Part 3 (2018)

Commercial Law Reports

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AUTOMATED OFFICE TECHNOLOGY (PTY) LTD v INTERNATIONAL COLLEGES GROUP (PTY) LTD

A cession agreement which refers to contracts already in existence interpreted as applying to such contracts and not only contracts concluded after the conclusion of the cession agreement.

Judgment given in the Supreme Court of Appeal on 26 March 2018 by Swain JA (Navsa JA, Seriti JA, Pillay AJA and Makgoka AJA concurring)

In 2005, Katlego Solutions (Pty) Ltd entered into a master rental agreement with International Colleges Group (Pty) Ltd for the hire of equipment to ICG. In terms of the master rental agreement, the equipment to be hired 'from time to time' by Katlego to ICG would be 'described in signed Addendums' in accordance with the 'Proforma Addendum' annexed to the master rental agreement, which would be subject to the terms and conditions recorded in the master rental agreement.

ICG concluded nine written rental addenda with Katlego. Each was headed 'Rental Addendum – Annexure A', and specified that it was an addendum to the master rental agreement, described 'The Equipment' hired as well as the rental payable and provided that 'The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein'.

In 2006, Katlego concluded an agreement with Automated Office Technology (Pty) Ltd headed 'Cession of Master Rental Agreement and Addenda'. This provided that Katlego, 'hereafter referred to as the Cedent, hereby cede and transfer all of the Cedent's rights, title and interest in the Master Rental Agreement signed on 26 October 2005 and the addenda signed hereto between the Cedent. . .' and ICG to Automated and a valid cession and transfer of the rights of Katlego in the first, second and third rental agreements was effected to Automated..

ICG defaulted in paying the rentals due under the agreements. Automated issued summons claiming payment. The claim was dismissed on the grounds that Automated had pleaded and relied upon the written cession of agreement concluded in 2006 and had failed to plead and rely upon an alleged oral cession concluded in 2003, which had provided that all the agreements entered into by Katlego would be financed by and ceded to Automated, as a matter of practice. The court held that Automated should have called a witness from Katlego to confirm the oral cession agreement.

Automated appealed.

Held—

Whether the six rental agreements in issue were validly ceded to Automated required an interpretation of the written cession agreement, read together with the master rental agreement and the individual rental agreements. The central enquiry was the meaning of the sentence contained in the written cession agreement which provided '. . . hereby cede and transfer all of the Cedent's rights, title and interest in the Master Rental Agreement signed on 26 October 2005 and the addenda signed hereto between. . .'

The question was whether or not the words 'addenda signed hereto' referred only to those written rental agreements ie addenda, in existence and signed at the time of signature of the written cession agreement, or did they include written rental agreements to be concluded in the future?

When interpreting the written cession agreement, the significance of the prior oral cession agreement lies in the context and circumstances in which the written cession agreement came into being. It was clear that the rights, title and interest of Katlego in the master rental agreement were validly ceded to Automated, in terms of the written cession agreement. In terms of the master rental agreement, it was provided that 'the customer' ie ICG , agreed to hire from Katlego the equipment which would be described in signed Addendums, as per the Proforma Addendum annexed. To place an interpretation on the words, '. . . and the addenda signed hereto . . .' in the written cession agreement, to mean that only signed rental agreements in existence at the time of the cession were ceded, would lead to impractical, unbusinesslike and oppressive consequences and would stultify the broader operation of the master rental agreement, as well as the individual rental agreements concluded after the written cession agreement. This was because the later rental agreements would be inchoate and unenforceable, because Katlego no longer possessed any rights, title and interest in and to the master rental agreement, having ceded them to Automated.

The appeal was upheld.

Advocate P A Botha instructed by Laubscher & Hatting, Cape Town, appeared for the appellant

Advocate E A Limberis SC instructed by Cuzen Randeree, Johannesburg, appeared for the respondent

Swain JA:

[1] Whether rental is owed by the respondent, International Colleges Group (Pty) Ltd to the appellant, Automated Office Technology (Pty) Ltd t/a AOT Finance, for the hire of items of office equipment,

comprising a number of copiers and fax machines, is the origin of a war of attrition which has raged between the parties for the last ten years. Problems first arose between the parties in January 2008 when the respondent summarily ceased making payment of the rentals.

[2] Concerned at the unexpected turn of events, the appellant sought an explanation from the respondent, only to be informed that new owners had taken over and wished to review all of the rental agreements, before making any further payments. The appellant heard nothing further and the arrears on the accounts increased. Letters of demand for payment by the respondent of the outstanding rentals were ignored, save that a payment of R 200 000 was received during 2008, which was allocated to a portion of the arrears. No further payments were received and no clarification was furnished by the respondent, as to why payment was withheld.

[3] The appellant accordingly issued summons against the respondent in the Magistrates Court for the district of Cape Town during May 2010. Return of the equipment together with arrear and future rentals was claimed on the basis that as a result of the failure by the respondent to make payment of the rental due in terms of each of the nine written rental agreements, the appellant had cancelled them all[1].

[4] It was common cause that:

4.1 A company, Katlego Solutions (Pty) Ltd (Katlego), had entered into a master rental agreement with the respondent on 3 November 2005 for the hire of equipment to the respondent, a copy of which was annexed to the appellant's particulars of claim;

4.2 In terms of the master rental agreement, the equipment to be hired 'from time to time' by Katlego to the respondent would be 'described in signed Addendums' in accordance with the 'Proforma Addendum' annexed to the master rental agreement, which would be subject to the terms and conditions recorded in the master rental agreement;

4.3 The respondent concluded nine written rental addenda with Katlego, copies of which were annexed to the appellant's particulars of

[1] In terms of an order granted by consent and without prejudice, the respondent was ordered by the Magistrates Court to return the equipment to the appellant.

claim marked 'A' to 'J'. Each was headed 'Rental Addendum – Annexure A', specified that it was an addendum to the master rental agreement, described 'The Equipment' hired as well as the rental payable and provided that 'The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein';

4.4 On 28 April 2006, Katlego concluded an agreement with the appellant headed 'Cession of Master Rental Agreement and Addenda' which provided that Katlego, 'hereafter referred to as the Cedent, hereby cede and transfer all of the Cedent's rights, title and interest in the Master Rental Agreement signed on 26 October 2005 and the addenda signed hereto between the Cedent. . .' and the respondent to the appellant and;

4.5 A valid cession and transfer of the rights of Katlego in the first, second and third rental agreements was effected to the appellant.

[5] The defence advanced by the respondent fell within a highly technical narrow compass. It was simply that a valid cession of Katlego's rights in the remaining six rental agreements was not effected to the appellant, because they were all concluded after the written cession agreement. In other words, these later rental agreements were not included in the cession, because the reference to 'the addenda signed hereto' in the written cession agreement only referred to the first three rental agreements in existence at the time of the cession. In other words, the written cession did not operate in respect of rental agreements to be concluded in the future.

[6] Accordingly, the only issue to be determined by the trial court was whether the appellant had discharged the onus of proving that the rights, title and interest of Katlego in the six rental agreements had been validly ceded to the appellant. It held that the appellant had failed to do so and therefore granted judgment in favour of the appellant only for the payment of arrear and future rental in respect of the three rental agreements not in dispute, but dismissed its claim in respect of the remaining six rental agreements, with costs. A subsequent appeal to the Western Cape Division of the High Court, Cape Town was dismissed with costs. The appeal is with the special leave of this court.

[7] The only evidence upon which the trial court and the court a quo relied in dismissing the claims of the appellant in respect of the six

rental agreements in issue, was the evidence of Mr Gregg Coull, a director of the appellant, as the respondent closed its case without leading any evidence. He stated that he had signed the master rental agreement and all nine rental agreements on behalf of Katlego. He was duly authorised to do so, because Katlego was a Johannesburg based company and when they opened a branch in the Western Cape, they did not have sufficient resources and asked him to be a signatory on their rental agreements.

[8] The relationship between the appellant and Katlego dated back to 2003 when Mr Coull had represented the appellant in orally agreeing with Katlego that each time Katlego entered into a rental agreement, it would automatically be financed and ceded to the appellant. He expressed the view that the rights, title and interest in the first three rental agreements were ceded to the appellant on the date of the written cession, being 28 April 2006 and that the rights, title and interest in the remaining six rental agreements in issue, were ceded to the appellant on the dates that he signed each of them on behalf of Katlego, and simultaneously accepted their cession to the appellant, on its behalf. He was of the view, however, that the cession of the rights, title and interest in the six rental agreements in issue, took place in accordance with the 2003 oral agreement.

[9] When cross-examined, he however, stated that when Katlego signed each rental agreement with the customer, it could on an ad hoc basis choose to sell and cede the agreement to the appellant, in order to finance the transaction and raise funds upfront. He was unable to explain how it could be at Katlego's choice if there was an oral agreement in 2003 that the rental agreements would automatically be ceded to the appellant, but later reiterated that from the inception of the agreement, the rights in the rental agreements would automatically be ceded. When asked about the purpose of the written cession agreement in 2006, he replied it was to record the oral cession agreement.

[10] The grounds upon which the trial court dismissed the appellant's claim in respect of the six rental agreements in dispute, were as follows:

10.1 The appellant, in its particulars of claim, had pleaded and relied upon the written cession of agreement concluded on 28 April 2006 and had failed to plead and rely upon the oral cession concluded in 2003,

which provided that all the agreements entered into by Katlego would be financed by and ceded to the appellant, as a matter of practice.

10.2 The appellant failed to call a witness from Katlego to confirm the oral cession agreement and the court was unable to rely upon the evidence of Mr Coull, because he represented the appellant and not Katlego in the conclusion of this agreement.

[11] On appeal the court a quo dismissed the appeal for the same reasons, making the following findings:

11.1 The appellant's case was based upon the written cession agreement concluded between the appellant and Katlego on 28 April 2006, but the evidence of Mr Coull that the six rental agreements in issue were ceded to the appellant as a result of the 2003 oral cession agreement, did not accord with the case as pleaded by the appellant. His evidence accordingly could not assist the appellant as it was trite that a litigant is bound by its pleadings.

11.2 Although Mr Coull testified that he was authorised to sign the master rental agreement as well as the addenda on behalf of Katlego, he did not testify that he was authorised to cede the agreements on behalf of Katlego.

11.3 The appellant had therefore failed to prove the cessions of the six rental agreements in issue, by Katlego in favour of the appellant.

[12] In reaching these conclusions the trial court and the court a quo erred, for the following reasons:

12.1 Whether the six rental agreements in issue were validly ceded to the appellant, requires an interpretation of the written cession agreement, read together with the master rental agreement and the individual rental agreements. The written cession agreement was pleaded in the following terms, in the appellant's particulars of claim:

'15. On 28 April 2006 and at Cape Town, Plaintiff and Katlego entered into a cession agreement in terms of which Katlego agreed to cede and transfer all of its rights title and interest in the master rental agreement, and the addendums thereto, to the Plaintiff.

15.1 A true copy of the aforesaid cession agreement is annexed hereto, marked "D".

16. Pursuant to the aforesaid cession agreement:

16.1 Katlego ceded and transferred all of its rights, title and interest in the master rental agreement, and in the first, second and third agreements, to the Plaintiff on about 28 April 2006;

16.2 Katlego ceded and transferred all of its rights, title and interest in:

16.2.1 the Fourth agreement to the Plaintiff on about 8 May 2006;

16.2.2 the Fifth and Sixth agreements to the Plaintiff on about 6 August 2006;

16.2.3 the Seventh, Eighth and Ninth agreements to the Plaintiff on about 31 August 2006.'

In other words, the first three rental agreements were ceded to the appellant on the date of the written cession agreement, but the remaining six rental agreements in issue were ceded to the appellant in terms of the written cession agreement, on the dates when each of them were concluded.

12.2 The view of Mr Coull that the six rental agreements concluded after the written cession agreement, were ceded in terms of the 2003 oral cession and not the written cession agreement, is irrelevant to an interpretation of the 2006 written cession agreement, particularly as he stated that the purpose of the written agreement was to record the oral cession agreement. In addition as stated in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd [*2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27, it is the role of the court and not witnesses to interpret a document.

12.3 When interpreting the written cession agreement, the significance of the prior oral cession agreement lies in the context and circumstances in which the written cession agreement came into being. As stated in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that

occurs in stages but is "essentially one unitary exercise".'

12.4 The central enquiry is the meaning of the sentence contained in the written cession agreement which provides as follows:

'. . . hereby cede and transfer all of the Cedent's rights, title and interest in the Master Rental Agreement signed on 26 October 2005 and the addenda signed hereto between. . .' Katlego and the respondent, to the appellant.

In other words, do the words 'addenda signed hereto' refer only to those written rental agreements ie addenda, in existence and signed at the time of signature of the written cession agreement, or do they include written rental agreements to be concluded in the future?

12.5 It is clear that the rights, title and interest of Katlego in the master rental agreement were validly ceded to the appellant, in terms of the written cession agreement. In terms of the master rental agreement, it is provided that 'the customer' ie the respondent:

'. . . agrees to hire from Katlego the equipment which will be described in signed Addendums, as per the Proforma Addendum annexed hereto marked "A", subject to terms and conditions recorded overleaf.'

On the reverse of the master rental agreement detailed terms and conditions are set out which govern the rental of any equipment by the respondent from Katlego. The master rental agreement also provides that:

'The description of The Equipment, serial numbers, and Rental charge payable will be as agreed to in the Rental Addendums.'

12.6 Each of the written rental agreements is headed 'Rental Addendum – Annexure "A"' with the subheading, 'Addendum No ---------- To the Master Rental Agreement.' A description of 'The Equipment', the serial numbers of the equipment, the quantity of each item of equipment supplied and the rental payable, is set out in each written rental agreement. The following clause is included, with provision for signature by the parties to acknowledge its existence:

'The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein.'

12.7 It is therefore clear that the rights and obligations of Katlego and the respondent in respect of the hire of particular equipment by the respondent from Katlego, could only be determined by reading the

master rental agreement together with each rental agreement, applicable to the equipment in question. Each of the written rental agreements could not stand alone and had to be read in conjunction with the master rental agreement.

12.8 As stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 26:

'An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

To place an interpretation on the words, '. . . and the addenda signed hereto . . .' in the written cession agreement, to mean that only signed rental agreements in existence at the time of the cession were ceded, would lead to impractical, unbusinesslike and oppressive consequences and would stultify the broader operation of the master rental agreement, as well as the individual rental agreements concluded after the written cession agreement. This is because the later rental agreements would be inchoate and unenforceable, because Katlego no longer possessed any rights, title and interest in and to the master rental agreement, having ceded them to the appellant.

