Pandor's Trustee v Beatley & Co quoted at page 7; the words of Bristowe J in Central London Property Trust v High Trees House Ltd quoted at page 45; the words of Solomon JA in Baumann v Thomas quoted at page 57; the words of Miller J in South British Insurance Co Ltd v Glisson quoted at page 59; and at page 62; and the words of Hofmeyr J in Autoles Ltd v De Plessis quoted at page 60. These are but small blemishes in a work which represents a valuable addition to the stock of South African legal authority.

As the author points out in the preface, the book under review is essentially an expanded version of the chapter on estoppel contributed by him in volume 9 of LAWSA. It is to be hoped that in days to come the author's rare talents will be devoted to the writing of a still more comprehensive work on the subject of estoppel.

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Labour and Employment Law
by MJD Wallis SC
Butterworth Publishers (Pty) Ltd 1992

The development of labour law over the past decade or so has been truly remarkable. To those practitioners brought up on the law of master and servant and to whom industrial law had something to do with demarcation disputes and safety regulations, the first determinations of the industrial court came as a considerable, and probably rather unpleasant, shock. Legal practitioners and employers were suddenly confronted by the advent of a powerful tribunal with wide powers which could apparently set aside perfectly lawful acts on the part of employers and for which the maxim pacta sunt servanda held little awe.

It is clear that the writings of a core of labour lawyers and academics have had a fundamental influence on the development of labour law in this country. Unfortunately in some cases the views expressed by such writers have tended to reflect an adherence to a particular moral view of the contest between capital and labour and the debate has preceded from assumptions as to the inherent superiority of the moral or social values of one argument over another. That approach has at times clouded rather than illuminated the issues. Mr Wallis's textbook, published in loose-leaf form, is a balanced and carefully researched contribution to the topic. The book is comprehensive, well structured, excellently annotated and written in an economical style. The arguments presented on unresolved issues (of which there are many in labour law) are closely reasoned and bear the hallmarks of careful thought. The author's treatment of difficult and controversial topics such as the limits of industrial action, the nature of the protection provided by section 79 of the Labour Relations Act and the interplay between provisions of the latter Act and the Basic Conditions of Employment Act is both informative and perceptive.

Above all however the work provides a satisfying framework within which labour law must be seen in order to be understood. The topic is not treated in isolation. It is examined in relation to both common law and the relevant statutory provisions which have a bearing upon the position of the employer and the employee. The recognition which the book gives to the importance of the common law and the Basic Conditions of Employment Act is to be welcomed and should provide those who treat with suspicion any departure from the common law with an intellectually satisfactory means of bridging the gap between employment law and labour law.

Practitioners will find the notes to the text very useful. Each proposition is, where appropriate, supported by relevant authority. Finally, the loose-leaf format is, provided it is regularly updated, ideally suited to a quickly developing topic like labour law. Mr Wallis's work will probably become an indispensable part of the library of any practitioner who wishes or is required to enter the fray on behalf of either side.

CDA Loxton SC
Johannesburg Bar

Environmental Management in South Africa
by RF Fuglele and MA Rabie (ed) Juta & Co Ltd 1992
823 pages
Hard cover R185,00 incl. VAT

Fifty authors of impressive standing have contributed to this book. It is an imposing work of some 800 pages. Experts from some fifteen major disciplines are represented in the research team. Most chapters are composite efforts consisting of a discussion of the nature and extent of the relevant issues in South Africa, an exposition of the legal position, followed by an analysis of the degree to which existing provisions meet South African requirements. Part 1 deals with elements of environmental management and more particularly the rise of environmental concerns, resource economics, socio-political factors and environmental administration. Part 2 deals with environmental law such as the nature and scope thereof, the Environment Conservation Act, the implementation of environmental law and international environmental law. Part 3 deals with renewable resources such as soil, plants, wild animals, fresh water systems and marine systems. Part 4 deals with non-renewable resources such as terrestrial minerals and offshore minerals. Part 5 concerns the control of environmental quality with chapters on air pollution, water pollution, solid waste, pesticides, radiation and noise. Environmental health is also dealt with in detail. Features of particular concern are dealt with in Part 6, and more specifically refer to mountains, rivers, the coastal zone, protected areas, land-use planning and agriculture. Part 7 consists of an environmental evaluation such as an integrated environmental management. For the lawyer certain chapters are of particular importance, whilst others are obviously intended for a scientific mind and require scientific knowledge. There is little doubt that environmental protection will have its own niche in a future Bill of Rights. It does not require a broad vision to appreciate that environmental concerns will become more and more topical in South Africa. It is difficult to appreciate how any practitioner concerned with environmental studies can advise his clients without the benefit of this most effective work. Environmental management in all its facets has to a certain extent, been a stepchild in South Africa. Future application is also not readily
ascertainable unless and until we all appreciate the following:

