Part 1 (2017)

Commercial Law Reports

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The Law Pub [illegible]92/26137/23

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SHAIKH v TRAFFORD TRADING (PTY) LTD

The Master of the High Court controls any interrogation process brought against a director of a company in liquidation

Judgment given in the Kwazulu Natal Division, Durban, on 29 November 2016 by D Pillay J

The National Bargaining Council for the Leather Industry of South Africa brought a claim against Trafford Trading (Pty) Ltd for underpayment of remuneration due to the Council on behalf of the latter's former employees. An arbitrator declared the amount of the claim to be R282 853.53.

Trafford failed to pay this amount. The Council obtained a final order liquidating Trafford. It then took steps in terms of sections 414, 415, 416 of the Companies Act (no 61 of 1973) with to interrogate Shaikh, Trafford's sole director and manager.

Shaikh applied for an interdict preventing the Council from interrogating him on the grounds that the interrogation was illegitimate, as its purpose was to enable the Council to establish whether it had a claim against Mr Shaikh in order to sue him personally in terms of section 424 of the Act, and as such, would be an oppressive, vexatious, unfair and/or impermissible use of section 414.

Held—

The Master of the High Court controls the interrogation process, not the Council and the liquidator. Shaikh made no criticism of the Master. Consequently, any contention that the Master would not afford him a fair hearing was unfounded and premature. If the Master or the presiding officer had no grounds for issuing the subpoena, Shaikh could have applied to the court to have it set aside on review under section 151 of the Insolvency Act (no 24 of 1936) read with section 339 of the Companies Act. Mr Shaikh did not resort to this avenue, since it was clear that the sole director and manager of Trafford could 'give material information concerning the company or its affairs'. Once the Master issued the subpoena to secure Mr Shaikh's attendance, the Council and the liquidator were entitled invoke all their rights flowing from it to interrogate Mr Shaikh.

Aside from constitutional and statutory obligations aside, the profound moral principle, based upon good faith and foundational human values embedded in the common law prescript pacta servanda sunt meant that agreements had to be kept. As the mind and manager of Trafford, Shaikh did everything to avoid his legal and moral obligations. Trafford's business was so structured that its survival was premised on avoiding its liability to the Council from the outset.

Section 424 can be invoked even without liquidating the company. With liquidation comes the opportunity and tactical advantage of interrogating 'any person… able to give material information concerning the company or its affairs'. Consequently, the next predictable step after confirming the order for liquidation has always been the interrogation in terms of sections 414, 415, 416 of the Companies Act. Shaikh should have been in no doubt that the Council would implement its plan to interrogate him as pleaded in the liquidation proceedings and, depending on his responses, proceed to hold him personally liable in terms of section 424. If Mr Shaikh did not carry on the business 'recklessly or with intent to defraud creditors …or for any fraudulent purpose' there were no grounds upon which he should have no concerns about the interrogation.

Advocate A Findlay SC instructed by Mohamed Khan & Associates, Durban, appeared for the applicant

Advocate L.B Broster SC instructed by Cox Yeats Attorneys, Durban, appeared for the respondent

D Pillay J:

Introduction

[1] The applicant, Abdul Kader Hoosen Shaikh seeks to interdict the second and third respondents from interrogating him under ss 414, 415, 416 of the Companies Act 61 of 1973 (CA). Trafford Trading (Pty) Ltd (Trafford) is the first respondent of which Mr Shaikh was its sole director and manager. The National Bargaining Council for the Leather Industry of South Africa (the Council) is the second respondent and only creditor of Trafford. John Douglas Michau is the third respondent and is the liquidator of Trafford. The Master of the High Court is the fourth respondent. The third and fourth respondents abide the decision of this court.

[2] The second respondent's claim against Trafford is for underpayment of remuneration due to the Council on behalf of the latter's former employees. On 2 November 2005 an arbitrator declared the amount of the claim to be R282 853.53. On 3 March 2006 the Council applied to liquidate Trafford. On 23 March 2012 Vahed J granted the provisional order for winding-up. Mokgohloa J confirmed the final order for liquidation on 5 November 2013 and refused leave

to appeal to the Supreme Court of Appeal. The Supreme Court of Appeal refused the petition for leave to appeal.

Ancillary Grounds

[3] Mr O. A. Moosa who had represented Mr Shaikh and Trafford throughout the various proceedings until this hearing had included in his heads of argument submissions that the Council's claim had prescribed and that the liquidator was partial to the Council. Mr Findlay now appearing for Mr Shaikh correctly abandoned these submissions. Manifestly the chronology above shows that the liquidation interrupted prescription.

[4] In so far as the prescription point is pitched at protecting Mr Shaikh against prejudice he would suffer as a result of the delay in the prosecution of claims against him personally, this contention must also fall away. Mr Shaikh has been the principal architect of the delay of more than ten years in settling the Council's claim. The history of the Council's claim dates back over a decade. Mr Shaikh applied unsuccessfully on behalf of Trafford for an exemption to the Council's Exemptions Committee. That dispute wound its way to arbitration, the Labour Court, the Labour Appeal Court and eventually to the Constitutional Court, which on 15 September 2011 conclusively rejected Trafford's appeal. At every step Trafford and Mr Shaikh failed in their bid to avoid the Council's claim.