12.9 **Counsel for the respondent, however, submitted that the clause in each of the rental agreements which provided that, 'The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein' meant that the terms of the master rental agreement were incorporated by reference into each of the six rental agreements, by agreement between Katlego and the respondent. As a result these rental agreements were not inchoate and unenforceable. The submission is without foundation. Having divested itself of all of its rights, title and interest in and to master rental agreement in favour of the appellant, Katlego could not re-acquire them simply by agreement with the respondent. What was required was a re-cession of the ceded rights, title and interest by the appellant as cessionary, back to Katlego, their previous holder. There is no evidence that the appellant as cessionary agreed to transfer the ceded rights, title and interest it held in the master rental agreement to Katlego, at the time each of the later rental agreements was concluded.**

12.10 **This interpretation is in accordance with the background and context in which the written cession agreement was concluded namely,**

the prior oral cession agreement transacted in 2003 in terms of which Katlego, according to the evidence of Mr Coull, agreed to cede to the appellant its rights, title and interest in future rental agreements to the appellant. The vacillation in his evidence as to whether in terms of the prior oral cession agreement Katlego's rights in future rental agreements were automatically ceded, or whether this only occurred on the election of Katlego, cannot lead to an unbusinesslike and impractical interpretation being placed upon the terms of the written cession agreement, read together with the master rental agreement and the six rental agreements in issue. In addition, as pointed out in Novartis, it is the role of the court, not witnesses, to interpret a document.

[13] Accordingly, in terms of the written cession agreement properly construed, the rights, title and interest of Katlego in each of the six rental agreements in issue, were validly ceded to the appellant on the date on which each of these rental agreements were concluded. The appeal must accordingly succeed.

[14] As regards the issue of costs, clause 18 of the master rental agreement provides that:

> 'In the event of Katlego instructing its attorneys to take steps to enforce any of its rights under the agreement, The Customer shall pay to Katlego on demand all collection charges and other legal costs which it incurs with its attorney, on the attorney and client scale.'

In *Sapirstein and others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at page 14 E-F, the following was stated:

> 'I do not consider it necessary to decide whether the Court retains a residual discretion to refuse to enforce such an agreement in certain circumstances, or to deprive a successful party, relying on such an agreement, or any portion of his costs, because, whatever the position may be, in the present instance no grounds exist for depriving the plaintiff of such costs or any portion thereof. From these authorities it is clear, in my view, that the approach is not, as suggested by Mr Louw, that the agreement to pay attorney and client costs will only be enforced where there is reprehensible conduct on the part of the unsuccessful litigant (the appellant in the present appeal) but rather that the Court is bound to enforce such an agreement unless the Court finds that there is conduct which justifies it in depriving the

successful litigant (the respondent in the present appeal) of part or all of its costs.'

There is no conduct on the part of the appellant which would justify an order depriving the appellant of part, or all of its costs, on the attorney and client scale.

[15] The following order is granted:

1 The appeal succeeds with costs on a scale as between attorney and client.

2 The order of the Court a quo is set aside and replaced with the following order:

'(a) The appeal succeeds with costs, on a scale as between attorney and client.

(b) The order of the trial Court is set aside and replaced with the following order:

(i) Judgment is granted in favour of the plaintiff for payment of the aggregate amount of arrear rentals, in respect of the first to the ninth rental agreements, in the sum of R479 257,35.

(ii) Judgment is granted in favour of the plaintiff for payment of the aggregate amount of future rentals, in respect of the first to the ninth rental agreements, in the sum of R54 510,78.

(iii) Interest is granted on the aforesaid amounts, payable from the date of judgment being 27 November 2013 to date of payment, calculated at the prescribed statutory rate.

(iv) The defendant is ordered to pay the plaintiff's costs of suit on a scale as between attorney and client.

(v) The plaintiff is ordered to pay the defendant's wasted costs on the magistrates court party and party scale, occasioned by the adjournment of the trial on the 20 February 2013.'

MOBILE TELEPHONE NETWORKS (PTY) LTD v SPILHAUS PROPERTY HOLDINGS (PTY) LTD

An owner of property subject to a sectional title scheme obliged to follow the course provided for in section 41 of the Sectional Titles Act (no 95 of 1986)

Judgment given in the Supreme Court of Appeal on 15 March 2018 by Ponnan JA (Saldulker JA and Swain JA, Plasket AJA and Makgoka AJA concurring)

Prior to the subdivision and coming into existence of a sectional title scheme, MTN Mobile Telephone Networks (Pty) Ltd and Alphen Farm Estate in Constantia (Pty) Ltd concluded agreements of lease pursuant to which 2G cellular antennae were installed on a rooftop of one of the buildings situated on the property owned by Alphen. When the sectional title scheme was introduced, the building was located within a precinct which remained owned by Alphen, the historic precinct. On the other precinct, the residential precinct, were located seventeen sections, owned by Spilhaus Property Holdings (Pty) Ltd and the other respondents.

On 10 October 2012 one of the historic precinct trustees sought the consent of the two residential precinct trustees, for MTN to upgrade its existing cellular installations. This consent was granted on the same day. In November 2013, the upgraded antenna was erected, by the installation of a fake chimney some five metres in height. The base station equipment was also upgraded.

The following month, the City of Cape Town served a notice on Alphen to the effect that the base station had been erected in contravention of the National Building Regulations and Building Standards Act (no 103 of 1977) as no prior written approval for the erection of such building had been obtained from the city. Alphen was ordered to obtain written approval for the said unauthorised building work, by submitting and having building plans approved within 60 days.

At a meeting of the trustees of the scheme on 19 February 2014 the residential precinct trustees confirmed that they were withdrawing their consent to the upgrade on the grounds that significant new issues had come to the fore, which they were not aware of at the time. On 14 May 2014 the attorney for the residential precinct owners wrote to Alphen asserting that the cell-phone mast installation, which had been installed on the common property, was illegal. The letter also pointed out that Alphen's application to the City for land use approval was made without the consent of all owners in the scheme and that this rendered the application defective.

The residential precinct owners, Spilhaus and the other respondents, applied for an order directing MTN to remove the cellular network base transceiver station together with associated infrastructure, and directing Alphen to

co-operate to the extent necessary in the removal of the installation. MTN and Alphen opposed the application.

Held—

Section 41 of the Sectional Titles Act (no 95 of 1986)*, provides that when an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of the matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed.

To satisfy s 41(1), the adverse events must be suffered not only by the owner but by the body corporate as well. It would be competent for the body corporate to institute action in some or other form in relation to the matters which were the subject of the present litigation. Such a conclusion accorded with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers. Section 41, which provides a comprehensive statutory right to an owner of a sectional title unit aggrieved at the failure of the body corporate to act in respect of a matter mentioned in section 36(6), was applicable.

The body corporate had not instituted the proceedings, nor had it been called upon by the respondents to do so. The relief available to an owner in the position of the respondents was to approach the court for the appointment of a curator ad litem to the body corporate, so that the curator might investigate the events complained of and, if so advised, take action aimed at somehow remedying the position. Section 41 is an important component of the overall structural scheme. On the one hand it filters out unmeritorious claims by over-zealous individuals. On the other it ensures that individuals complaining should have the advantage of the information and the funds of their corporation in pursuing legitimate claims.

Since the residential precinct owners had not followed the course prescribed by section 41, they were not entitled to the order they sought.

* Re-enacted in section 9 of the Sectional Titles Schemes Management Act (no 8 of 2011).

Advocate M Basslian SC and Advocate T K Manyage instructed by Mashiane Moodley Monama Inc, Cape Town, appeared for the appellant

Advocate R W F MacWilliam SC instructed by Lawrence Whittaker Attorneys, Cape Town, appeared for the respondents

Ponnan JA:

[1] Sectional title ownership consists of three elements, namely individual ownership of a section, joint ownership of the common parts of the sectional title scheme and membership of a body corporate[1]. The registered title-holder of a unit is the owner of the section, joint owner of the common parts of the scheme and a member of the body corporate[2]. Thus, a person, buying into a sectional title scheme, enters into a series of interlocking relationships. The Sectional Titles Act No 95 of 1986 (the Act)[3] introduced several new concepts into our law. By providing for the division of land and buildings comprising a development scheme into sections and common property, it created an entirely new composite res, called a unit, which consists of a section and an undivided share in the common property[4]. The section is considered the principal component, with the undivided share in the land and other common property inextricably linked thereto as an accessory[5]. The Act also created an entirely new form of composite ownership, namely separate ownership of a section coupled with joint ownership of the common property. Sectional owners own the common property collectively in undivided shares in accordance with the

[1] Du Bois Wille's Principles of South African Law 9 ed at 564.

[2] Wille's at 564

[3] The Act has been substantially amended by the Sectional Titles Schemes Management Act 8 of 2011 (the STSMA), which came into operation before the commencement of these proceedings in the court below on 7 October 2010.

[4] Van der Merwe Sectional Titles Share Blocks and Time-Sharing 2015 para 1.9.

[5] Willie's at 564.

provisions of the Act[6].

[2] The question raised by this appeal is whether the owners in a sectional title scheme had the requisite locus standi to seek interdictory relief in relation to the common property. The Western Cape Division, Cape Town (per Williams AJ) answered that question in favour of the owners. The issue arises for determination against the backdrop of the following facts: Until its subdivision in terms of the Act, Erf 377 Constantia was owned by the second appellant, Alphen Farm Estate in Constantia (Pty) Ltd (Alphen). On subdivision, two so-called precincts were established, namely a historic precinct and a residential precinct. The historic precinct, which has remained the property of Alphen, comprises sections 1 and 2 of the sectional title scheme. The residential precinct consists of sections 3 to 19 of the scheme. Between them, the respondents[7] own those 17 units. Located within the historic precinct is the original Alphen Hotel (which has been declared a provincial heritage site in terms of the National Heritage Resources Act No 25 of 1999) and commercial office buildings.

[3] Shortly after registration of the sectional title scheme, litigation ensued between various owners in the scheme. The litigation was settled and a settlement agreement was made an order of court, in terms of which management rules, conduct rules and guidelines were agreed upon by the parties. According to those rules, the body corporate consists of four trustees – two of whom are elected by the owners of units in the residential precinct (the residential precinct trustees) and

[6] Section 2(c).

[7] Spilhaus Property Holdings (Pty) Ltd (1st Respondent); Jan Arseen Joris De Decker (2nd Respondent); The Trustees for the time being of the Rietvlei Trust (3rd Respondent); Martin Ryman (4th Respondent); Jade Ann Ryman (5th Respondent); Frances Ilse Hills (6th Respondent); The Trustees for the time being of the Ristele Investment Trust (7th Respondent); Rene Adele Larsen (8th Respondent); Susan Marin N.O. (9th Respondent); Michael Black N.O. (10th Respondent); Pamela Goldie Buckham (11th Respondent); Alyson Roslynne Rink (12th Respondent); Raphael Unit 104 (Pty) Ltd (13th Respondent); Marc Andre Paul Marie Cosse (14th Respondent); Jane Handsley Porter (15th Responden); L Y Investments (Pty) Ltd (16th Respondent); Janet Beyer Russel (17th Respondent); Quelle Foundation (18th Respondent); Cherokee Rose Properties 199 CC (19th Respondent); Ronald Alexander Rink (20th Respondent).

two by the owner (Alphen) of the units in the historic precinct (the historic precinct trustees). In the event of any deadlock between the historic and residential precinct trustees, such deadlock must be referred for resolution to a referee, who is obliged to take into account and be guided by the guidelines at all times.

[4] Prior to the subdivision and coming into existence of the sectional title scheme, the first appellant, MTN Mobile Telephone Networks (Pty) Ltd (MTN) and Vodacom (Pty) Ltd (Vodacom), on the one hand, and Alphen, on the other, concluded agreements of lease pursuant to which 2G cellular antennae were installed on a rooftop of one of the buildings, namely the Mill Range building, which is located within the historic precinct. On 10 October 2012 one of the historic precinct trustees sought the consent of the two residential precinct trustees, for MTN and Vodacom to upgrade their existing cellular installations on the Mill Range building from 2 to 3G, which consent was granted on the same day. On or about 1 November 2013 the upgraded antenna was erected, by the installation of a fake chimney some five metres in height. At the same time the base station equipment, which since inception was housed within the hotel building, was also upgraded.

[5] During December 2013 the City of Cape Town (the City) served a notice on Alphen to the effect that the base station had been erected in contravention of the National Building Regulations and Building Standards Act No 103 of 1977 as 'no prior written approval for the erection of such building [had] been obtained from the [City]'. Alphen was ordered to 'obtain written approval for the said unauthorised building work, by submitting and having building plans approved within 60 days'. Failure to comply, so the notice stated, 'constitutes a criminal offence in terms of . . . the National Building Regulations'.

[6] On 21 January 2014 Mr Pieter van Staden of Warren Petterson Planning (WPP) wrote to the City:

> '[P]lease be informed that we have been appointed by MTN (and the property owner) to prepare and submit the necessary applications. Please be advised that the legislation requires Council's Consent before we would be able to submit the Building Plan.
>
> Once the Consent Use Application has been approved, we will submit the Building Plan. This may take some time, around 6 months, depending if objections are received.'

At a meeting of the trustees of the scheme on 19 February 2014 the residential precinct trustees confirmed that they were withdrawing their consent to the upgrade because, as it was put, 'significant new issues have come to the fore, which they were not aware of at the time'.

[7] On 3 April 2014 WPP lodged an application with the City for '[c]onsent use, council's approval, consent [in terms of] Title Deed, [and] amendment of Title Deed condition to permit existing rooftop cellular communications infrastructure'. In response, on 9 May 2014 the City addressed a letter to WPP pointing out that the application is incomplete and cannot be processed because certain information and documents are missing including 'a Power of Attorney signed by all registered owners (all sectional title unit owners) as the proposal is located on common property'. By then nine of the residential precinct owners or their representatives had already deposed to affidavits objecting to the installation. On 14 May 2014 the attorney for the residential precinct owners wrote to Alphen asserting that the cell-phone mast installation, which had been installed on the common property, was illegal. The letter also pointed out that Alphen's application to the City for land use approval was made without the consent of all owners in the scheme and that this rendered the application defective.

[8] Impasse having been reached, on 1 August 2014 the residential precinct owners (the present respondents) applied to the high court for an order directing: (a) MTN to remove the cellular network base transceiver station together with associated infrastructure, cabling and support structure; and (b) Alphen to co-operate to the extent necessary in the removal of the installation. MTN and Alphen opposed the application. In addition, they launched a counter application seeking the postponement of the main application pending inter alia: (a) the final determination of the consent use application lodged with the City; (b) the amendment of the title deed; (c) the approval of any required building plans in respect of the infrastructure; and (d) the joinder of Vodacom as a party to the proceedings.