Because of the way we live today our civilisation is at risk. The 5,3 billion people alive now, especially the 1 billion in the best-off countries, are misusing natural resources and seriously overstepping the earth's ecosystems. World population may double in 60 years, but the earth will be unable to support everyone unless there is less waste and extravagance, and more open and equitable alliance between rich and poor. Even then the likelihood of a satisfactory life for all is remote unless present rates of population increase are drastically reduced. (United Nations Environment Programme 3rd ed. 1991).

What is required, therefore, is a widespread and deeply held commitment to an ethic for sustainable living, and to integrate conservation and development. The introduction to the book sets out eight principles for building a sustainable society which are worth repeating:

- Respect and care for the community of life;
- Improvement of the quality of human life;
- Conservation of the earth's vitality and diversity;
- The minimisation of the depletion of non-renewable resources;
- The development within the earth's carrying capacity;
- Changing one's personal attitude and practices in this context;
- The enablement of a community to care for its own environment;
- The provision of a national framework for integrating development and conservation and the creation of a global alliance in this field.

The book is absolutely essential for a proper appreciation and understanding of environmental management and the legal implications and requirements. The contributors and the publisher are to be congratulated on an excellent work. It is certainly one of the most impressive commissions in general and more particularly in its field.

HJ Fabricius SC
Preatoria Bar

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**Interpretation of Statutes**

*by GE Devenish*

Juta & Co Ltd

298 pages

Hard cover R132,00 incl. VAT

Professor Devenish's book is a timely addition to the South African literature on the subject. The most recent edition of LC Steyn's *Die Uitleg van Wette*, hitherto the standard South African work on the interpretation of statutes, is now more than eleven years old, while the third edition of Gail-Maryse Cockram and Du Plessis' *The Interpretation of Statutes and Lourens du Plessis' The Interpretation of Statutes* are both more than five years old. More important is that all of these books were published before the dramatic political developments in South Africa of recent years. Although Devenish's work professes to be a synthesis of ideas drawn from the work of Steyn, Cockram and Du Plessis, among others, his book is the first to have been written in anticipation of South Africa acquiring a justiciable and entrenched Bill of Rights in the period immediately following its publication and this has had a significant impact on his approach to the subject matter.

The most notable feature of Devenish's work is his attention to the purely theoretical aspects of the interpretation of statutes, both in general and in respect of South African law. This feature permeates the whole work but is particularly evident in the subject matter of the first two and the last three of the thirteen chapters of which the work is comprised, and is given greater depth in the comprehensive referencing in the footnotes. Devenish's concern for theory is underscored in the light of his anticipation of a justiciable Bill of Rights. If the Supreme Court is to be given the power to test the constitutionality of South African laws against the provisions of a Bill of Rights, its approach to interpretation will have to undergo a fundamental change. This will necessitate the reformulation of the theoretical precepts which are employed in the interpretation of statutes. The Courts will have to move away from merely ascertaining the intention of the legislature. They will have to assess the way in which each statute of the legislature affects entrenched rights.