[5] To compound the delay, Mr Shaikh applied for the same relief as in this application in his previous application launched on 20 May 2015 under case no 5050/2015. His erstwhile attorneys had failed to deliver heads of argument in time for that matter which was enrolled on the opposed roll for 18 February 2016. The Council consented to Mr Shaikh withdrawing that application and tendering its costs. Almost simultaneously with negotiating the withdrawal and with no indication to the Council or its attorneys of his intentions, Mr Shaikh launched this application. Even before 18 February 2016 Mr Shaikh signed the founding affidavit in this application and filed it on 17 February 2016 for substantially the same relief.

[6] Why Mr Shaikh had to withdraw the application instead of applying formally for an adjournment and tendering the costs of the other side becomes clear from the response from the Council to Mr Shaik's request for the adjournment. The Council's attorney pointed out that

> 'given the very long history of filibustering by your client. . .my client is entirely unwilling to allow your client to delay the matter any further.'

Thereafter, Mr Shaikh followed with the offer to withdraw the application altogether and tender costs. Seemingly Mr Shaikh and his attorney accepted that no court would accede to his application for a postponement notwithstanding Mr Shaikh's tender of costs because of his conduct.

[7] In these circumstances, Mr Shaikh's lament that the Council

'has every intention of not affording [him] an opportunity of presenting this matter for argument' and that 'any difficulty [in pursuing the matter to finality] cannot be attributed to [him]'

is insincere.

[8] As for the alleged partiality of the liquidator, notwithstanding Mr Findlay's concession, elucidating the role and function of the liquidator is material to assessing what scope, if any, would the liquidator have of subjecting Mr Shaikh to 'vexation and oppression', which is his principle challenge to the interrogation.

[9] Because the Council is funding the costs of the liquidator does not necessarily indicate partiality or bias on his part. The liquidator in a compulsory winding-up has the statutory duty to consider the interest of creditors. The function of liquidators is not to speculate but:

'. . .to pursue the interests of creditors and members, which in the case of a company unable to pay its debts means its creditors. That is doubly important in the present case because the only source of the finance to pursue the present litigation is the creditors of the company.'

[10] In rejecting the Cape decision in *James v Magistrate Wynberg & others* 1995 (1) SA 1 CPD at 16C-D, upon which Mr Shaikh relied the Appellate Division in *Receiver of Revenue, Port Elizabeth v Jeeva & others; Klerck & others NNO v Jeeva & others* 1996 (2) SA 573 (A) opined that even though

> '. . .the liquidator has fiduciary duties towards, say, creditors, [it] does not mean that he can always be evenhanded. He is obliged, should the occasion arise, to dispute a creditor's claim or to impeach a transaction between a creditor and the company. I do not accept as a general proposition that in such circumstances the relevant creditor can object to an examination or litigation on the ground of the

liquidator's perceived bias.'

In short, the liquidator acts

'in neither an administrative nor quasi-judicial capacity. He is not in a position of authority vis-à-vis with the witness. He does not determine or affect any of his rights. He simply represents the company in liquidation at the inquiry.'

Given the legislative scheme expatiated further below a liquidator has little scope to act out any bias even if he was subjectively so inclined.

Principal Ground

[11] **The singular issue in dispute remaining for my determination is whether the interrogation in terms of ss 414, 415, 416 of the CA is illegitimate, if the purpose is to enable the Council to establish whether it has a claim against Mr Shaikh in order to sue him personally in terms of s 424. Would such interrogation be an 'oppressive, vexatious, unfair and/or impermissible' use of s 414.**

[12] In this application Mr Shaikh no longer regards the purpose of the interrogation to be 'actuated by an ulterior purpose' as he did when he opposed the liquidation of Trafford. In all the proceedings against Trafford and potentially Mr Shaikh the Council has been forthright about its intentions to recover its claim. Throughout all the proceedings the Council has enjoyed unqualified success. Therefore Mr Shaikh can hardly be surprised now that its pursuit has been relentless and unwavering.

[13] The Council's aim in liquidating Trafford for purposes of interrogating Mr Shaikh and eventually proceeding against him under s 424 was pleaded, argued and rejected by two judges of this Division and two from the Supreme Court of Appeal. If the two judges of this Division were wrong on this point, which is a point of the law, then the Supreme Court of Appeal would not have refused leave to appeal. Assuming in favour of Mr Shaikh that different considerations apply now when deciding the point in an application to interdict the interrogation, I examine the requirements for s 414 of the CA. Manifestly the requirements for liquidation are different from the requirements for interrogation under s 414 and litigation under s 424 of the CA. [14] Section 414(2) of the CA provides:

'(2) The Master or officer who is to preside or presides at any meeting of creditors, may subpoena any person-

(a) who is known or on reasonable grounds believed to be or to have been in possession of any property which belongs or belonged to the company or to be indebted to the company, or who in the opinion of the Master or such other officer may be able to give material information concerning the company or its affairs, in respect of any time before or after the commencement of the winding-up, to appear at such meeting, including any such meeting which has been adjourned, for the purpose of being interrogated; or

(b) who is known or on reasonable grounds believed to have in his possession or custody or under his control any book or document containing any such information as is referred to in paragraph (a), to produce that book or document or an extract therefrom at any such meeting or adjourned meeting.'

[15] For Mr Shaikh, it was submitted that there is a distinction between an interrogation conducted by a creditor or liquidator into the affairs of the liquidated company, as opposed to an interrogation designed to establish whether a creditor has a claim against a third party. The former purpose is legitimate and permissible on the basis of *Cooper & others NNO v SA Mutual Life Assurance Society & others* 2001 (1) SA 967 (SCA) but not the latter.