[9] At the commencement of the hearing before Williams AJ, the learned judge was informed that the matter had been settled as between the respondents and Vodacom – the latter having since been joined as a party to the proceedings. In terms of the settlement agreement,

Vodacom undertook to 'disconnect its cellular services presently installed on the roof of the Mill Range building' and to 'remove all its equipment, infrastructure, cabling and support structures associated with the cellular network base transreceiver station installed on the roof of the premises at its own expense'.

[10] The application thereafter proceeded as against Alphen and MTN. At the conclusion of those proceedings Williams AJ issued the following order:

> '23.1. The first respondent is ordered to remove the cellular network base transceiver station which has being installed on the roof of the Mill Range building in Sectional Title Scheme New Court at Alphen, registered under scheme number 449/2006, situated at remainder erf 377,Constantia, together with associated infrastructure, cabling and support structures (collectively, "the cellphone mast installation") and to have completed such removal, including the making-good of the Mill Range building by 3 December 2016;
>
> 23.2. The second respondent is ordered to cooperate to the extent necessary in the removal of the cellphone mast installation;
>
> 23.3. The respondents' application for a postponement/stay is dismissed with costs;
>
> 23.4. The respondents are ordered to pay the applicants' costs of suit in respect of both the main application and the respondents' application for a postponement/stay thereof, such costs to include the costs attendant upon the employment of two counsel;
>
> 23.5. The respondents' liability for costs shall be joint and several, the one paying, the other to be absolved.'

[11] The case advanced on the papers by the respondents is that the infrastructure is unlawful in as much as: first, it breaches the zoning scheme regulations in at least two respects; and second, it was erected in breach of two conditions registered against the title deed of the property. Williams AJ agreed, holding 'from the correspondence exchanged between the City and [WPP], there have clearly been breaches inter alia of the zoning scheme and the Title Deed restriction'. But, argue the appellants, unlike conventional owners, sectional title owners are burdened by the provisions of the Act, the rules and the resolutions of the body corporate. That being so, so the argument goes, as the infrastructure is situated on common property, s 41(1) of the Act

finds application.

[12] Section 41 of the Act[8], headed 'Proceedings on behalf of bodies corporate', reads:

'(1)When an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of the matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed in this section.

(2)

(a) Any such owner shall serve a written notice on the body corporate calling on the body corporate to institute such proceedings within one month from the date of service of the notice, and stating that if the body corporate fails to do so, an application to the court under paragraph (b) will be made.

(b) If the body corporate fails to institute such proceedings within the said period of one month, the owner may make application to the Court to for an order appointing a curator ad litem for the body corporate for the purposes of instituting and conducting proceedings on behalf of the body corporate.

(3) The court may on such application, if it is satisfied –

(a) that the body corporate has not instituted such proceedings;

(b) that there are prima facie grounds for such proceedings; and

(c) that an investigation into such grounds and into the desirability of the institution of such proceedings is justified;

appoint a provisional curator ad litem and direct him to conduct such investigation and to report to the Court on the return day of the provisional order ….'

[13] The jurisdictional facts provided for in s 41(1) are that an owner be of the opinion that he, she or it and the body corporate 'have been

[8] Section 41 has been repealed by the STSMA. A similarly worded provision is to be found in s 9 of the STSMA.

deprived of any benefit in respect of a matter mentioned in s 36(6)'[9]. Section 36(6) provides:

'The body corporate shall have perpetual succession and shall be capable of suing and of being sued in its corporate name in respect of –

(a) any contract made by it;

(b) any damage to the common property;

(c) any matter in connection with the land or building for which the body corporate is liable or for which the owners are jointly liable;

(d) any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule; and

(e) any claim against the developer in respect of the scheme if so determined by special resolution.'[10]

[14] The body corporate is constituted in terms of the Act[11]. It is charged with the responsibility of enforcing the rules and the control, administration and management of the common property for the benefit of all members[12]. In *Wimbledon Lodge (Pty) Ltd v Gore NO & others*[13], Schutz JA pointed out:

'The jurisdictional facts that an owner must establish in order to entitle him to apply for the appointment of a curator are set out in s 41(1). They are:

1. The owner must hold an opinion.

2. The opinion must be either (a) that he and the body corporate have suffered damages (again sic) or loss or (b) that he and the body

[9] Cassim & another v Voyager Property Management (Pty) Ltd & others, Cassim & another v St Moritz Body Corporate (Pty) Ltd & others 2011 (6) SA 544 (SCA) para 11.

[10] A similarly worded provision is to be found in s 2(7) of the STSMA.

[11] Section 36(1).

[12] Section 36(4).

[13] Wimbledon Lodge (Pty) Ltd v Gore NO & others 2003 (5) SA 315 (SCA) at para 13.

corporate have been deprived of a benefit in respect of a matter mentioned in s 36(6).

3. The body corporate has not instituted proceedings for recovery.'

[15] Here, the first requirement is uncontentious. So too the third. That the third (which is a purely factual enquiry) should be a requirement, said Schutz JA, is a necessary counterpart to the sections of the Act divesting individual owners of control and vesting it in the body corporate[14]. As Malan JA pointed out in *Oribel Properties 13 (Pty) Ltd & another v Blue Dot Properties 271 (Pty) Ltd & others*[15]:

'A body corporate has perpetual succession and is capable of suing or [being sued] in its own corporate name in respect of the five matters referred to. Some of the powers, such as the one in paragraph (a), are only declaratory but the power granted in paragraph (b) – and in some circumstances paragraph (c) as well – gives it an entitlement it would otherwise not have had. Under normal circumstances only all the owners of the common property, ie the owners of the sections, would have been able to do so jointly as the common property is owned by them jointly'.

[16] To satisfy s 41(1), the adverse events must be suffered not only by the owner but by the body corporate as well, 'for the reasons that the "and" in "he and the body corporate" not only ordinarily conveys a conjunctive meaning, but that the word is twice succeeded by the plural verb "have", indicating that both he and the body are being referred to. Moreover, one would hardly expect that the legislature would require the body corporate to sue in matters which did not concern it.'[16] Section 41(1) refers in the alternative to matters upon which an opinion may be formed, including the deprivation of a benefit in respect of a matter mentioned in s 36(6). Does the contemplated action fall within any of those subdivisions? Starting with s 36(6)(c), which confers the power to sue in respect of 'any matter in connection with the land or building

[14] Wimbledon Lodge para 14.

[15] Oribel Properties 13 (Pty) Ltd & another v Blue Dot Properties 271 (Pty) Ltd & others [2010] 4 All SA 282 (SCA) para 24.

[16] Wimbledon Lodge para 20.

for which the body corporate is liable or for which the owners are jointly liable'. It is common cause that the Mill Range building and the mast are located on common property. That being so, it seems to me that subsection (c) is satisfied. If this be not correct, another basis is provided by s 36(6)(d), which gives the body corporate the power to sue in respect of 'any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under this Act or any rule'. To those provisions may be added s 37(1) which, to the extent here relevant, provides:

'A body corporate referred to in section 36 shall perform the functions entrusted to it by or under this Act or the rules, and such functions shall include –

(k) to comply with any notice or order by any competent authority requiring any repairs to or work in respect of the relevant land or building or buildings;

. . . .

(n) to ensure compliance with any law relating to the common property or to any improvement of land comprised in the common property;

. . . .

(r) in general, to control, manage and administer the common property for the benefit of all owners.'

[17] **I am of the opinion that it will be competent for the body corporate to institute action in some or other form in relation to the matters which are the subject of the litigation here. Indeed, such a conclusion accords with the general principle at common law that where a wrong is done to it, only the company (in this case the body corporate) and not the individual members may take proceedings against the wrongdoers[17]. For, as Schutz JA put it 'the body corporate is little more than the aggregation of all the individual owners. Their good is its good. Their ill is its ill. The body corporate is not an island, whatever the law of persons may say.'[18] The conclusion that I therefore reach is that s 41,**

[17] See Wimbledon Lodge para 18; see also Foss v Harbottle (1843) 2 Hare 461 (67 ER 189).

[18] Wimbledon Lodge para 21.

which provides a comprehensive statutory right to an owner of a sectional title unit aggrieved at the failure of the body corporate to act in respect of a matter mentioned in s 36(6), finds application[19].

[18] The body corporate has not instituted the proceedings. Nor, has it been called upon by the respondents to do so. However, say the respondents, they can hardly be expected to do so inasmuch as the trustees fall into two divergent camps who are at loggerheads with each other. *Cassim v Voyager Property Management (Pty) Ltd* dealt with a similar contention thus:

> '[I]t appears to me that the section finds application precisely when there is disharmony and disunity in the body corporate. The more dysfunctional the body corporate, the greater, I dare say, the need for a curator. On the view that I take of the matter, the argument advanced by and on behalf of the appellants misconstrues the section. The section does not require an owner to cause the body corporate to act in a particular way if the latter is unwilling to do so. All that is envisaged is for an owner to effect service of a notice on the body corporate calling upon it within the stated period to institute the contemplated proceedings. Should it fail to do so the envisaged remedy available to the owner is not to compel compliance with the notice but rather to approach the court for the appointment of a curator ad litem for the purposes of instituting and conducting the proceedings on behalf of the body corporate.'[20]

[19] **The relief available to an owner in the position of the respondents is to approach the court for the appointment of a curator ad litem to the body corporate, so that the curator may investigate the events complained of and, if so advised, take action aimed at somehow remedying the position[21]. Section 41 is an important component of the overall structural scheme. On the one hand it filters out unmeritorious claims by over-zealous individuals. On the other it ensures that individuals complaining should have the advantage of the information**

[19] Cassim para 16.

[20] Ibid para 13.

[21] Cassim para 16.

and the funds of their corporation in pursuing legitimate claims[22]. As to whether a curator ought to be appointed, Schutz JA stated: 'the court has a discretion under s 41(3), having regard to whether it is satisfied that the body corporate has not sued . . . that there are prima facie grounds for such proceedings . . . and that an investigation into the desirability of instituting proceedings is justified'[23]. No doubt a curator ad litem would obtain proper advice and properly investigate the facts before taking any further legal steps. Even then, the curator would have to first report to the court, which may issue such directions as to it seems meet[24].

[20] In the result the appeal must succeed and it is accordingly upheld with costs including those consequent upon the employment of two counsel. It follows that the order of the court below must be set aside and in its stead must be substituted an order dismissing the application with costs including those of two counsel.

[22] Cassim para 17.

[23] Wimbledon Lodge para 26

[24] Section 41(4); see Meridian Bay Restaurant (Pty) Ltd & others v Mitchell NO 2011 (4) SA 1 (SCA).

NKOLA v ARGENT STEEL GROUP (PTY) LIMITED

A judgment creditor may execute against immovable property if a judgment debtor has failed to point movables out and make them available.

Judgment given in the Supreme Court of Appeal on 26 March 2018 by Lewis JA (Saldulker JA, Swain JA, Pillay AJA and Makgoka AJA concurring)

Argent Steel Group (Pty) Limited obtained a judgment debt in the sum of R914 712, against Nkola.

Argent first tried to execute against the movable property of Mr Nkola. The sheriff demanded payment and then attached household furniture at one of his houses in October 2013. His return stated that Mr Nkola was unable to pay the judgment debt, and that goods described by him in an inventory had been attached. Mr Nkola's wife filed an affidavit shortly after the sheriff's return was made claiming that the furniture and household goods belonged to her. The goods were released from attachment.

On 17 January 2014, Argent brought an application for a declaration that two immovable properties owned by Nkola be declared specially executable. Nkola defaulted in adhering to a settlement agreement subsequently entered into between the parties.

Nkola argued that before the immovable properties could be sold in execution, his movable assets should have been attached and sold in execution. He claimed to have more than sufficient movable assets of significant value, far in excess of the judgment debt, against which Argent could execute should it choose to do so, without having to execute against the immovable properties.

In deciding on the application, in exercising her discretion in the court of first instance, the judge took into account all of Nkola's circumstances as set out in his answering affidavit. These included the fact that he said that he was a person of considerable means and that the debt had been outstanding since July 2014, despite the fact that he said that his liquidity problems would be resolved by the end of that year.

The application was dismissed. Nkola appealed.

Held—

In executing a judgment, a debtor's movable property must be attached and sold to satisfy the debt before the creditor can proceed to execute against immovable property. Only if they are insufficient to fulfill the debt may a creditor proceed against immovable property. The common law rule is given effect in rules 45 and 46 of the Uniform Rules of Court.

The common law and the rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available.

What the sub-rule 46(1) of the Uniform Rules of Court requires is that in all cases where a debtor's home is in issue, a court must look at the circumstances of the debtor and exercise a discretion. Rule 46(1)(a)(ii) was amended so as to include a proviso that 'where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property'. The proviso reflects the principle that a poor person who runs the risk of losing a home should not be placed in jeopardy without a proper consideration of his or her circumstances.

In exercising her discretion in the court of first instance, the judge took into account all of Nkola's circumstances as set out in his answering affidavit. There was no reason to interfere with that exercise of her discretion.

The appeal was dismissed.

Advocate H E de la Rey instructed by Neville, Borman & Botha, Grahamstown, appeared for the appellant

Advocate T J M Paterson SC instructed by Nettletons Attorneys, Grahamstown, appeared for the respondent

Lewis JA:

[1] The issue in this appeal is whether a judgment creditor is entitled to have two immovable properties belonging to the debtor declared specially executable when the movable assets of the debtor are alleged to exceed the value of the judgment debt. The parties have been locked in litigation for several years. The appellant, Mr B S Nkola, has an admitted liability to the respondent, Argent Steel Group (Pty) Ltd t/a Phoenix Steel (Argent). The court of first instance (the East London Circuit Local Division of the High Court – Jacobs AJ) granted the application and declared the properties, both residential, executable.

[2] Jacobs AJ gave leave to appeal to a full court of the Eastern Cape Division, Grahamstown. The full court (Beard AJ, Beshe and Lowe JJ concurring) dismissed the appeal. Mr Nkola has brought a second appeal with the special leave of this court. The argument he makes is that he has substantial movable assets in the form, largely, of shares in companies that he controls, but also expensive motor cars, and that

Argent should have obtained execution in respect of these before seeking execution in respect of the immovable properties. He proffers no explanation as to why he has not realized these assets in order to pay his admitted liability. His argument assumes that the creditor, Argent, must find these assets, and that he is under no obligation to make them available for execution. I shall consider the essential facts giving rise to the litigation before discussing the argument that Mr Nkola makes.

[3] The judgment debt is in the sum of R914 712, plus interest and costs. It arose from a deed of suretyship that Mr Nkola signed in 2008 in favour of Argent, guaranteeing the obligations of a company controlled by him, School Furniture and Timber Products (Pty) Ltd (School Furniture), to which credit facilities had been extended by Argent. School Furniture did not honour its obligations to Argent, which claimed R2 851 504 from Mr Nkola as surety.