Not surprisingly, therefore, the author is highly critical of intention theory and literalism, both as regards the theoretical precepts which underpin it and as regards the extent which South African judges, particularly LC Steyn, have adhered to it. He argues that the process of interpretation and the application of the meaning of legislation to specific factual situations are cognate and judicially creative techniques that can be considered as the delegation of a quasi-legislative competence to the judicial arm of government and that consequently courts play a vital and unique role in developing and formulating the law (p 6). He finds support for this argument in Kelsen's contention that where the separation of powers is expressly maintained by a constitution, the legislative function is distributed among several organs although only one is acknowledged as the legislative organ. Nevertheless, he conceals that there are limits to the creativity of judges in the interpretation of statutes (p 11). Under the doctrine of separation of powers the legislature undoubtedly has sole power to enact law. Thus, in a legal order without an entrenched and justiciable Bill of Rights, such as in South Africa at present, the judiciary's role in interpreting the legislature's enactments is necessarily subordinate to the power of the legislature itself. However, Devenish clearly does not believe that this is justification for a strict adherence to intention theory, and he is most critical of the "persistent and deep-seated" reluctance of South African judges to acknowledge their creative role (p 8).

The arguments are hardly new, either in South African or international jurisprudence. The author is, however, the first South African jurist to carry his insight into the possibilities of judicial creativity to every aspect of his study, thus showing up the many areas of the interpretation of statutes in South African jurisprudence where different results could have been, and could in future be, obtained by greater exploration of the possibilities for such creativity. The work is therefore likely to be of immense value to teachers of law in preparing their students, the future practitioners, for a South African legal order with an entrenched and justiciable Bill of Rights. Practitioners will also find the book useful, not only in practice in the anticipated new legal order, but also in the immediate future. Although there have not been many real changes in the interpretation of statutes in South Africa since the publication of the other works in this field, except perhaps with regard to the presumption in favour of the implication of the principles of natural justice, particularly the *audi alteram partem* rule, the book contains many references to well-known works pertaining to the interpretation of statutes in other legal systems, as also many references to recent articles in South African journals. This will undoubtedly facilitate the preparation of cases.

A feature of the work which deserves particular mention is the author's inclusion of a discussion of the rights to legal representation in the context of the presumption that the legislature does not intend that which is harsh, unjust, or unreasonable (p 173), and a consideration of the presumption of constitutionality (p 210).

The book is extremely well researched and very well written. The author has, in the preparation of this work, undoubtedly matched, perhaps even surpassed, the scholarship which characterized the work of Steyn, and it is more than likely that this book will shortly be recognized as the standard South African work on the subject.

Gary A Oliver
State Law Advisor, Pretoria

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**Strafreg**

*deur CR Snyman*

Derde uitgawe

Butterworths Professionele Uitgewers (Edms) Bpk 1992

Hardeband R210,10 BTW en hanteringsingesluit

Sagteband R151,80 BTW en hanteringsingesluit
The lawyer is the public and unavoidable embodiment of the tension we all experience between the desire for an embracing and comfortingمز، the urge towards individual independence and self-assertion; between the need for a stable, coherent, and sincerely presented self and the fragmented and disassociated rules we are forced to play in the theatre of modern life. In popular imagery the lawyer is held to strict account for the discrepancy between our aspirations and our realities. But this discrepancy is not the lawyer’s alone, and once we understand this, we may also come to see that in popular culture the lawyer is so much our own enemy, because his failings are so much our own.

Because of these truths, the authors are of the view that lawyers are ideally qualified to advise on the sound management of industrial relations whether from a capital/management or labour/union perspective. They are aware that sound industrial relations do not just happen—thereby have to be managed. Contrary to common perceptions, there is little real mystique about industrial relations. There are several simple and concise principles concerning industrial relations which are breached or ignored at peril. Their intention, therefore, in presenting this work, is to try to set out these principles with clarity to make them easily and readily available to those concerned with or responsible for managing sound industrial relations.

The following quote from A Cox (1979) 92 Harvard Law Review 1178 is worth repeating:

"The lawyer is also an expert in process, and thus knows better than others that seemingly irreconcilable conflicts of interest or principle can be postponed in that subsequent step-by-step accommodations can be realised by establishing suitable procedures into which to channel specific instances of actual conflict. Even though the weight of the past makes some lawyers resistant to change, appreciation of the past flow of lawyerly inventions may also give a confident sense of capacity for creation."