[16] First, Mr Shaikh is not a third party but the managing and sole director of Trafford. So was Mr Kebble the sole surviving director of the company in liquidation in *Kebble v Gainsford* 2010 1 SA 561 (GSJ). Because of Mr Shaikh's fiduciary duties the Council has a stronger case for interrogating him than it would for a third party. Furthermore, s 414 allows the Master to subpoena 'any person' who has material information about the company.

[17] Second, it is for the Master to believe or form the opinion that the person to be subpoenaed may be able to give material information concerning the company or its affairs. So the issue of the Council's motive or purpose is immaterial. Furthermore, the primary purpose of an interrogation by any creditor or liquidator is to establish whether claims of creditors can be recovered, be it from the company, its office bearers, employees, debtors or any other person. There would be no point in incurring the costs and inconvenience of conducting an enquiry for any subversive purpose if the prospects of recovering the claims of creditors are non-existent. This is especially so in the case of Councils

that are statutory bodies funded partly by workers' wages.

[18] Third, the notion of 'oppression' arises from the prospect of the person interrogated incriminating himself and risking prosecution. However, s 415 (1) which gives effect to the constitutional protection against self-incrimination would address his concerns. As a general rule an interrogation in terms of subsection (1) would not be admissible as evidence in criminal proceedings in a court of law against Mr Shaik if he gives any incriminating answer or information. He risks prosecution if he gives false evidence, makes a false statement or fails to answer lawful questions fully or satisfactorily. What he may not do at such interrogation is to refuse to answer any question upon the ground that the answer would tend to incriminate him. In so far as this application is Mr Shaikh's preemptive strike to achive what he may not at the interrogation it must fail.[19] Fourth, in Receiver of Revenue, Port Elizabeth above the court went on to clarify that it is the commissioner, or in this instance the Master:

> '. . .who has to act in a quasi-judicial capacity. He has the main duty to examine the witnesses. He has to regulate and control the interrogation. Should he fail in his duty to apply procedural fairness appropriate to this forum, an aggrieved party may approach the Court for suitable relief. . . .'

[20] The Master is in charge of the interrogation process, not the Council and the liquidator. Mr Shaikh advances no criticism of the Master; consequently, any contention that the Master will not afford him a fair hearing is unfounded and at least premature.

[21] Fifth, in substantiation of his submission that the interrogation would 'amount to oppressive, vexatious, unfair and/or an impermissible use of s 415,' Mr Shaikh relied on *James v Magistrate Wynberg & others* 1995 (1) SA 1 (CPD) at 16C-D; *Simon & another v The Assistant Master & others* 1964 (3) SA 715 (TPD) at 718E and *Anderson & others v Dickson & another NNO (Intermenua (Pty) Ltd Intervening)* 1985 (1) SA 93 (NPD) at 111H. On the basis of these decisions, purportedly confirmed in Cooper, it was submitted that the interrogation would be 'impermissible' in law.

[22] Contrary to this submission, *Cooper* applied *Simon* and *James* and considered *Anderson* but only in the context of determining that delictual claims did not concern the company or its affairs in terms of

s 414(2). These cases did not bar an interrogation in contemplation of prosecuting claims under s 424 for carrying on business recklessly or fraudulently. As a general rule in South Africa following Cooper and the United Kingdom the courts would not allow oppressive interrogation or production of information. Citing *Ex Parte Brivik* 1950 (3) SA 790 (W) at 791E-H Harms JA reminded:

> 'The Court is careful to see that the inquisitorial powers of the section are not used for purposes of vexation or oppression. . .but an applicant is not required to make out a prima facie case that there has been misfeasance or actionable conduct of any kind. It is sufficient if the Court is satisfied that there is a fair ground for suspicion ... and that the person proposed to be examined could probably give information about what is suspected.'

[23] Sixth, **if the Master or the presiding officer had no grounds for issuing the subpoena, Mr Shaikh could have applied to the court to have it set aside on review under s 151 of the Insolvency Act 24 of 1936 read with s 339 of the CA. Prudently Mr Shaikh did not resort to this avenue. After all, who else but the sole director and manager of Trafford could 'give material information concerning the company or its affairs'? Once the Master issued the subpoena to secure Mr Shaikh's attendance on 25 June 2015, the Council and the liquidator were entitled invoke all their rights flowing from it to interrogate Mr Shaikh.**

[24] Seventh, Mr Shaikh's plea of 'vexation or oppression' would be facetious if it were not cynical, having regard to the nature, origin and purpose of the Council's claim. The debt arises in terms of the Labour Relations Act 66 of 1995 (LRA) read with subordinate legislation in the form of agreements of the Council that are extended to employers and employees in the leather industry, and the common law of contract. The amount claimed constitutes a portion of the minimum prescribed wages of Trafford's employees payable to the Council on their behalf. An employer can be exempted from paying over this portion to the Council if it shows good cause to an Exemptions Committee of the Council.

[25] The rationale for creating a statutory right and enforcement mechanism for payment of minimum wages was to redistribute wealth and resources in order to promote the constitutional values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. Furthermore, the stated purpose of the LRA is:

'(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa, 1996.

. .

(c) to provide a framework within which employees and their trade unions, employers and employer's organisations can –

(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest. . . .'

[26] Unmistakeably, the constitutional and statutory scheme aims to achieve social transformation through redistribution of resources and protection of vulnerable persons who, in this instance, are workers who find themselves between the rock of low wages and the hard place of unemployment. The Council as the collective voice that endeavours to balance the interests of employers, trade unions and their respective members has constitutional and statutory obligations to enforce its agreements. Conversely, employers like Trafford and Mr Shaikh have corresponding obligations to abide by such industry agreements.