[4] In July 2011, Argent applied for and was granted a default judgment against Mr Nkola in the sum of R914 712. Mr Nkola's application for rescission of the judgment was dismissed. Argent first tried to execute against the movable property of Mr Nkola. The sheriff attached household furniture at one of his houses in October 2013. His return stated that Mr Nkola was unable to pay the judgment debt, and that goods described by him in an inventory had been attached. Mr Nkola's wife filed an affidavit shortly after the sheriff's return was made claiming that the furniture and household goods belonged to her. The goods were released from attachment.

[5] On 17 January 2014, Argent brought the application under consideration for a declaration that the two immovable properties be declared specially executable. However, the parties entered into a settlement agreement in May 2014, in terms of which the latter would pay R100 000 a month to Argent to settle the debt. The agreement was made an order of court and Mr Nkola consented to execution in the event of his default. Mr Nkola failed to pay a single instalment.

[6] As I have said, Mr Nkola has throughout, including in this appeal, argued that before the immovable properties could be sold in execution, his movable assets should have been attached and sold in execution. It is of course correct that in executing a judgment, a debtor's movable property must be attached and sold to satisfy the debt before the creditor can proceed to execute against immovable property. Only if

they are insufficient to fulfill the debt may a creditor proceed against immovable property. The common law rule is given effect in rules 45 and 46 of the Uniform Rules of Court.

[7] Rule 45(3) requires the officer of the court executing the order to demand payment of the debt by the debtor, and failing payment, 'demand that so much movable and disposable property be pointed out as he may deem sufficient to satisfy' the writ of execution, and failing such pointing out, search for such property. The rules specify how incorporeal movable property is to be attached.

[8] There is no evidence on record that any movable assets, corporeal or incorporeal, were pointed out by Mr Nkola to the sheriff. Yet in his answering affidavit in the application, he claims to have 'more than sufficient movable assets of significant value (far in excess of the judgment debt) against which the applicant can execute should it choose to do so, without having to execute against my immovable properties.' Mr Nkola continued:

> 'I am the shareholder in five active companies . . . .The applicant would be at liberty to execute against any/all of my shares or loan accounts in these companies . . . but which attachment has not been done for reasons which are not apparent to me presently. I have other movables too, which should be excussed, over and above my said shares and loan accounts (in four of aforementioned companies these are valued at the sum of R2,763,00.00) These other movables of mine are, inter alia, motor vehicles (valued at R1,597,617.00), furniture and fittings . . . and a Liberty Life retirement annuity policy . . .'.

[9] Mr Nkola went on to say that, although he owned assets of significant value, he could not afford to pay the instalments that he had undertaken to pay under the settlement agreement for various reasons. But, he said, when certain problems had been resolved (which he anticipated would occur in December 2014), he would be able to settle the debt to Argent.

[10] The question that springs to mind immediately is why Mr Nkola, possessed of such wealth, did not dispose of his incorporeal property and pay the admitted debt to Argent. His stance is that Argent must seek out the movables and sell them before attempting to execute against his immovable properties. He would place the duty on the judgment creditor instead of resolving his financial problems himself.

[11] I consider that **the common law and the rules place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available.** The sheriff's return read together with Mr Nkola's 'defence' raised in his answering affidavit, show him to be a 'tricky' debtor of the kind referred to by Voet 42.1.42 (in Gane's translation), cited by Wunsh J in *Silva v Transcape Transport Consultants & another* 1999 (4) SA 556 (W). Voet wrote:

> 'Generally the judgment debtor himself is asked to point out to the person making the execution the property which he wishes to be taken and sold off with a view to the securing of a judgment debt. If he refuses to do so or does so in a tricky manner or points out what is not enough, the court servant himself seizes at his discretion those things from which the money can most readily be made up. He does so up to the limit of the debt.'

[12] Wunsh J held in Silva that rule 45 did not remove the court's discretion. He considered that, because the debtor in that matter had not pointed out movable property that was available to satisfy the judgment debt, he had behaved in a tricky manner, and had deliberately frustrated the creditor's efforts to obtain payment. Wunsh J said (at 563D-E):

> 'This is pre-eminently a case where the interests of justice do not dictate that the execution of the judgment should be stayed and a case where execution should proceed against the [debtor's] immovable properties.'

Silva was endorsed in *Tirepoint (Pty) Ltd v Patrew Transport CC & others* [2012] ZAGPJHC 34; 2012 JDR 0417 (GSJ).

[13] Mr Nkola argued nonetheless that the sheriff had not issued a nulla bona return and that it was common cause that he had movable assets that he could use to satisfy the debt. Rule 46 deals with execution against immovable property. Rule 46(1)(a)(i) provides that no writ of execution against immovable property shall issue until a return has been made that the debtor does not have sufficient movable property to satisfy the writ, or (ii) the immovable property is declared specially executable by a court. The requirements of sub-rules (i) and (ii) had not been met since there was no nulla bona return, it was argued. The submission was that sub-rules (i) and (ii) have as a matter of practice been read to require that there must be a nulla bona return before immovable property can be declared specially executable.

[14] Counsel for Mr Nkola cites as authority for this proposition two judgments: *Firstrand Bank Ltd v Folscher & another* and similar matters 2011 (4) SA 314 (GNP) and *Nedbank v Molebeloa* [2016] ZAGPPHC 863. He argued that these judgments have changed the common law, reflected in Silva. However, both those cases deal with a completely different factual matrix. They follow on the judgments in the Constitutional Court which deal with the right to housing, which might be jeopardized where execution is permitted in respect of a debtor's primary residence: *Jaftha v Schoeman & others, Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC) and *Gundwana v Steko Development CC & others* 2011 (3) SA 608 (CC). The decisions of the Constitutional Court are confined to execution in respect of a debtor's primary home and bring the law in line with the constitutional right to housing. See in particular *Mkhize v Umvoti Municipality & others* [2011] ZASCA 184; 2012 (1) SA 1 (SCA) para 26 where this court said that the object of judicial oversight is to determine whether rights in terms of s 26 of the Constitution (the right to adequate housing) are implicated.

[15] What the sub-rule requires, as a result of these decisions, is that in all cases where a debtor's home is in issue, a court must look at the circumstances of the debtor and exercise a discretion. Rule 46(1)(a)(ii) was amended so as to include a proviso that 'where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property'. The proviso reflects the principle that a poor person who runs the risk of losing a home should not be placed in jeopardy without a proper consideration of his or her circumstances.

[16] In exercising her discretion in the court of first instance, Jacobs AJ took into account all Mr Nkola's circumstances as set out in his answering affidavit. These included the fact that he said that he was a person of considerable means and that the debt had been outstanding since July 2014, despite the fact that he said that his liquidity problems would be resolved by the end of that year. Mr Nkola, on his own account, is not the kind of person who qualifies for the protection

required by Gundwana.

[17] The full court appropriately did not interfere with the exercise of the discretion by the court of first instance. It was exercised after proper consideration was given to Mr Nkola's personal circumstances. The fact that one of the houses was his and his family's primary residence, and the other that of his elderly father, is of no consequence: he had the means to avert the execution of the judgment debt and chose not to pay his admitted liability. There is no justification in this matter to read the requirements of rule 46(1)(a) conjunctively. 'Or' need not be read as 'and' save where a debtor is indigent, has insufficient assets to satisfy the debt and is at risk of losing his or primary residence.

[18] And in any event, the sheriff's return dated 11 October 2013, which preceded the agreement of settlement, made it clear that he had demanded payment of the debt by Mr Nkola who did not make any movable asset available for execution such that there would be satisfaction of the debt. The return met the requirements of rule 46(1)(a)i.

[19] There is no justification for interfering with the exercise of her discretion by Jacobs AJ, as the full court rightly found.

[20] Accordingly, the appeal is dismissed with costs.

THE SOUTH AFRICAN BANK OF ATHENS LIMITED v ZENNIES FRESH FRUIT CC
BUSINESS PARTNERS LTD v ZENNIES FRESH FRUIT CC

The mechanisms of business rescue proceedings not designed to protect a company indefinitely to the detriment of the rights of its creditors.

Judgment given in the Western Cape Division, Cape Town, on 1 February 2018 by Kusevitsky AJ

On 30 January 2017 the sole member of Zennies Fresh Fruit CC signed a resolution to place it under voluntary business rescue proceedings in terms of section 129(1) of the Companies Act (no 71 of 2008). On 3 February 2017, Bernard Schneider was appointed as the business rescue practitioner for Zennies.

On 14 February 2017 an application for judgment brought by Business Partners Ltd was postponed to 16 May 2017 to allow Schneider an opportunity of approximately three months to finalise the business rescue proceedings. Schneider prepared and published the plan which was distributed on 9 March 2017. This plan would be tabled for discussion and voting at the second creditors meeting which was scheduled for 23 March 2017. A second meeting took place and was adjourned in order to prepare and publish a revised plan. According to the minutes of that meeting under the topic of 'Business Rescue Plan', it was recorded, inter alia that the plan had been timeously circulated, that in order to comply with the prescribed time frames, there were certain information that Schneider had been unable to confirm at the time of compiling the plan and that as such, it was suggested that the second meeting and the voting on the plan be adjourned until certain information and facts were more firmly established. The minutes recorded that Schneider had received an offer of R5.5m for the company vehicles and that the proceeds would be sufficient to settle the outstanding creditors. It was noted that Business partners and the South African Bank of Athens as the major creditors were present at the meeting and that Schneider 'advised those present that he will amend and redistribute the business plan when he had more facts at his disposal, especially around the pending sale of assets and that Zennies would be able to settle its overdue debt.' The minutes also recorded that the 'period for the voting of the plan can be extended with the permission of the major creditors.'

Schneider stated that the reason for the adjournment was for him to obtain information, inter alia regarding the sale of certain assets of Zennies and these included the sale of certain trucks, properties and the raising of working capital. He also stated that he had entered into an agreement in principle and was awaiting signature of the signed sale agreement which would ostensibly

have been finalized on 20 May 2017.

Business Partners relied on the recordal in the minutes to claim that in terms of section 153(3)(a)(ii) of the Act, Schneider was required to prepare and publish a new or revised plan within ten business days from the date of the second creditors' meeting, that that period having lapsed on 6 April 2017 and neither it nor the bank having agreed to extend the time period for him to prepare and publish a new or revised plan, the business rescue had lapsed. It therefore sought a declaratory order that the business rescue had ended and/or lapsed in terms of section 132(2)(c)(i) of the Act.

On 3 May 2017, the bank brought a liquidation application against Zennies. It contended that all parties present at the second meeting had agreed to extend the time periods in order to file an amended business rescue plan, and the effect of this was that the plan was dismissed as contemplated by section 152 (3)(a) of the Act.

Zennies contended that as a result of the lack of information available to Schneider at the second meeting and the creditors' position at the time, the plan was not accepted, and the meeting was adjourned on the basis that Scheider would amend the plan and address the concerns raised by the creditors.

Held—

The issue was whether the business rescue proceedings had terminated or whether Zennies was still under business rescue. The crisp question was whether the fact that no vote was taken to approve the plan at the second meeting justified a conclusion that the plan was rejected as envisaged by section 152(3)(a) of the Act. This section provides that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153.

At the meeting it was evident that the business plan was presented to the creditors in terms of section 151 of the Act. It was common cause that the meeting was adjourned. On Zennies version, the meeting was adjourned in order for Mr Schneider to obtain more information. Section 152 provides that at a meeting convened in terms of section 151, the practitioner must, inter alia, introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders, and call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting had first been adjourned in accordance with paragraph (d)(ii).

In the absence of specific information received to finalize an amended plan for consideration, a business rescue practitioner is under a statutory duty to file

a Notice of Termination. There had been an extraordinary long period of time since the business rescue proceedings were initiated. The second meeting of creditors occurred on 23 March 2017 and In the absence of this vital information, this court was therefore unable to ascertain how far Mr Scheider was in securing these agreements. Notably absent from Schneider's affidavit was any evidence that the sale agreement had in fact been concluded. Neither was any evidence produced regarding the purported sale of the trucks which would have been sold in the region of R4m.

The mechanisms of business rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalization of the business rescue proceedings was unreasonable in the circumstances. Accordingly an order terminating the proceedings was justified.

Kusevitsky AJ:

[1] This dispute concerns two applications, being case numbers 24618/2016 and 7681/2017, which were consolidated as they both relate to a common Respondent, Zennies Fresh Fruit CC, ('Zennies'). Both Applicants are seeking a declaratory order that the Business Rescue Proceedings in respect of Zennies have ended or lapsed in terms of section 132(2)(c)(1) of the Companies Act No 71 of 2008 ('the Act'). Zennies on the other hand refutes that the business rescue proceedings have been terminated and aver that the Applicants are not entitled to proceed against it in terms of Section 133 of the Act which places a general moratorium on legal proceedings against a company.

THE PARTIES

Business Partners Limited

[2] Business Partners Limited ('Business Partners') is the Applicant in case number 24618/2016. The First Respondent is Zennies and the Second Respondent is Zenophane Denver Schroeder ('Schroeder') who signed a deed of suretyship in favour of Business Partners for the performance of Zennies obligations to it. Business Partners is seeking judgment against First and Second Respondents jointly and severally, the one paying the other to be absolved for monies loaned and advanced in terms of loan and royalty agreements entered into between

them. As security for its indebtedness, Zennies caused a covering mortgage bond to be registered in favour of Business Partners on several properties in Gouda. Furthermore, as security for Zennies debts, the Second Respondent Schroeder, caused a surety mortgage bond to be registered in favour of Business Partners over a further property in Durbanville.

[3] On the 14 February 2017, Business Partners applied for judgment and execution of the properties.

The South African Bank of Athens Limited

[4] On the 16 May 2017, the South African Bank of Athens ('the Bank') brought a liquidation application against Zennies by virtue of monies due and payable in respect of various property loan and instalment sale agreements which debt, it said, Zennies were unable to pay as and when they fell due.

[5] The liquidation application became opposed and was eventually postponed to the semi – urgent roll.

THE BACKGROUND

[6] On 30 January 2017 the sole member of Zennies signed a resolution to place it under voluntary Business Rescue proceedings in terms of section 129(1) of the Companies Act. The business rescue proceedings of Zennies commenced on 1 February 2017. On 3 February 2017, Bernard Schneider ('Schneider') was appointed as the business rescue practitioner for Zennies.

[7] On 14 February 2017 the application for judgment which was issued on 19 December 2016, was postponed to 16 May 2017 to allow Mr Schneider an opportunity of approximately three months to finalise the Business Rescue Proceedings.