The authors therefore emphasize that the necessary creation of wealth for this nation will not be achievable without our establishing and maintaining and managing sound industrial relations. The authors briefly but concisely deal with the most important aspects of an understanding of the principles and rules of criminal law. This includes the translation into English of judgments delivered in Afrikaans. This makes the work more accessible to English-speaking students studying criminal law in South Africa and even abroad.

The side numbers on each page of the English text facilitate reference to specific passages in the judgments. The work contains judgments published prior to March 1992 and it is hoped that the authors will update the work from time to time.

Although the work is primarily directed at students and teachers, I have no hesitation in recommending it to the practitioner of criminal law.

Cases and Materials on Criminal Law

by John Milton and Jonathan Burchell
Juta & Co Ltd
687 pages
Soft cover R38,00 incl. VAT

Power Law and Procedure: A Contemporary Guide to Industrial Relations

by AT Trollip and SC Ged
Butterworths Professional Publishers (Pty) Ltd 1992
220 pages
Soft cover R73,70 incl. VAT

The introduction to this book contains a quote from the International Bar News of 1989, which is worth repeating:

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(viii) Specific forms of damnum iniuria datum/Besondere verskyningsvorme van damnum iniuria datum
(ix) Specific forms of iniuria/Besondere verskyningsvorme van iniuria
(x) Forms of liability without fault/Verantwoordelikheidsonderlinge

Verder word dan onder die onderskeie hoofde 110 van die belangrikste beslissings oor die gebeurtenis van die deliktereg behandeld.


Elke beslissing word voorafgegaan deur 'n Engelse asook Afrikaanse opsomming van die beslissing, gevolg deur 'n baie volledige verbatim aanhaling van die belangrikste gedeeltes van die beslissing. Aan die einde van die gewysde volgende volg weer eens 'n tweetalige vermelding van die belangrikste bron wat op die betrokke aspek geraadpleeg kan word soos 'n 'n tweetalige uiteenstelling van die toepaslike regsregulasies in die kruisverwysings in ander beslissings.

In die voorwoord sit die outeurs self die voordele van 'n vonnisbundel uiteen wat inshuit die feit dat gesaghebende beslissings in 'n enkele bron saamgevat word.

Die regspraak tot Oktober 1990 is bygewerk.

Soos in alle geskiedlike hier ook 'n drukfout of wat ingesluit soos byvoorbeeld die verwysing na die Tommie Meyer beslissing (bl 9) waar dit as 1976 (4) in plaas van 1977 (4) aangegee word.

Hoewel die outeurs die bundel ten doel het om behandeld te gee van 'n aantal taamlik belangrike saake, dit word van die belangrikste begin met die deliktereg en sal ongetwyfeld vir die praktisyn van groot nut wees.

JJ Goodey Pretoria-Balie

Medical Negligence in South Africa
by NJB Claassen and T Verschoor
First Edition
Digma Publications (Pty) Ltd 1992
158 pages
Hard cover R87,00 excl. VAT

This book is based on the unpublished dissertation which was written by NJB Claassen under the supervision of Prof T Verschoor as part of the requirements of the LLM degree at the University of the Orange Free State.

The book is divided into seven chapters; dealing respectively with the concept of negligence generally, negligence and medical practitioners, negligent malpractice, consent to treatment, wrongful life, vicarious liability of hospital authorities and physicians and underlying principles of the physician’s liability. The textbook concludes with a bibliography, reports, a list of relevant statutes, an alphabetical list of cases and an index.

Although the title of this textbook seems to suggest a discussion of medical negligence in the South African context, it also briefly offers English and American legal perspectives on the subject. The textbook is however by no means a comprehensive book on medical negligence and affords no more than an easy and basic entry into the subject for the practitioner.

The book is ultimately aimed at both the medical and legal professions and as such they should benefit by taking formal notice of this publication.

PA Carstens
Pretoria Bar