[27] Eighth, **constitutional and statutory obligations aside, the profound moral principle, based upon good faith and foundational human values embedded in the common law prescript pacta servanda sunt quite simply means: agreements must be kept. This principle should be intrinsic, if not intuitive generally but especially when compliance is called for as a patriotic commitment to social transformation and, at its most basic, a commitment to simply obey the law. Mr Shaikh, who as a businessman of some forty-seven years should appreciate the moral principle of keeping to agreements.**

[28] Instead, as the mind and manager of Trafford, Mr Shaikh did everything to avoid his legal and moral obligations. Impermissibly and unconscionably Trafford's business was so structured that its survival was premised on avoiding its liability to the Council from the outset.

[29] Ninth, to the economic, social and other incalculable costs of all the processes Mr Shaikh and Trafford initiated unsuccessfully must be added the costs of his failed opposition of the liquidation application and the aborted predecessor to this application. Throughout Mr Shaikh engaged the services of senior counsel. On any estimates his litigation costs to date must at least equal if not exceed the claim. What motivated this relentless resistance to pay not only a legal but also a moral and social debt is a question Mr Shaikh has yet to answer.

Equally curious is the fact that the Council, whose trade union's members are 'soft targets' for recalcitrant employers, is the only creditor. Why? In these circumstances there is not merely a belief but a strong suspicion that Mr Shaikh must have material information about Trafford and its affairs.

[30] In conclusion, Mr Shaikh is so insensitive to the social needs of poor workers dependant on minimum wages for survival that it hardly lies in his mouth to plead 'vexation or oppression'. Public interest compels the court to be less concerned about his oppression arising from the interrogation. Nothing from the text and purpose of s 414 of the CA prohibits, as a matter of law, the interrogation of the managing and sole director of a company for the purposes of determining whether there is a basis to sue him personally in terms of s 424 of the CA. Trafford's failure to pay the claim of the Council is therefore not only a breach of a statutory and contractual duty, but also a moral dereliction.

[31] In my view the proverbial horse has bolted. Mr Shaikh allowed the subpoena to be issued unchallenged; he cannot now seek to withdraw or impede the rights of the Council and the liquidator flowing from it. Whatever process, if any, the Council and liquidator intend to invoke to recover the claims of creditors, be it s 424 or any other means is their prerogative and would depend on whether the prerequisites for such process are met at that stage. It would be premature to pronounce on the propriety of proceedings in terms s 424 at this stage and no relief is claimed in respect of such proceedings.

[32] **Section 424 can be invoked even without liquidating the company. With liquidation comes the opportunity and tactical advantage of interrogating 'any person… able to give material information concerning the company or its affairs'. Consequently, the next predictable step after confirming the order for liquidation has always been the interrogation in terms of s 414, 415, 416 of the CA. Mr Shaikh should have been in no doubt that the Council would implement its plan to interrogate him as pleaded in the liquidation proceedings and, depending on his responses, proceed to hold him personally liable in terms of s 424 of reckless trading. If Mr Shaikh did not carry on the business 'recklessly or with intent to defraud creditors …or for any fraudulent purpose' he should have no concerns about the interrogation,**

which then may not even lead to s 424 proceedings.

[33] Mr Shaikh has no choice but to comply with the subpoena failing which, he 'shall be guilty of an offence' punishable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment.

The Order

[34] In the premises, I grant the following orders:

a. The application is dismissed.

b. The applicant shall pay the costs of the second respondent, such costs to include the costs of senior counsel.

BASSON v HANNA

A party who is, prima facie entitled to specific performance may claim in the alternative damages as surrogate for specific performance

Judgment given in the Supreme Court of Appeal on 6 December 2016 by Zondi JA (Shongwe JA, Willis JA, Dambuza JA and Mathopo JA concurring)

During 2002 Hanna, Basson and Dreyer concluded an oral agreement relating to the development of a property, and a sale by Basson to Hanna and Dreyer of one third of his member's interest in the CC. At the time of the agreement Basson was the sole member of Plot 31 Vaalbank CC. The CC owned the property concerned. Basson undertook to develop the property by building three separate houses each with a cottage on the property.

The parties took occupation of each of the three residential units which were constructed on the property on 1 December 2002. During January 2003 Basson issued to Hanna a tax invoice confirming the purchase price of R624 953 for the sale of a one-third share of the member's interest in the CC, payable in monthly instalments of R8229.32. In addition to paying the monthly instalments Hanna was also obliged to pay a third of the CC's monthly operating expenses and maintenance costs. Hanna regularly paid the monthly instalment of R8 229.32, together with his portion of the CC's expenses. This continued until June 2007. In a letter dated 6 August 2007 Basson's attorneys informed Hanna's attorneys that there was no valid agreement between the parties. In a further letter dated 20 February 2008 they were informed by Basson's attorneys that the agreement was null and void, because of its non-compliance with the Property Time-Sharing Act and the Share Blocks Control Act.

Subsequently, Hanna elected to hold Basson to the terms of the agreement. He asked Basson to furnish him with the total outstanding amount so as to settle his indebtedness. When Basson threatened to cancel the agreement because Hanna was allegedly in arrears with his monthly instalments and contributions towards the expenses of the CC, Hanna made payment of the amount that was alleged to be owing.