[8] On 17 February 2017 the first creditors' meeting for the general body of creditors of Zennies took place in terms of section 151 of the Act. There were two creditors present, namely Business Partnersand the Bank. The minutes of the meeting indicate that:

> 'At the next meeting, scheduled for 25 business days after the appointment of the business rescue practitioner, a plan will be presented and voted on. This period for the voting of the plan can be extended with the permission of the major creditors'.

[9] The minute contains no recordal of any vote having taken place at

the meeting. The proceedings at this first meeting are not in dispute. On 9 March 2017 a Business Rescue Plan ('the plan') was published by Mr Schneider.

[10] On 23 March 2017 the second creditors' meeting took place. It is what happened at this meeting which is the nub of the dispute.

[11] According to the supplementary affidavit of Business Partners, Schneider prepared and published the Plan which was distributed on 9 March 2017. This plan would be tabled for discussion and voting at the second creditors meeting which was scheduled for 23 March 2017. On the 20 March 2017, Business Partners attorneys directed an email to Mr Schneider which dealt with, inter alia, the contents of the plan and raised its concerns that the plan did not comply with the requirements of section 150(2) of the Act. The letter ended by stating that they would advise their client to either raise a motion in terms of section 152(d)(i) alternatively (ii) of the Act 'in terms of which you will be allowed to either amend the proposed plan in accordance with the request by the holders of the creditors voting interest or adjourn the meeting in order to revise the plan for further consideration.' On the 22 March 2017, Mr Scheider replied by stating that it was his intention of settling all of the creditors in full and that he had already addressed this by realizing certain assets. He believed that two to three months would be the maximum duration of this proposed plan.

[12] According to Business Partners, the second meeting which took place was adjourned in order to prepare and publish a revised plan. According to the Minutes of that meeting under the topic of 'Business Rescue Plan', it was recorded, inter alia that the plan had been timeously circulated, that in order to comply with the prescribed time frames, there were certain information that Mr Schneider had been unable to confirm at the time of compiling the plan and that as such, it was suggested that the second meeting and the voting on the plan be adjourned until certain information and facts were more firmly established. The Minutes also recorded that the 'period for the voting of the plan can be extended with the permission of the major creditors.'

[13] In its affidavit, Business Partners relies on this recordal to claim that in terms of section 153(3)(a)(ii) of the Act, Mr Schneider was required to prepare and publish a new or revised plan within ten business days from the date of the second creditors' meeting, that

period so it was stated, having lapsed on 6 April 2017 and neither it nor the Bank had agreed to extend the time period for him to prepare and publish a new or revised plan. It therefore seeks a declaratory order that the Business Rescue of Zennies has ended and/or lapsed in terms of section 132(2)(c)(i) of the Act.

[14] Finally, with regard to the financial position of Zennies, the Minutes recorded that Mr Schneider had received an offer of R5.5 million for the company vehicles and that the proceeds would be sufficient to settle the outstanding creditors. It was noted that Business partners and the Bank as the major creditors were present at the meeting and that Mr Schneider 'advised those present that he will amend and redistribute the Business plan when he had more facts at his disposal, especially around the pending sale of assets and that Zennies Fresh Fruits CC would be able to settle its overdue debt.'

[15] On 3 May 2017, the Bank brought a liquidation application against Zennies. The founding affidavit addressed only the requirements necessary to seek a winding up order, and did not deal with the business rescue of Zennies, nor did it ask for the termination of the business rescue on the basis of what had purportedly transpired at the second meeting. In its replying affidavit, the Bank averred that Zennies was no longer under Business Rescue, the contention being that there was no agreement to extend the time periods in reply to the allegation that all parties present agreed to extend the time periods in order to file an amended business rescue plan. The effect of this was that the plan was dismissed as contemplated by section 152 (3)(a) of the Act. It also denies that Mr Schneider took any steps in order to prepare and publish a new revised business plan within 10 days as permitted by section 153(3)(a)(ii) as contemplated.

[16] Zennies on the other hand contends that as a result of the lack of information available to Mr Schneider at the Second Meeting and the creditors' position at the time, the plan was not accepted, and the meeting was adjourned on the basis that Mr Scheider would amend the plan and address the concerns raised by the creditors.

[17] It argues that on Mr Schneider's version, all of the parties present at the Second Meeting agreed to extend the time periods to file an amended business rescue plan and that the Plan was neither accepted nor rejected. The argument therefore is that, 'a further step' had been

taken in the business rescue proceedings by the affected parties.

[18] In summary, Zennies argument is that it remains under business rescue and that, without the consent of Mr Schneider or the leave of the Court, the moratorium against any proceedings being instituted against it remains in place.

[19] The Plan was therefore not rejected, rather the parties agreed that it be amended as contemplated in Section 152(1)(d)(ii) and therefore section 153 does not apply and even were it to be held that the Plan was rejected (and that Section 153 does apply), in light of the instruction that Mr Schneider had to amend the Plan, the business rescue proceedings did not terminate (as Section 153(1)(a)(i) would apply.

THE ISSUES TO BE CONSIDERED

[20] The issue that needs to be considered in both matters therefore is whether the business rescue proceedings have terminated or come to an end or whether it is still under business rescue. In order to answer this question, I was requested to answer the following subsidiary questions:

20.1 Whether it was agreed to amend the plan as contemplated in section 152(1)(d)(ii) without rejection of the plan;

20.2 Whether if the plan was rejected,a further step was taken within the ambit of section 132(2)(a)(ii) thereby preventing the termination of the business rescue proceedings and

20.3 Whether, if a further step within the contemplation of section 132(2)(a)(ii) was taken, the business rescue still automatically terminates if the Business Rescue Practitioner fails in any of his other statutory obligations.

THE LEGISLATIVE FRAMEWORK

[21] The crisp question is whether the fact that no vote was taken to approve the plan at the second meeting justifies a conclusion that the plan was rejected as envisaged by section 152(3)(a) of the Act. This section provides that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153. It states as follows:

'152 Consideration of business rescue plan

…

(3) If a proposed business rescue plan –

(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153…'

[22] Business rescue proceedings are initiated either through a resolution adopted by the board of the company in terms of section 129 (1)(a) or (b). The Act furthermore provides the termination of Business Rescue in certain instances. The first method of termination is through an application by an 'affected person' to court in terms of section 130 (1)(a) for the setting aside of the resolution on three grounds. Subsection (b) also makes provision that an affected person may also apply to court to set aside the appointment of a practitioner on the grounds that the practitioner does not satisfy the requirements of section 138, is not independent of the company or its management or lacks the necessary skills, having regard to the company's circumstances. An affected person is defined in section 128(1)(a) of the Act in relation to a company, as a shareholder or creditor of the company, any registered trade union representing employees of the company and if any of the employees of the company are not represented by a trade union, each of those employees or their respective representatives.

[23] Business Rescue ends in terms of section 132 (2)(a)(i) of the Act when the court sets aside the resolution or order that began those proceedings or has converted the proceedings to liquidation proceedings in terms of section 132(2)(ii) of the Act.

[24] Another manner in which Business Proceedings comes to an end is in terms of section 132(2)(b) where the practitioner has filed with the Commissioner a notice of termination of business rescue proceedings. It is common cause that this has not been done. Finally, business rescue proceedings also ends in terms of section 132(2)(c)(i) or (ii) of the Act which provides for the termination of business rescue when a business rescue plan has been proposed and rejected in terms of Part D and no affected person has acted to extend the proceedings in any manner contemplated in section 153.

[25] In my view, this provision should be read in conjunction with section 152(3)(a) which reiterates that if a proposed business rescue plan is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected and may only be considered further

in terms of section 153 of the Act.

[26] Section 153 of the Act therefore only kicks in when a business rescue plan has not been approved and subsequently rejected. Section 153 provides for remedies in the event that a business rescue plan has not been adopted. These include seeking a vote of approval by the practitioner from the holders of voting interests to prepare and publish a revised plan or apply to court to set aide the result of the vote.

[27] Section 153(3)(a)(i) and (ii) furthermore provides that if, on the request of the practitioner in terms of subsection (1)(a)(i), or a call by an affected person in terms of subsection (1)(b)(i)(aa), the meeting directs the practitioner to prepare and publish a revised business rescue plan –

'(a) the practitioner must

(i) conclude the meeting after that vote; and

(ii) prepare and publish a new or revised business rescue plan within 10 business days;…'

[28] In terms of section 153(5), if no person takes any action contemplated in subsection (1), the practitioner 'must promptly file a notice of the termination of the business rescue proceedings.'

[29] It is common cause that the business rescue practitioner in both applications has not filed a notice of termination of the business rescue proceedings. It is also interesting to note that despite the apparent unhappiness in the manner in which the proceedings were undertaken, no application to remove the practitioner or set aside his appointment was ever brought in terms of section 130(1)(b)(iii) of the Act. Furthermore, none of the creditors sought to set aside the Resolution in terms of section 130(1)(a)(ii) on the grounds that there is no reasonable prospect for rescuing the company.

[30] At the meeting it is evident that the business plan was presented to the creditors in terms of section 151 of the Act. It is common cause that the meeting was adjourned. On Zennies version, the meeting was adjourned in order for Mr Schneider to obtain more information. This requires a closer analysis of section 152 of the Act which provides for the consideration of a business rescue plan. This section provides, inter alia as follows:

'152. Consideration of business rescue plan

(1) At a meeting convened in terms of section 151, the practitioner must-

(a) introduce the proposed business plan for consideration by the creditors and, if applicable, by the shareholders;

(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;

(c) provide an opportunity for the employees? representatives to address the meeting;

(d) invite discussion, and entertain and conduct a vote, on any motions to-

(i) amend the proposed plan, in any manner moved and seconded by holders of creditors? voting interests, and satisfactory to the practitioner; or

(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and

(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).'

[31] It is apparent from the wording of subsection 152(1)(d)(ii) that it has to be read in conjunction with section 152(1)(e) by the inclusion of the word 'and' at the end of the sentence. This means that in the event that a practitioner is directed to adjourn the meeting in order to revise the plan for further consideration, one of two things can occur in terms of subsection (e). First, the practitioner would have to call for a vote for preliminary approval of the proposed plan, as amended if applicable unless (my emphasis) the meeting has first been adjourned in accordance with paragraphs (d)(ii).

[32] The Respondent argued that there was no evidence that a vote had been taken. This contention would be correct if the meeting was postponed in order for the practitioner to obtain further information that he required for the amended business plan.

[33] Both Applicants placed reliance on section 152 (3)(a) of the Act on the proposition that because the business rescue plan was not approved on a preliminary basis as envisaged in section 152(1)(e) and 152(1)(d)(ii) of the Act, that it was automatically rejected. This argument presupposes that there was a vote on a preliminary basis of

the business rescue plan as contemplated in subsection 2. There is no evidence to suggest that this happened and accordingly I find that the both the Applicants reliance on section 152 (3)(a) and 132(2)(c)(1) is misplaced. Since I have found that there is no evidence to suggest that the business rescue plan was not approved, there is no need for me to deal with section 153 as it does not find application here.

[34] To my mind, however, this is not the end of the inquiry. Can it be that a company enjoys the protection of business rescue indefinitely to the detriment of its creditors? Although the Act does not directly specify the length a company can be under business rescue, section 132(3) provides a guide under which the legislature envisaged companies to remain under business rescue. This section provides that if a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner may allow, the practitioner must prepare a progress report of the business rescue proceedings and update it at the end of each subsequent month and deliver it to each affected person until the end of the proceedings. No such application was brought by Mr Schneider to extend the business rescue.

Purpose of Business Rescue

[35] 'Business rescue' is defined in Section 128(b) of the Act to mean 'proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for-

i) the temporary supervision of the company, and of the management of its affairs, business and property;

ii) the temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.'

[36] In *Advanced Technologies and Engineering Company (Pty) Ltd (in Business Rescue) v Aeronautique et Technologies Embarquees Sas and Others* (GNP) Case No 72522/2011, judgment delivered on 6 June

2012, Fabricius J was asked to consider an application for the extension of the time limits stated in ss 129(3) and (4) after these had expired. He was of the view that it was clear from the relevant sections contained in Chapter 6 that a substantial degree of urgency is envisaged once a company has decided to adopt the relevant resolution beginning business rescue proceedings.

[37] With regard to argument that the sole purpose of the business rescue is to avoid liquidation proceedings the following was said in the matter of *Absa Bank Limited v Caine NO and Another; in re Absa Bank Limited v Caine N.O. and Another* (38123/2013; 3915/2013) [2014] ZAFSHC 46 (2 APRIL 2014) where it was stated as follows at para 40:

> 'Business rescue proceedings are much more flexible and financially distressed company friendly than judicial management. The potential business rescue plan provided for in ss 128(1)(b)(iii) has two objects in mind, the primary object being to facilitate the continued existence of the company in a state of solvency and secondly and in the alternative, in the event that the primary objective cannot be achieved or appears not to be viable, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation. Consequently the Supreme Court of Appeal found in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* 2013 (4) SA 539 (SCA) at para [26] as follows:
>
> 'It follows, as I see it, that the achievement of any one of the two goals referred to in section 128(1)(b) would qualify as 'business rescue' in terms of section 131(4).'

As further stated by the Supreme Court of Appeal in para [27]:

> '… business rescue proceedings are not limited to the return of the company to solvency…'

[38] While the sentiments expressed are noble, it cannot lead to a situation that where an extraordinary amount of time is taken to achieve this result, this should be at the expense of the rights of creditors. The balancing of these rights should always be paramount in the ambit of fairness.

[39] In *Commissioner, South African Revenue Service v Beginsel NO and Others* 2013 (1) SA 307 (WCC), where the Commissioner challenged the validity of a decision taken at a meeting of creditors to

adopt a business plan and sought a conversion of the business rescue into winding-up proceedings, the court found that the implementation of the business plan was far advanced - there was already planning for the sale of some of the respondent's operations and the business rescue plan was supported by 87% of the value of creditors present at the meeting of creditors whilst only SARS took an opposite view. Consequently the court found that nothing would be achieved if the business rescue proceedings would be converted into liquidation, bearing in mind the extra costs to be incurred. The court was also satisfied that the continuation of the business rescue proceedings would result in a better return for the company's creditors as a whole than would result from the reintroduction of the liquidation process.

[40] This, however, is not the case in this instance. From the minutes of the second meeting, it is apparent that what Mr Schneider envisages for Zennies is an informal liquidation process, by selling the assets of Zennies in order to settle its indebtedness in full to the Bank and Business Partners. This matter is distinguishable from the Beginsel matter as the majority of the creditors in casu were not satisfied with the initial plan – hence the call for additional information and there seems no indication that Mr Schneider obtained the additional information that he required in order to finalise an amended plan.

[41] In *Oakdene Square Properties*, supra, the court, remarked as follows in para [33]:

> 'My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution……. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.'

[42] In the absence of specific information received to finalize an amended plan for consideration, a Business Rescue Practitioner is under a statutory duty to file a Notice of Termination. There has been

an extraordinary long period of time since the Business Rescue Proceedings were initiated. The second meeting of creditors occurred on 23 March 2017 and according to the affidavit of Mr Schneider, the reason for the adjournment was for him to obtain information, inter alia regarding the sale of certain assets of Zennies and these included the sale of certain trucks, properties and the raising of working capital. There was also an averment that he had entered into an Agreement in principle and was awaiting signature of the signed sale agreement which would ostensibly have been finalized on 20 May 2017. Notably absent from the opposing affidavit, which was commissioned on 29 May 2017 was any evidence that the sale agreement had in fact been concluded. Neither was any evidence produced regarding the purported sale of the trucks which would have been sold in the region of R4million. In the absence of this vital information, this court was therefore unable to ascertain how far Mr Scheider was in securing these agreements. I mention these considerations in passing as it would in any event not have assisted Zennies since this was not part of the implementation of a plan as was consideration in Beginsel.

[43] **In my view, the mechanisms of Business Rescue proceedings were not designed to protect a company indefinitely to the detriment of the rights of its creditors. The delay in the finalization of the business rescue proceedings are unreasonable in the circumstances and I am satisfied that an order is justified terminating the proceedings.**

[44] In case number 24618/2016, Business Partners in addition to seeking judgment against Zennies, is also pursuing judgment against the Second Respondent in his personal capacity by virtue of the suretyship agreement in respect of the immovable property described as Erf 1319 Durbanville. There is no indication that this property is the primary residence of the Second Respondent especially given the indication that this property would have been be sold in order to raise working capital for Zennies. As an aside, in *New Port Finance Company (Pty) Ltd and Another v Nedbank Ltd* [2014] ZASCA 201; [2015] 2 All SA 1 (SCA) paras 9, 10 and 12 the Supreme Court of Appeal considered the effect of business rescue on obligations of sureties and pronounced as follows:

'But we were referred to no authority and I have discovered none, in which it has been held that a compromise of the principal debtor's

liability under the judgment, whether as a result of business rescue or otherwise, would accrue to the advantage of the surety after judgment had been taken against them. Therecan be no question of the surety's rights or interests being prejudiced *thereby, [Bock and others v Duburoro Investments (Pty) Ltd 2004* (2) SA 242 (SCA) paras 18 – 21] because the extent of the surety's liability for the debt has been fixed and determined. How the creditor thereafter sets about ex ecuting the judgment against the principal debtor does not affect either the nature or the extent of the surety's liability …. Any default on the part of the principal debtor entitled the bank to sue the sureties. The benefit of excussion was waived …. the fact that in any of those situations the principal debtor would be released in whole or in part from its obligations would not disentitle the bank from recovering the outstanding amount from the sureties.'

[45] I am therefore satisfied, that even if I am wrong with regard to my assessment of the Business Rescue proceedings, that Business partners is entitled to judgment against Schroeder in the absence of any answering affidavit in the application for judgment. I will however not order the executability of Erf 1319 Durbanville as I do not have sufficient information before me to make such an order at this stage. I will also not order the executability of the listed properties given the order that I propose to make in case number 7681/2016. I conclude therefore that a proper case has been made out for the relief sought in both notice of motions adjusted as indicated in the orders below.

In the circumstances, the following orders are made:

Application 24618/2016:

1.It is declared that the Business Rescue proceedings of First Respondent has terminated.

2.Judgment is granted against first and second respondents jointly and severally, the one paying, the other to be absolved, for:

2.1 Payment in the amount of R 19 151.04 for arrear Royalties in respect of the Royalty Agreement with account number 702009;

2.2 Payment in the amount of R 7 693.26 for future Royalties in respect of the Royalty Agreement with account number 702009;

2.3 Payment in the amount of R 666 749.28 in respect of the Loan Agreement with account number 405756;

2.4 Payment in the amount of R 2 046 179.68 in respect of the Loan

Agreement with account number 405757;

2.5 Interest on the amounts referred to in paragraphs 2.1 and 2.2 above at a rate of Prime plus 0% (Prime currently 10.50%) compounded monthly in arrears from 26 November 2016 until date of final payment, both days inclusive.

2.6 Interest in the amount referred to in paragraphs 2.3 and 2.4 above at a rate of Prime plus 4.00% (Prime currently 10.50%) compounded monthly in arrears from 26 November 2016 until date of final payment, both days inclusive.

3.Costs to be paid on a party and party scale.

In matter 7681/17: Liquidation application

1.It is declared that the Business Rescue proceedings of Respondent has terminated.

2.The estate of Respondent is placed under provisional liquidation in the hands of the Master of the High Court.

3.A rule nisi is issued calling upon all interested parties to furnish reasons, if any, to this court on Tuesday 27 February 2018 why a final winding-up order should not be issued against Respondent.

4. This order is to be served by the Sheriff of his or her duly authorized deputy at its registered office and principal place of business being 11 Watercress Lane, Zeekoevlei, 7941.

5.A copy of the order must be served on:

(i) Any registered trade union that, as far as the sheriff can reasonably ascertain, represents any of the employees of Respondent;

(ii) The Respondent's employees if any, by affixing a copy of the order to any notice board to which the employees have access inside the Respondent's premises, alternatively by affixing a copy thereof to the front gate, where applicable, failing which the front door of the premises from which the Respondent conducts any business at 11 Watercress Lane, Zeekoevlei, 7941.

6. This order should be served upon the South African Revenue Services.

7. This order is to be published without any delay in The Burger and the Cape Times.

8.The costs of this application, including the costs of the 14 September 2017 but excluding the costs of opposition of this application, shall be costs in the liquidation.

In order to establish that a contract has been concluded between two parties, it is necessary to prove that there was an intention by both parties to contract. To establish that a contract has been concluded on the basis of quasi-mutual assent, similar evidence is necessary.

Judgment given in the Supreme Court of Appeal on 27 March 2018 by Ponnan JA (Saldulker JA, Plasket AJA, Mothle AJA and Schippers AJA concurring)

On behalf of his corporation, Vin Co, Mr M Pretorius concluded an agreement with Trust Hungary ZRT, under which Trust would supply wine barrels to Vin Co from time to time upon the placing of orders for the wine barrels. Pretorius informed Trust that for payment purposes, he would work through Vincorp (Pty) Ltd, a financing company specializing in financing wine barrels.

When orders were then placed, Trust despatched proforma invoices made out to Vin Co. Trust was informed that the procurement and financing of the oak barrels was to be done through the agency of Vincorp.

In due course, Pretorius requested Trust to replace Vin Co with Vincorp on the documentation, but stressed that Vincorp acted as financing company and importing agent on behalf of Vin Co. This happened in order to meet difficulties Vincorp had been experiencing in regard to permissions required from the exchange control authorities.

At a certain point, Vin Co was unable to pay invoices amounting to US$112,726. Trust took the view that their contract was with Vincorp and not Vin Co. It brought an action for payment of the amount outstanding.

Held—

Vincorp only came onto the scene after the relationship between VinCo and Trust had already been established. Initially, VinCo placed the orders with Trust, and invoices were made out VinCo, not Vincorp. It was only when Vincorp's bank experienced difficulty with the expatriation of funds that, at Mr Pretorius' request, a change to the invoices came to be effected. However, that was for that rather limited purpose and in no way served to alter the relationship between the parties. The mere fact that Vincorp came to be reflected as the purchaser or importer on some of the documents in itself did not signify any new legal relationship between it and Trust.

In view of the fact that the documents relied upon were, in terms, plainly not offers to purchase, Trust ought to have laid a foundation in fact for a finding that it was entitled to conclude, or that a reasonable person would have believed, that the written purchase orders constituted an offer to purchase.

However, the evidence tendered on behalf of Trust fell woefully short of laying any such foundation. In the final analysis, the evidence adduced on behalf of Trust did not disclose any conduct on the part of Vincorp that could have caused Trust to believe that those documents constituted an offer to purchase, other than the mere fact of their delivery to Trust. There was no evidence to show that any conduct on the part of Vincorp that could have caused Trust to labour under the genuine misapprehension that Vincorp was anything other than VinCo's importing and logistical agent.

Even assuming, however, that Trust's case as pleaded was sufficient to justify reliance on quasi-mutual assent, Trust still had to fail because the evidence did not support a finding of quasi-mutual assent.

Advocate R F van Rooyen SC instructed by Faure & Faure Inc, Paarl, appeared for the appellant

Advocate R D McClarty SC instructed by Miller Bosman Le Roux Hill, Somerset West, appeared for the respondent

Ponnan JA:

[1] Wine barrels, or more accurately, whether or not there were a series of agreements of sale between the parties in relation to them, is the subject of this litigation. The respondent, Trust Hungary ZRT (THR), as the name suggests, is a Hungarian company that conducts business as the manufacturer and supplier of Hungarian oak wine barrels to the wine industry. Alleging that it had sold and delivered wine barrels to the appellant, Vincorp (Pty) Ltd (Vincorp), a South African company, for which payment remained outstanding, it caused summons to be issued out of the Western Cape High Court, Cape Town against the latter. The trial judge, Van Staden AJ, dismissed the claim with costs, but granted leave to THR to appeal to the full court of that division. The full court upheld THR's appeal with costs. It accordingly set aside the order of the trial judge and replaced it with one ordering Vincorp to pay to THR the sum of US $112 526 together with interest as claimed and costs. The further appeal by Vincorp is with the special leave of this court.

[2] THR alleged on the pleadings, which was denied by Vincorp, that:

'3. Since about 2002 Defendant has been ordering and purchasing wine barrels from Plaintiff in terms of written purchase orders at

Plaintiff's usual prices from time to time, and Plaintiff has been selling the wine barrels ordered by Defendant to Defendant accordingly.

4.During December 2008 and 2009 Defendant inter alia ordered and purchased wine barrels from Plaintiff for a total purchase price of US $146,850.00 in terms of written purchase orders. Copies of these written purchase orders are annexed hereto, marked ?A1" to "A33".

5.In terms of these purchase orders, which were accepted by the Plaintiff and in terms whereof Plaintiff sold the wine barrels referred to in paragraph 4 above to Defendant, Defendant was obliged to pay Plaintiff the total amount of each order within 90 days from date of loading. Details of these purchases are as follows:

. . .

6.All these oak barrels were duly loaded and delivered by or on behalf of Plaintiff to Defendant or its duly authorised agents.

7.Defendant has failed and/or refused to pay to Plaintiff the purchase price of the wine barrels purchased by it in terms of Annexures "A1" to "A33" hereto, as it is legally obliged to do.

9.In the premises, Defendant is liable to pay Plaintiff the sum of US $146,850.00 which remains due, owing and payable, but despite demand, Defendant has to date failed and/or refused to pay the said amount or any portion thereof.'

[3] Each of annexures A1 to A33 to the particulars of claim was described as a 'purchase order and confirmation'. The following* is a fair reproduction of Annexure 1. Save for differences relating to the respective customer in each instance, the other 32 annexures, were for the most part, identical in form to Annexure 1.

[4] In dismissing THR's claim, Van Staden AJ held:

'52. I agree with counsel for Vincorp that the Trust has not succeeded in showing that there was animus contrahendi to enter into an agreement of purchase and sale on the part of VinCo. In my view the parties were at cross-purposes - Molnar was convinced that Vincorp is the purchaser of the barrels, whereas Vincorp only

* On the following page - Ed

PURCHASE ORDER & CONFIRMATION

VINCORP (PTY) LTD, POBox 7477, Stellenbosch 7599, South Africa Tel: +27 21 883 9023 Fax: +27 883 9020

To / Cim:	Date of Order / Rendelés dátuma:	Loading Date / Szállitási határidö:
VinCo CC, PO Box 1459, Suider Paarl 7624, South Africa	2008-12-16	2009-01-03
Customer ID / Vevö adatai:	**Purchase Order No./ Rendelési szám:**	**Delivery Date / Szállitási nap:**
Adam Tas	B0904/4274	

Type Tipus	Qty. Db	Age of wood Fa kora	Toast lev. Pörkölés	T.Head Fej pörk.	Hoops # Abroncs #	Logo Logo	Vintage Évjárat	Bung Dugó	Bung hole Akona	Unit Price Egységár
300 L	8	24 months	M	-	8	Trust	2009	Silicone	50 mm	550.00 $
300 L	9	24 months	M+	-	8	Trust	2009	Silicone	50 mm	550.00 $
TOTAL / ÖSSZES:			17	PAYMENT TERMS / FIZ. MÓD:		90 Days	TOTAL AMOUNT / ÖSSZESEN:			9350.00 $

SPECIAL REQUESTS / SPEC. KERES

Mark heading as follow: Trust Logo, Wood Type, Toasting Level, Vintage

Supply with each barrel an A4 Packing slip with the following detail: Customer ID, Toasting Level, Wood Type, Size of Barrel.

SHIPPING INSTRUCTIONS—ORDER EX FACTORY

Tariff Code:	44616	Consign by sea to Cape Town:	Röhling
Consignee:	Vincorp (Pty) Ltd	Nominated Fright Forwarder:	FRA/Claudine/Tel: 01.48.16.12.88 Bremen/H G. Machowiak/Tel: 049.42.13.03.10
Ordered by:	Ilse Liebenberg	Documents from supplier:	3 x Commercial invoices
Insurance:	To be arranged by buyers	Original Documents to:	1 set direct to: Vincorp (Pty) Ltd, PO Box 7477, Stellenbosch 7599, South Africa
Packaging:	Containerised	Copy of Documents:	1 set direct to: VinCo CC, PO Box 1459, Suider Paarl 7624, South Africa

PLEASE CONFIRM THIS ORDER AND FAX TO: +27 21 872 0110

ACCEPTED BY COOPER: .....

signature / stamp aláirás / pecsét

intended to render logistical services. The fact that Vincorp had no intention to purchase is also supported by the following:

52.1 Vincorp categorically stated in the letter of 28 August 2002 that it was only rendering logistical services and would make no payments to the Trust unless payment was received from Vinco. The letter of 28 August 2002, delivered to Pretorius of VinCo, obviously supports Vincorp's version.

52.2 The change in the purchase orders in Feburary 2002.

52.3 Vincorp came on the scene when the relationship between the Trust and VinCo had already been established.

52.4 VinCo placed all the orders with the Trust.

52.5 There was no evidence that Vincorp dealt with the Trust for any

other reason but to render logistical services.

53 In all the circumstances I conclude that the Trust has not discharged the onus of showing that Vincorp ever had the intention to purchase the barrels in question.' (Footnotes omitted.)

[5] Having reached that conclusion, the learned judge then added:

'54 As stated above the Trust did not file a replication and did not rely on either estoppel or quasi-mutual assent in the pleadings. A party raising quasi-mutual assent as a defence should also plead and prove it.