Hanna, instituted an action against Basson and the other appellants seeking an order compelling Basso to transfer one third of the member's interest in the CC to him against payment of the outstanding balance, alternatively payment of the sum of R2 650 824.72 as damages in lieu of specific performance.

Basson and the CC defended the action and denied that Hanna was entitled to an order for specific performance or damages as a surrogate for performance. They contended that by failing to pay all amounts due by him in terms of the agreement timeously and in full, Hanna repudiated the agreement.

In consequence, Basson cancelled the agreement; alternatively no agreement came into being as there was no consensus between the parties regarding the rate of interest which would apply in respect of the agreement.

Held—

Basson contended that in the absence of a determination on what the parties agreed upon as far as the interest rate is concerned, it was impossible to determine the quantum of damages. This was crucial as the determination of the balance outstanding was dependent on the nature of the interest.

However, in general, parties' failure to agree on the rate at which the amount payable under an agreement is to be calculated, does not render the agreement invalid. If no rate has been agreed on, expressly or impliedly, and the rate is not governed by any other law, the rate of interest is that prescribed in terms of the Prescribed Rate of Interest Act (no 55 of 1975).

As far as the defence based on repudiation was concerned, Basson's actions after June 2007 constituted conduct from which the only reasonable inference that could be drawn was that he did not regard himself bound by the agreement and that he was not prepared to perform its terms. This was apparent from the correspondence which exchanged between the parties in 2007 and 2008, and the subsequent events.

Despite doubts ostensibly created by *ISEP Structural Engineering & Plating Ltd v Inland Exploration* 2001 (4) SA 159 (SCA) the principle, that a party who is, prima facie entitled to specific performance may claim in the alternative damages as surrogate for specific performance, has been consistently followed by the courts. Hanna was ready to carry out his own obligation under the agreement and had a right to demand either literal performance, or monetary value of the performance. His claim for damages, to the extent that he sought the monetary value of the performance, was akin to a claim for the replacement value of the lost property.

Hanna was entitled to the order he sought. The appeal was dismissed.

Advocate D T v R Du Plessis SC instructed by Olivier & Malan Attorneys, Randburg, appeared for the appellant

Advocate G M Young instructed by Goërtz Attorneys Inc, Johannesburg, appeared for the respondent

Zondi JA:

[1] This is an appeal against the judgment of the Gauteng Local Division of the High Court, Johannesburg (P G Cilliers AJ) awarding damages in lieu of specific performance in favour of the respondent and ordering the first appellant to pay the respondent the amount of R1 762 626.46 and interest on that amount at the rate of 15,5 per cent per annum from 20 May 2008 to date of final payment. The appeal against the judgment, which has since been reported *sub nom Hanna v Basson & others* [2016] 1 All SA 201 (GJ), is with the leave of that court.

[2] One of the issues that were before the court below and which still remains an issue in this Court, is whether the parties' failure to reach consensus on the applicable rate of interest, rendered the agreement null and void. The second issue that was raised by the court a quo at the hearing of the application for leave to appeal, was whether a claim for damages as a surrogate for specific performance is competent in law. This point was raised because of the remarks by Smallberger ADCJ in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 186B-H regarding the correctness of the majority decision in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) holding that a claim for damages in lieu of specific performance is not competent in law.

[3] At the hearing the parties informed the court, firstly, that the amount of R1 762 626.46 granted by the court below as damages is incorrect. It is not what the respondent had sought; secondly, that the court below in calculating the amount of R1 762 626.46 ignored the calculations of the appellants' actuary, on which both parties had relied at the trial; and thirdly, that the mora interest rate determined by the court below is incorrect. The mora interest should have been granted at a rate of 9,5 per cent from the date of service of the amended particulars of claim not summons.

[4] Flowing from this, the appellants informed the court that in the alternative to dismissal of the respondent's claim or absolution from the instance, it would request that it be ordered to pay R1 212 994.80, together with interest on that amount at the rate of 9,5 per cent per annum from 14 September 2014 to date of payment and costs. On the other hand the respondent indicated that it would request that the

judgment be maintained except that the capital amount granted by the court below should be replaced with the amount of R1 212 994.80, together with interest at the rate of 9,5 per cent per annum calculated from 14 September 2014 to date of payment.

[5] The respondent, Mr Tyrone Paul Hanna, instituted an action against the appellants seeking an order compelling the first appellant (Basson) to transfer one third of the member's interest in the third appellant (the CC) to the respondent against payment of the outstanding balance, alternatively payment of the sum of R2 650 824.72 as damages in lieu of specific performance. Mr Paul Dreyer (Dreyer), the second appellant was the second defendant in the court below and he plays no role in this appeal.

[6] The basis of the respondent's claim is that he, Basson and Dreyer concluded an agreement during 2002 in terms of which Basson agreed to sell to each of them one third of his member's interest in the CC for R624 953 payable in monthly instalments of R8 229.32 over a period of 20 years. According to the respondent the agreed rate of interest was prime plus 1 per cent per annum, fluctuating. In addition thereto the respondent agreed to pay a third of the CC's monthly maintenance and operating costs. Basson conducted his banking activities with ABSA Bank, which at the time of the conclusion of the agreement had a prevailing prime interest rate of 17 per cent.

[7] Basson and the CC defended the action and denied that the respondent was entitled to an order for specific performance or damages as a surrogate for performance. They contended among others, that the respondent, by failing to pay all amounts due by him in terms of the agreement timeously and in full, repudiated the agreement as a result of which Basson cancelled the agreement; alternatively that no agreement came into being as there was no consensus between the parties regarding the rate of interest which would apply in respect of the agreement. Basson and the CC though admitting that the interest rate was prime plus 1 per cent denied that it was a variable one. They contended that the rate was fixed.