55 The Trust has not pleaded or proved estoppel or quasi-mutual assent and it is irrelevant. However, in my view, it is clear that the Trust and Vincorp were at cross-purposes. There was a mutual mistake and both parties were mistaken about the other's state of mind. In such circumstances parties can often rely on the said doctrine or on estoppel. I therefore considered estoppel and quasi-mutual assent in the matter under consideration.

56 To rely on the doctrine of quasi-mutual assent the understanding of what 0has been agreed of one party must be reasonable as oppose[d] to that of the other party being unreasonable. In respect of estoppel it must be shown that the other party made a negligent representation.

57 In my view, had the Trust pleaded estoppel or quasi-mutual assent it would have been to no avail. There is no question of the Trust having proved the requirements of estoppel. In order to rely on the doctrine of quasi-mutual assent, the understanding of what has been agreed of one of the parties must be reasonable, as opposed to that of the other that must be unreasonable. There are probabilities favouring the version of both parties, but not to such an extent that it can be said that one version is reasonable as opposed to the other being unreasonable.

58 The Trust could therefore not have successfully raised estoppel or quasi-mutual assent.' (Footnotes omitted.)

[6] In upholding THR's appeal, the full court (per Rogers J, with whom Erasmus J and Samela J concurred) reasoned:

'[36] It has long been accepted in our law that a person cannot escape from an apparent agreement merely because his subjective intention differed from the apparent agreement. This is known as the doctrine

of quasi-mutual assent. In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 324 (A) at 239F-240B the court said that in various earlier decisions our courts had adapted, for purposes of the facts of their respective cases, the well-known dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

See also, for example, *Pillay & Another v Shaik & Others* 2009 (4) SA 74 (SCA) paras 55-60; and see Christie *The Law of Contract in South Africa* 6th Ed at 10-12; 24-30.

[37] Although this doctrine may have its roots in estoppel, it appears now to have an independent existence (Christie op cit 28-30), expressing the essentially objective nature of the enquiry into whether there is consensus, namely that the law does not concern itself with the working of the minds of the parties to a contract but with the external manifestations of their minds (see *SAR & H v National Bank of SA Ltd* 1924 AD 704 at 715; *Makata v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 72-73 per the majority and para 157 per the minority). The learned trial judge erred, in my respectful view, in stating that a party raising quasi-mutual assent must plead it.

[38] The external manifestations of the parties' conduct over the period 2002-2009 was such that a reasonable person would have understood there to be consensus between them that Vincorp was buying barrels from THR in accordance with orders placed by the former and invoices issued by the latter. This is how commercial documents of this kind would normally be understood.

[39] If both parties to a supposed contract subjectively know that the external manifestations of their conduct are not to be taken at face value the court will naturally not insist that there is a contract contrary to their actual state of mind (see Christie op cit 25). But the evidence and documentation to which I have referred satisfy me that THR subjectively understood the external manifestations of the interactions between itself and Vincorp in a manner consistent with

its pleaded case, namely a series of sale agreements in accordance with Vincorp's orders. The trial judge found that this was Molnar's sincere belief but that THR and Vincorp were ?at cross-purposes".'

[7] In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 324 (A) at 239I-240B, after referring to the leading cases and academic writings on the topic, Harms AJA concluded:

'In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'

[8] Undertaking the enquiry postulated by Harms AJA, requires an exposition in some detail of the background facts. Those facts appear from the correspondence exchanged between the parties and the evidence of the dramatis personae. Events commenced in 2001 when, with a view to expanding its business into South Africa, THR ran a series of advertisements in local wine journals and magazines 'seeking individuals who might be interested in representing its products' locally. By 'representing', so testified Mr James Molnar, the managing director of THR, it was envisaged that those individuals would act in 'a sales capacity'.

[9] One such advertisement piqued the interest of Mr Mihan Pretorius who, on 31 August 2001, despatched the following email to THR:

'Regarding the advertisement . . . I am addressing this letter to you on behalf of my corporation VinCo.

. . . .

VinCo has the necessary infrastructure, management and skilled (coopers) labour for the marketing, distribution and after sale service of wine barrels.

I see this as a[n] excellent opportunity to market "TRUST" in South Africa. As such, I would like to engage in conversation with you if we are in principle and in broad terms in agreement that such an arrangement could be mutually beneficial. I am also prepared to visit your establishment in Hungary, hence your reaction on this letter.'

[10] Mr Pretorius thereafter travelled to Hungary, where he met Mr Molnar and inspected THR's facilities. He testified:

'In 2001. Wat – met u terugkeer na Suid-Afrika, was daar enige verstandhouding wat u bereik het met mnr Molnar en Trust Hungary? --- Ja, die verstandhouding was dat ek die vate, of sy produk sal bemark in Suid-Afrika. Op daai stadium het hy voorgestel dat daar nóg 'n agentskap belang stel om dit te doen, en voorgestel dat ons dit dalk saam moet doen. Ek het dit van die hand gewys, en hy het ingestem, en ons het dan nou besluit dat ek dit alleen sal doen, of my maatskappy dit alleen sal doen, die bemarking … (tussenbeide)

Sou Vin Co. alleen in Suid-Afrika die reg hê … (tussenbeide) --- Alleenagentskap het, ja (onduidelik) ja … (tussenbeide)

Alleenagentskap vir Trust Hungary se vate. --- Presies.'

[11] On his return to South Africa, Mr Pretorius emailed Mr Molnar on 21 January 2002:

'My wish is that our friendship and business relationship will grow this year.

. . . .

. . . I want to thank you for your trust in me – you won't be disappointed.

As mentioned earlier, the time frame to introduce 'TRUST' to the South African market is very unfavourable, but I am happy with our progress under the circumstances below.

. . . .

Except for one or two winemakers, most of the winemakers are very interested and curious about 'TRUST' barrels and would like to have some trial barrels for next year. Luckily, most of the big wineries ordered some barrels – I will send you my list of orders late afternoon or early tomorrow.

It is a privilege to be associated with "Trust".

. . .

PS.

For payment purposes, I will work through a company called

VINCORP. They are a financing company and specialize in financing wine barrels.

Please forward me your bank details and method of payment.'

[12] On 31 January 2002 Ms Barbara Kerner of THR despatched a 'proforma invoice' to Mr Pretorius. She invited him to '[c]heck it and please advise if everything is OK or do you need any modifications.' In material part the 'proforma invoice' read:

Vevõ / Sold To: Shipped to: Final destination:
VinCo SST C/O Rohling France VinCo
. . . . . .
Contact person: Mihan Pretorius
Contact: Mihan Pretorius

[13] During March 2002 Mr Molnar invited Mr Pretorius and some other wine makers to visit Hungary to attend 'THR's 10th anniversary and open house in Hungary'. On 6 July 2002 Mr Pretorius reported to Mr Molnar that barrel sales were going well in South Africa. He added:

'I have been very busy seeing winemakers lately. I am seeing about 2 to 4 new clients on average per day. I will send you a full report on sales for June and July later.

A question that comes up frequently is "what kind of variety does our barrel compliments the best ?" – please advise!'

Mr Molnar replied the next day 'all varieties work well in our barrels'. He then proceeded to advise Mr Pretorius as to how best the barrels could be used for optimum fermentation and aging of both white and red wines. Mr Molnar also informed Mr Pretorius that he planned to visit Cape Town from 'Tuesday Sept. 10th and stay until Saturday the 14th'. He added 'I hope these dates work for you so we can tackle clients together'. Under cover of a separate email on the same day Mr Molnar sentMr Pretorius 'a complete price list as discussed in Hungary'. Mr Molnar did indeed visit South Africa, not in September as previously intimated, but during October of that year.

[14] On 28 August 2002 Vincorp wrote to Vinco setting out their terms of service. The letter read:

'Dit is belangrik om daarop te let dat Vincorp geen betalings sal maak aan die vervaardigers alvorens ons nie die fondse vanaf VinCo ontvang het nie. Ons behartig slegs die logistieke funksie en neem

ook geen verantwoordelikheid vir die kwaliteit of vakmanskap van die vate nie. Indien enige van VinCo se kliënte finansiering sou verlang, is Vincorp se huuropsie beskikbaar. Ons sal egter elke geval op sy eie meriete evalueer in terme van ons kredietbeleid.'

[15] On 9 October 2002 Mr Pretorius wrote to Mr Molnar that 'dealing through Vincorp will be the best option and will be for mutual benefit to Trust and VinCo'. He attached a letter from Vincorp to his email. The attachment on a Vincorp letterhead, under the hand of its logistics clerk, Ms Ilse Liebenberg, read:

'We do the procurement and financing of oak barrels in the South African wine industry. Vincorp has been in operation for the past 3 years and has procured and financed +/- 50 % of all new barrels for the South African market during the previous season. We have longstanding relationships with all the large French cooperages and deal directly with them on a daily basis. They prefer to deal with Vincorp because once we have made the credit decision they are ensured of payment. It is important to note that we are not barrel agents, we only do the procurement and financing of the barrels. Due to our well established infrastructure and the related cost savings for our client, we generally prefer to deal directly with the foreign cooperages. We offer a one stop service that includes, order of barrels, procurement and logistics, forward cover, financing and away payment of foreign amounts.

Please confirm the payment terms. We normally order exw and payment is due 60 days after bill of lading.'

[16] On 4 November 2002 Mr Molnar wrote to Mr Pretorius:

'Thank you for getting back to me regarding Laborie. Shipping costs from Szigetvar to Cape Town with my freight company Kuhne and Nagel are as follows:

Price is US$4326.00 transit time from Germany is 16 days, this is for a 40 foot High Cube Container.

I would add one week to get to Germany and customs clearing time in Cape Town.

If you do not wish for us to arrange the container let me know, otherwise I will for December 4th most likely.'

Mr Pretorius replied the next day:

'Thanks, but Vincorp will arrange the transport through shipping agent; Rohlig. This is part of Vincorp's contract with me. What I still need from you is the amount of barrels a 20ft, 40ft & 40ft HC can take for the 225L and 300L ranges.'

[17] On 13 February 2003 THR informed Mr Pretorius that the barrels that he had ordered were ready for loading. Mr Pretorius reiterated: 'The company in South Africa that is handling my logistics and forward payments are Vincorp'. He went on to supply Ms Liebenberg's details as the contact person. Mr Molnar, in his evidence in chief, stated that he had been aware of this email. Later that year, during August, THR furnished Mr Pretorius with new order forms and guidance as to how he could more easily complete them.

[18] On 28 October 2003 Mr Pretorius wrote to Mr Molnar:

'It is barrel order time again in South Africa and I am running around like a mad dog.

With reference to my experience from the previous season, I want to ask you to extend my payment terms from 60 days to 90 days after loading date: Below, the reasons for my request:

. . .

It is very important for me to pay you on time, every time, but with my growing market it will become more and more difficult.'

Mr Molnar acceded to Mr Pretorius' request in an email to the latter on 31 October 2003.

[19] Early in 2004, according to Vincorp, its bankers began to experience difficulty with the payment of THR's invoices. Apparently, so Vincorp was informed, the difficulty lay in obtaining approval from National Treasury for the expatriation of funds to meet THR's invoices, which had been issued in the name of Vinco, not Vincorp. In that regard Mr Paul Haumann, the financial director of Vincorp, testified:

'Mnr Haumann, net voor die verdaging het ek u geneem na bladsy 37, na daardie epos wat Mihan Pretorius gestuur het oor vorige veranderinge of fakture. Weet u waaroor dit gegaan het? --- Ja, baie van die invoices wat ons van Trust ontvang het nog op daardie stadium het vir Vin Co aangeteken, het Vin Co se details op gehad as die koper.

As die koper? --- Ja en ons het probleme begin ondervind by die bank

om die betaling te doen. Ek dink die name Vincorp en Vin Co is baie naby aan mekaar, maar hulle het dit opgetel dat dit Vin Co nie Vincorp is nie en ek moes … (tussenbeied)

Kan ek u net vra? --- Ja.

Tot in daardie stadium het van die betalings deurgegaan terwyl die faktuur van Trust Hungary Vin Co aangetoon het as die koper. --- Ja, van dit het deur gegaan. Goed. --- En toe het die bank vir ons gesê hoor hierso die invoices stem nie ooreen nie. Sal julle asseblief sorg dat die invoices moet ooreenstem met die bill of lading, die bill of entry en die customs, klaringsdokument anders kan ons nie die betaling doen nie.

Uit … (tussenbeide) --- Uit ons euro rekening uit.

Uit Vincorp se euro rekening. --- Ja. So dit was 'n spesifieke versoek van ons kant af dat hulle asseblief Vincorp details vir administratiewe doeleindes op die invoice sit sodat ons die buitelandse betaling kan doen.

Goed. --- Namens Vin Co.

Goed. En aan u het u daardie versoek oorgedra? U sien nou die epos hier onder. --- Ek het vir mnr Pretorius gevra of vir Trust te vra.'

[20] Later, under cross examination, Mr Haumann's evidence went thus:

'Voor daardie punt, dis nou hier op 29 Januarie 2004, was daar enige probleme met die fakture terwyl dit uigemaak is aan Vin Co. sodat u nie betaling kon maak? --- Die bank het dit laat deurgaan, en toe ewe skielik het hulle vir ons laat weet dat weet, daardie Vin Co. stem nie ooreen met Vincorp op die invoer dokumentasie nie, en hulle kan nie die betaling laat deurgaan nie.'

On this aspect of the case, Mr Pretorius testified:

Korrek. Weet u waarom daar dan nou toe gevra is dat die fakture uitgemaak word aan Vincorp? --- Dit is op versoek [van] Vincorp gewees, bloot oor logistieke redes en administratiewe redes in terme van – ek dink dit was die Reserwe Bank, of ook vir die klaring van die vate deur die hawe by doeane, ensovoorts.

Goed. Maar voordat daardie fakture nou op versoek van Vincorp verander word, het – sê u dis uitgemaak aan Vin Co. En wie is aangetoon as die koper op daardie fakture wat aan Vin Co. uitgemaak

… (tussebeide) --- Wel, Vin Co. sou aangetoon word as die koper, ja. Dis nou fakture wat Vin Co. ontvang van Trust Hungary. --- Presies, soos die eerste ene.'

[21] On 2 February 2004 Mr Pretorius did indeed request THR to replace Vinco with Vincorp on the documentation, but stressed that Vincorp 'acts as financing company and importing agent on behalf of VinCo (my company)'. In reply he was informed:

'I have transmitted your ask to the accounts but I'm very sorry they said this time is unable to change the invoices to your new address. All we doing can is to do the new address on the invoices to your next shipment. I hope you understand this and don't be angry.' Thereafter, THR's invoices were altered to accord with Mr Pretorius' request and things appear to have proceeded smoothly, so much so that by December 2007, Mr Pretorius complained to THR that Vincorp 'is processing my orders to[o] slow'.