Factual background

[8] It is common cause that during 2002 the respondent, Basson and Dreyer concluded an oral agreement relating to the development of the Farm Vaalbank IR, Farm No 476, Unit 31, situated on the banks of the

Vaal River (the property) and a sale by Basson to the respondent and Dreyer of one third of his member's interest in the CC. At the time of the agreement Basson was the sole member of the CC which owned the property concerned. Basson undertook to develop the property by building three separate houses each with a cottage on the property. He financed the development.

[9] Building operations on the property commenced in August 2002 and were finalised at the end of November 2002. The parties took occupation of each of the three residential units on the property on 1 December 2002. During January 2003 Basson issued to the respondent a tax invoice dated 11 December 2002 confirming the purchase price of R624 953 (the capital amount) for the sale of a 33 and a third per cent share of the member's interest in the CC, payable in monthly instalments of R8229.32. In addition to paying the monthly instalments the respondent also had to pay a third of the CC's monthly operating expenses and maintenance costs. The respondent's evidence was that in compliance with his contractual obligations, he regularly paid the monthly instalment of R8 229.32, together with his portion of the CC's expenses. That went on until 2007 when the relationship between the respondent, on the one hand, and Basson and Dreyer on the other, turned sour.

[10] It is important to mention that during the trial Basson alienated a third of his member's interest in the CC, the subject matter of the contract, to his brothers. Hence the respondent amended his claim so as to introduce an alternative claim for damages as a surrogate for specific performance.

Agreement on the interest rate

[11] The terms of the agreement regarding the interest rate are in dispute. Basson's evidence was that the fixed interest rate was agreed upon. Basson's words were:

> 'Die rentekoers kon enige kant toe gegaan het. Dit was 'n vaste betaling, daar was nie, in my tyd was daar nooit gepraat oor 'n wisselende rentekoers nie.
>
> Wat was die, kan u onthou, Mnr Basson, wat gebeur het met die rentekoerse op daardie stadium? Was die rentekoers oppad op, of wat die rentekoers oppad af? --- Jy weet ek is nie 'n bankier nie, so ek hou nie rentekoerse dop nie, of ek het nie… Nee, ek het nie geweet

wat die rentekoerse doen, of dit op of af gaan nie.'

[12] Dreyer's evidence was that the purchase price for his one third of the member's interest in the CC, similar to that of the respondent, was R624 995 from which he deducted R130 000 which he spent on the property. His evidence was that the interest rate was 18 per cent per annum and was fixed. He stated that he was aware that in 2003 the respondent had expressed a concern to him that he was paying the interest at a fixed rate when the trend was that the interest rates were on the decline. Dreyer explained to the respondent that there was nothing he could do about it, because this was what they had agreed to pay.

[13] The court below found that although the parties agreed that the interest rate would be prime plus 1 per cent they did not reach an agreement on whether the interest rate would be fixed or variable. It found it unnecessary to make a definite finding on the disputed issue. This was so, the court below reasoned, because it was not necessary to make a finding on whether the respondent was in arrears with his repayments when Basson purported to cancel the agreement on 20 February 2008 or 27 February 2008. Basson had already taken the position before 7 June 2007 that the agreement was invalid and unenforceable and persisted in that position until 25 February 2009.

[14] The appellants attack this finding. They contend that its implication is that the parties did not have consensus on a material term of the agreement, that no agreement came into being between the parties and that the respondent could therefore not claim specific performance or damages in lieu of specific performance on a non-existing agreement. The appellants maintain that the onus was on the respondent to prove the terms of the agreement, which he failed to do.

[15] Without a finding, contend the appellants, on what the parties agreed upon as far as the interest rate is concerned, it was impossible to determine the quantum, which was crucial as the determination of the balance outstanding was dependent on the nature of the interest; that is to say whether fixed or fluctuating, which is an element which the respondent had to allege and prove in order to succeed in his claim. The appellants accordingly submit that absolution should have been granted.

[16] I disagree. **In general, the parties' failure to agree on the rate at which the amount payable under the agreement is to be calculated, does not render the agreement invalid. If no rate has been agreed on, expressly or impliedly, and the rate is not governed by any other law, the rate of interest is that prescribed from time to time by notice in the gazette by the relevant Minister in terms of the Prescribed Rate of Interest Act 55 of 1975.**

Repudiation

[17] In the particulars of claim the respondent alleged that Basson repudiated the agreement and that, at his election he was entitled to claim performance *in forma specifica* entailing an order compelling Basson to transfer a third of the member's interest in the CC to him, against payment of the outstanding amount to Basson alternatively damages as a surrogate for performance. The respondent led evidence, both oral and documentary to demonstrate that Basson had repudiated the agreement.

[18] The court below accepted the respondent's version that Basson repudiated the agreement on or before 7 June 2007 and that he did not repent his repudiation of the agreement before the attempted cancellation of the agreement on 27 February 2008. I agree with the court below's conclusion and reasoning underlying it. There is no appeal against this finding and it must therefore stand.