[22] From the end of 2008 through to 2009 a series of orders were placed with THR. Those form the subject of the present litigation. Each was under cover of a VinCo letterhead. It was addressed to Ms Annamária Ruppert of THR and read:

'Dear Ami

Attached, order for [the name of the cellar]'.

Best wishes,

Mihan'

Mr Pretorius also on occasion issued specific instructions to Ms Ruppert in respect of company branding on the barrels as per the request of particular wineries. The order confirmation from THR bore inter alia the following information:

Bill to / Számlázási Cím: Ship To / Szállítási hely:

Vicorp PTY Ltd. VinCo CC

. . . . . .

Customer ID / Vevõ adatai:

VinCo. Mihan Pretorius

[23] When payment for those orders did not eventuate as anticipated, Ms Laura Kope of THR emailed Mr Paul Haumann on 24 November 2009:

'I'm writing on behalf of Trust Hungary. They have notified us that Vincorp has a balance of US$112,726 and I'd like to inquire about the payment.

Can you please let us know how soon Vincorp can arrange to pay the balance?'

In answer, Mr Haumann wrote:

'You must contact your agent in South Africa, Mr Mihan Pretorius. We only did the logistics on your behalf – which Trust is aware of. The relationship with Trust has always been that we only settle once your agent has paid us – this has always been the case in the past.'

To which Ms Kope replied:

'Yes, I was aware of the arrangements, but since I noticed the last payment Trust Hungary received was a month ago, I just wanted to see if there was any chance of them receiving another payment anytime soon.

Do you have any info based on your correspondences with Mihan?'

[24] On 1 December 2009 Mr Molnar addressed the following email to Mr Haumann:

'I have not had the opportunity to meet you but I did deal extensively with Ilse Liebenberg. Over the past 6 years VinCorp has made their payments for barrels from Trust Hungary. This year the payment has not been made. We have reviewed the orders placed by and through VinCorp. Numerous emails confirm this relationship, not to mention the practice of the past 6 years. VinCorp did in fact import these barrels and order these barrels. If you require a payment plan I am likely able to accommodate you, alternatively please remit payment in full.

Please do not hesitate to contact me with any questions.'

Mr Andre Viljoen, the Managing Director of Vincorp, replied:

'Thank you for your email sent today 1 December 2009. I wish to refer to the correspondence between Mr Paul Haumann and your Ms Laura Kope of Trust International Corp. and attach the email for your attention.

We do not intend to answer your mail in great detail or to react to each averment you have made. Our failure to do so must however not be seen as an admission of any allegation nor as an admission in any form. Our right to react more fully at a later stage is reserved.

I wish to make it clear that Vincorp has never acted as an agent or re-seller of Trust barrels in South Africa, which is apparent from the work method that we adapted and was confirmed by your Ms Kope. The only reason why Vincorp ordered the barrels on behalf of Mr Pretorius was to comply with South African statutory requirements applicable to importers - the details of which I am sure you are aware. The transactions were structured in this fashion for the sake of the system and not because it created a Seller/Buyer relationship between our companies.

The work method over the past six years confirms this state of affairs. The method clearly shows and supports our position that we are merely an intermediary. Vincorp only pays when your Mr Pretorius, as your agent, receives money from your clients in South Africa and pays to us. We do the administration and logistics on behalf of and at the request of Mr Pretorius. We render this service to numerous cooperages and the work method is exactly the same. I believe that it is disingenuous of you to attempt to hold Vincorp responsible in circumstances where there is non-performance or lack of cooperation by Mr Pretorius.

Vincorp will endeavour to assist you in this matter as far as it is within our power to influence Mr Pretorius. If we can assist in other ways we are more than willing to do so.

We trust the matter will be speedily resolved.'

[25] Impasse having been reached, THR caused summons to be issued against Vincorp. The onus was on THR to prove the contract on which it relied. Proof of the terms of the contract included proof of the anterior question, namely whether both parties had the requisite animus contrahendi[1]. The pleadings tend to obfuscate rather than clarify the true issues in the case. THR pleaded that since 2002 Vincorp had ordered and purchased barrels from THR. It then specifically pleaded that during December 2008 and 2009 Vincorp ordered and purchased barrels from THR in terms of written purchase orders that were accepted by THR. Consequently, according to the particulars of claim, the written purchase orders constituted the agreement between the

[1] Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd 2002 (4) SA 681 (SCA) para 33.

parties. No other underlying agreement was pleaded. Apart from the fact that those purchase orders do not specifically reflect Vincorp as the purchaser, they had been despatched to THR by VinCo, not Vincorp. The letter dated 28 August 2002 from Vincorp to VinCo defined the relationship between them. Vincorp there stated that it was only rendering logistical services and would make no payments to THR unless payment was received from VinCo.

[26] **Vincorp only came onto the scene after the relationship between VinCo and THR had already been established. VinCo placed the orders with THR. From 2002 to 2004, invoices were made out by THR to VinCo, not Vincorp. It was only when Vincorp's bank experienced difficulty with the expatriation of funds that, at Mr Pretorius' request, a change to the invoices came to be effected. However, that was for that rather limited purpose and in no way served to alter the relationship between the parties. The mere fact that Vincorp came to be reflected as the purchaser or importer on some of the documents (for the purposes of expatriating funds from Vincorp's Euro bank account as part of its logistical services to VinCo) in itself did not herald any new legal relationship between it and THR. Other than in the execution of the logistical services, Vincorp did not deal with THR. In any event whilst those documents may otherwise have been a telling indicator in THR's favour, they have to be counterbalanced by the evidence that they were produced for a specific limited purpose. That evidence is credible. There is no counter to it.**

[27] Moreover, it was never Mr Molnar's case that THR understood the external manifestations of the interaction between it and Vincorp as a series of sale agreements in accordance with the latter's orders. In his evidence, Mr Molnar alluded to a meeting with Ms Liebenerg during October 2002. His evidence on that score was:

'Well, Ms Liebenberg, for lack of a simpler word to put it, was really trying to sell me on the merits of doing business with Vincorp. She said that they understand the South African more in business and therefore are in a position to guarantee payment for the barrels that go through them. And she said this is a service they offer to many cooperages because this is their primary business model. In addition to that she says they have some logistics capabilities which they like to handle if they work with you as a cooperage. I said: well, you

know, we normally have our own freight companies and we did refer her to ours but we understand that they had a relationship with a company called Röhlig. We were comfortable with that. She kept explaining to me that they will handle everything and the upside of working with them is we're ensured of payment.

They were also rendering other services such as custom clearance and associated services. --- Yes, they offered things that didn't always apply to me but things like forward cover; fluctuations in the rand. They also provided financing, of course, that being their main business, to wineries here. And, of course, they handled the customs and shipping from other areas as well.

Now, in what capacity would they render these services and would they make payment to you? --- They would be acting in a distributor-like capacity, the buyer.

The buyer would be from you? --- They would be buying my barrels from me, yes.'

Mr Molnar sought to elevate this to the foundation for some sort of underlying agreement between THR and Vincorp. On this footing, Mr Molnar said that THR's intention was to accept what they believed to be an offer by Vincorp. However, that was never pleaded. The trial court found that Mr Molnar's version regarding his interaction with Ms Liebenberg during 2002 is improbable. And, what is more, Ms Liebenberg was a logistics clerk who had no authority to bind Vincorp.

[28] Much was also sought to be made of the letter written by Ms Liebenberg to THR on 7 October 2002. Irrespective of what had gone before, so I understood counsel to submit from the bar in this court, that letter, was the genesis of a new contractual relationship between the parties. First, that letter does not constitute an offer. Nor, was it intended by Vincorp to be an offer. The evidence in this regard on behalf of Vincorp is explicit. Second, that letter must be seen against the backdrop of the relationship between the parties since inception, which I have attempted to sketch in far greater detail than might otherwise have been necessary. Third, the full court appears to have accepted that Ms Liebenberg was not authorised to write the letter but nonetheless, somewhat contradictorily, was willing to hold the content of the letter against Vincorp on the basis that 'nobody had suggested that what she said about Vincorp was factually incorrect'. Fourth, it is

difficult to discern the precise nature of the new legal relationship sought to be asserted by THR. In argument it was suggested that the letter signalled that Vincorp would replace Mr Pretorius as purchaser. That, however, is incompatible with the suggestion in Mr Molnar's evidence that Vincorp was in effect the guarantor of payment. Plainly, it is logically incompatible for Vincorp to have been both purchaser and guarantor at the same time. What detracts from the assertion that Vincorp's role had changed to that of purchaser (or at the very least had become liable for payment) is Mr Pretorius' request to THR for an extension of payment terms from 60 to 90 days. That request was made on 28 October 2003, approximately one year after the letter which supposedly altered Vincorp's status (from whatever it may previously have been) to that of purchaser.

[29] From 2001 Messrs Molnar and Pretorius regularly communicated with each other. They met in Hungary and South Africa. When Mr Molnar visited South Africa, they visited clients together. Mr Pretorius even took clients to Hungary where they visited THR's business and met with Mr Molnar. Vincorp was never part of this interaction. Before the first order placed by VinCo, Mr Pretorius informed Molnar in January 2002 that for payment purposes VinCo would work through Vincorp. From the first supply of barrels by THR, for which it invoiced VinCo as the purchaser, payments were made by VinCo through Vincorp. From 2002 until 2004 THR invoiced VinCo. This only changed to meet the requirements of Vincorp's bank. Even then in an email dated 2 February 2004, Pretorius reminded Molnar that Vincorp was acting as VinCo's importing agent. On 5 November 2002, VinCo informed Molnar in an email that, as 'part of Vincorp's contract with' it, the latter would arrange transport. It was a reference to the agreement as per the letter of 28 August 2002. Mr Molnar did not query the reference to a contract between VinCo and Vincorp. On 13 February 2003, VinCo informed THR in an email that Vincorp was the company in South Africa handling VinCo's logistics and forward payments. Payment terms were agreed between THR and VinCo. Written orders were sent to THR by VinCo. THR then confirmed those orders to VinCo and inserted the name of VinCo and/or Pretorius under the words 'Customer ID'. THR initially addressed VinCo, not Vincorp, in respect of late payment.

[30] To the aforementioned considerations falls to be added the exchange of emails between Ms Kope and Mr Haumann. In them, Ms Kope had signified her awareness of 'the arrangements', namely that 'Vincorp only did the logistics' which, as she put it, 'Trust is aware of'. The full court accepted Ms Kope's evidence that 'she was definitely not aware of the financial arrangements and her statement 'that she was aware of the arrangements was an "overstatement" of what she knew'. It described her email as 'an unguarded email'. In that, the full court may have been far too charitable to Ms Kope. Those emails do not represent the sum total of Ms Kope's involvement in the matter. She penned other emails as well. By way of example on 28 January 2008 Ms Kope wrote to Mr Pretorius 'Dear Mihan, Please find attached our invoice'. Later that day she wrote: 'I am showing Rohlig on the purchaser order. Mihan, can you please confirm if Rohlig is arranging the shipping?' The next day, in excess of five years from the date when Vincorp is alleged to have stepped into Mr Pretorius' shoes as purchaser, she wrote to Mr Pretorius: 'Hi Mihan Can you let me know when we can expect payment for the two outstanding invoices from 2005? . . . Please arrange payment ASAP!!!. Not only do these emails belie her assertion that her response to Mr Haumann was a 'bad choice of words', but they also afford material corroboration for Vincorp's case that THR was never under any misapprehension as to the true relationship between the parties.

[31] **In view of the fact that the documents relied upon were, in terms, plainly not offers to purchase, one would have expected THR to lay a foundation in fact for a finding that it was entitled to conclude, or that a reasonable person would have believed, that the written purchase orders constituted an offer to purchase[2]. However, the evidence tendered on behalf of THR falls woefully short of laying any such foundation. In the final analysis, the evidence adduced on behalf of THR does not disclose any conduct on the part of Vincorp that could have caused Mr Molnar to believe that those documents constituted an offer to purchase, other than the mere fact of their delivery to THR. A proper analysis of the evidence does not disclose any conduct on the part of Vincorp that could have caused THR to labour under the genuine misapprehension that Vincorp was anything other than VinCo's importing and logistical agent. As Nienaber JA observed in Africa Solar (para 33): 'If, at the end of all the evidence, there is uncertainty as to whether animus contrahendi on the part of both parties had been established, the plaintiff, on that particular issue, had to lose.' In my view, this is precisely such a case.**

[2] Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd [1983] 1 All SA 375 (A) at 374.

[32] It remains to observe: Van Staden AJ concluded that THR had failed to discharge the onus of establishing the necessary animus contrahendi on the part of both parties. That ought to have been the end of the matter. The learned judge then referred en passant to the fact that THR had not pleaded or proved estoppel or quasi mutual assent. The full court seems to have taken its cue from those observations. Arguably, the only conceivable basis for holding that an agreement arose out of the documents was the passage in the judgment of Blackburn J in *Smith v Hughes*[3] upon which the full court relied. However, the application of that test was not foreshadowed in THR's pleadings. In that regard the following observation by Heher J in *Constantia Graswerke BK v Snyman* 1996 (4) SA 117 (W) at 124I-J is apposite:

> 'Whatever the relationship of quasi-mutual assent to estoppel (see, for example, the discussion in Christie The Law of Contract in South Africa 2nd ed at 26-8), I have no doubt that, where the first-mentioned is relied upon by the plaintiff to meet a denial by a defendant that he is a party to a contract, that reliance amounts to a confession and avoidance in the sense of the plaintiff conceding that, although it is unable to rely upon the signature to the agreement as proof of real consensus, other facts nevertheless justify the conclusion that legal consensus existed between the parties. That, in turn, requires the raising of a replication so that the defendant may properly be apprised of the defence and may plead further to it, if necessary. The plaintiff did not do that and, in my view, its claim as formulated does not cater for counsel's submission.'

[33] As it was put in *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) paras 13 - 14:

[3] Smith v Hughes (1871) LR 6 BQ 597 at 607.

> 'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. . . . There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the
>
> case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'

[34] Assuming, however, that the case as pleaded was sufficient to justify reliance on quasi-mutual assent, THR still had to fail. As I have endeavoured to show, the evidence, considered holistically, does not support a finding of quasi-mutual assent. And, had the full court embarked upon the enquiry postulated by Harms JA in Sonap Petroleum, which it failed properly to do, it ought, in my view, to have found that even on that score THR had to fail.

[35] In the result the appeal must succeed and it is accordingly upheld with costs. The order of the full court is set aside and replaced by: 'The appeal is dismissed with costs.'