[19] **Objectively viewed, Basson's actions after 7 June 2007 constituted conduct from which the only reasonable inference that could be drawn was that he did not regard himself bound by the agreement and that he was not prepared to perform its terms[1]. This is apparent from the correspondence which exchanged between the parties. In a letter dated 6 August 2007 Basson's attorneys informed the respondent's attorneys that there was no valid agreement between the parties. In a further letter dated 20 February 2008 the respondent's attorneys were informed by Basson's attorneys that the agreement was null and void, because of its non-compliance with the Property Time-Sharing Act and the Share Blocks Control Act.**

[20] The respondent himself viewed Basson's conduct as a repudiation of the agreement. Hence the respondent issued summons against

[1] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F. This dictum was referred to with approval by this Court in *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 16.

Basson originally seeking an order for specific performance.

[21] **Subsequent to the repudiation of the agreement by Basson in April 2007, the respondent elected to hold Basson to the terms of the agreement. The respondent repeatedly asked Basson to furnish him with the total outstanding amount so as to settle his indebtedness to Basson. When Basson threatened to cancel the agreement because the respondent was allegedly in arrears with his monthly instalments and contributions towards the expenses of the CC, the respondent made payment of the amount that was alleged to be owing. The court below's conclusion that Basson repudiated the agreement, was therefore, correct.**

Specific performance as remedy for breach

[22] Christie's *Law of Contract in South Africa* 7 ed[2] at 616 states:

> 'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated.' (Footnote omitted.)

[23] There are many cases in which it was held that if one party to the agreement repudiates the agreement, the other party at his election, may claim specific performance of the agreement or damages in lieu of specific performance and that his claim will in general be granted, subject to the court's discretion[3].

[24] *Farmers' Co-operative Society*[4] concerned a claim for the delivery

[2] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 616.

[3] *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343; *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1; *Woods v Walters* 1921 AD 303; *Shill v Milner* 1937 AD 101; *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A); *Rens v Coltman* 1996 (1) SA 452 (A).

[4] Ibid.

of certain movables, alternatively for damages. The question was whether specific performance should be decreed[5]. Innes JA answered that question as follows at 350:

> '*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE, C.J., in *Thompson vs. Pullinger* (1 O. R., at p. 301), "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. . .'

[25] In *Woods*[6] the court was concerned with the action to enforce the execution and performance of a contract for the lease of certain land with a furnished house and other buildings thereon. The question related to the basis of assessment of damages when an alternative prayer for damages is granted. Innes CJ stated at 310:

> 'It is a common practice, in South Africa to add to a prayer for specific performance, an alternative prayer for damages. That course has been followed in the present case. Damages so claimed must, of course, be proved and ascertained in the ordinary way. The authorities do not warrant a punitive assessment.'

[26] *Victoria Falls & Transvaal Power Co Ltd*[7] also concerned the question of an assessment of compensation. Innes CJ stated at 22:

> 'The sufferer by such a breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party. The reinstatement cannot invariably be

[5] At 349.

[6] Supra fn 3.

[7] Supra fn 3.

complete, for it would be inequitable and unfair to make the defaulter liable for special consequences which could not have been in his contemplation when he entered into the contract. The laws of Holland and England are in substantial agreement on this point. Such damages only are awarded as flow naturally from the breach, or as may reasonably be supposed to have been in the contemplation of the contracting parties as likely to result therefrom (see *Voet* 45, 1, 9, Pothier, *Oblig* sec. 160; *Hadly v Baxendale*, 9 Exch. p. 341; *Elmslie v African Merchants Ltd*., 1908, E.D.C., p. 8-9, etc.).'

[27] **From the above analysis it seems that the principle, that a party who is, prima facie entitled to specific performance may claim in the alternative damages as surrogate for specific performance, has been consistently followed by the courts until the majority in *ISEP Structural Engineering & Plating Ltd v Inland Exploration* brought doubt as to the correct position.**

Competency of respondent's claim

[28] It was submitted by the appellants that the respondent's claim for damages as a surrogate for specific performance should fail because that claim is not competent in law. *ISEP* was cited as authority in support of that proposition. In response the respondent submitted that his claim for damages in lieu of specific performance is competent in law and that the principle stated in *ISEP* should not be followed as it is against weighty authority and besides criticism, its correctness was doubted by this Court in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* referred to above.

[29] In *ISEP Structural Engineering & Plating (Pty) Ltd* the city council sold certain property 'voetstoots, absolutely as it stands' to the respondent, Inland Exploration Company. The purchase price was agreed upon after some negotiations which involved the refusal by the seller to warrant that the property would be reinstated to its original condition. The lessee of the property, *ISEP*, had constructed certain concrete ramps on the property. In terms of a lease between the seller and *ISEP*, it was obliged, on termination of the lease to reinstate the premises to their original condition. The lease terminated before the sale to the respondent. Subsequent to the sale the seller ceded to the respondent its right against *ISEP* to have the property restored. The respondent instituted an action against *ISEP* claiming the sum of

R15 000 alleged to be the costs of restoring the leased premises to the same condition in which it was received by *ISEP* in terms of the lease between the city council and *ISEP*. The respondent's claim was a claim for damages in lieu of specific performance.

[30] The three main judgments that were delivered were those of Jansen JA, Van Winsen AJA and Hoexter AJA. Kotze JA concurred in the judgment of Van Winsen AJA and Viljoen JA concurred in the judgment of Hoexter AJA. Hoexter AJA agreed with Jansen JA's conclusion that our law does not recognise a claim for the objective value of the performance as an alternative remedy to specific performance.

[31] Jansen JA stated at 6G-H:

'That a plaintiff may claim either specific performance or damages for the breach (in the sense of *id quod interest*, ascertained in the ordinary way) is, on the authorities cited, beyond question. And it would seem that fundamentally these are the only alternatives recognized in our practice (leaving aside the possibility of a combination of the two), particularly in respect of an obligation *ad factum praestandum*. Certainly no cogent authority has been cited to us to show that there is any other. However, it has been suggested that there is the possibility of a plaintiff claiming "damages" in the sense of the objective value of the performance in lieu of the performance itself. This would not be damages in the ordinary sense at all, but amount to specific performance in another form.'

[32] He went on to say at 7E:

'A case which seems more in point is *National Butchery Co v African Merchants Ltd* 1907 EDC 57 where damages were granted "in lieu of specific performance", but this seems but slender authority for this Court, in effect, to recognize a remedy akin to specific performance in the shape of a claim for the objective value of the performance.

It may be pointed out, if there were justification for recognizing such a remedy, it would entail the introduction of a number of ancillary rules. Has the plaintiff an election of claiming either performance or its objective value? If he claims the latter, may the debtor tender actual performance? (Cf D Joubert "Skadevergoeding as Surrogaat van Prestasie" 1975 *De Jure* 32; "Some Alternative Remedies in Contract" 1973 *SALJ* 37 at 44 - 47.) If specific performance were to

be refused because it would operate "unreasonably hardly" on the defendant, would the plaintiff still be entitled to the objective value of the performance itself? It would seem not - otherwise the very hardship leading to refusal of the specific performance could still be inflicted upon the debtor by granting the objective value of the performance, as would be illustrated by the case of an obligation to reinstate in respect of a building destined for immediate demolition. In a case such as the present, the award of the objective value (reasonable costs of reinstatement) would be as unreasonable as an order for specific performance.'

[33] There has been severe criticism of the majority decision in *ISEP*[8] and Smallberger ADCJ in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) para 74 doubted its correctness and said that a reconsideration of the majority decision is called for.

[34] In *Mostert NO,* Mostert, a curator of a certain pension fund, instituted action against Old Mutual for damages. Mostert's claim arose from two payments made by Old Mutual to a third party. The payments were made pursuant to an insurance policy in terms of which Old Mutual held the pension fund's investment. Mostert's main claim was based on an alleged breach by Old Mutual, when making the payments, of its contractual obligations to the pension fund under the policy.

[35] In his particulars of claim Mostert had alleged that the pension fund had suffered damages as a result of such breach. Mostert did not seek to claim damages as a surrogate for performance. He disavowed reliance on that claim.

[36] Smallberger ADCJ remarked that Mostert's claim for damages as a surrogate for performance was competent unless the majority decision in *ISEP* precluded that claim, which he doubted it did. He stated, however at para 75 that:

'From a practical point of view, it would have made no difference in the present matter had Mostert claimed damages as a surrogate for performance, and the claim had been recognised on the basis that *Isep's* case was wrongly decided . . . The approach to the quantification of the fund's loss would therefore have basically been

[8] See for instance Oelofse (1982) TSAR at 63 et seq and those that are cited in para 74 of *Mostert NO v Old Mutual*.

the same had the claim been one for damages as a surrogate for performance rather than damages for breach.'

[37] The question is whether this is an appropriate matter in which to reconsider the correctness of the majority decision in *ISEP*. In my view, this is not. *ISEP* is distinguishable from the facts of the present matter. There, the court dealt with a lease and the case concerned the obligation of reinstatement under a lease. What was said there is no more than a ratio in regard to the limited class of contracts of reinstatement under a lease and does not constitute a ratio of general application in the law of contract.

[38] Furthermore, the practical difficulties expressed by Jansen JA in *ISEP* at 7F of the judgment as justification for not recognising a claim for damages in lieu of specific performance, do not arise in the present matter. For instance, Jansen JA pointed out that recognising such a remedy would entail the introduction of a number of ancillary rules to deal with the possibility of a contest between the specific performance and the economic value for specific performance. There is no such contest in this matter and the award of the objective value of performance would not cause Basson any hardship. The respondent does not have to choose between the two remedies. He is restricted to a claim for the economic value for specific performance following alienation by Basson of the property forming the subject matter of the contract. Thus specific performance has become impossible. Where specific performance is not possible, the parties have no choice[9].

[39] To the extent that what was said by Jansen JA in *ISEP* at 6G-H and 7E may be construed as constituting the ratio of general application in the law of contract, I have a difficulty with it. Justice cries out aloud for damages in lieu of specific performance in this particular case, precisely because specific performance by the appellants is not possible. This is the case in which 'justice between the parties can be fully and conveniently done by an award of damages'. (*Farmers' Co-operative Society* at 350)

[40] **The respondent is ready to carry out his own obligation under the agreement and has a right to demand either literal performance, or**

[9] *'Some Alternative Remedies in Contract'* 1973 SALJ 37 at 46.

monetary value of the performance, from Basson. The respondent's claim for damages, to the extent that he seeks the monetary value of the performance, is akin to a claim for the replacement value of the lost property.

[41] A creditor's right to demand performance from the debtor cannot be at the debtor's mercy. The exercise of that right cannot depend on what the debtor chooses to do with the asset to which the creditor's right relates. To say that a claim for damages as a surrogate for specific performance is not recognised in law, would deprive the creditor of the right, where it has elected to enforce the contract, to be put as much as possible, in the position that it would have been in if the performance was made *in forma specifica*.

[42] The respondent is entitled to the relief that he seeks. He has established that he concluded a valid agreement with Basson; that Basson repudiated the agreement; that he was willing to carry out his obligation under the agreement; and that he had elected to hold Basson to the terms of the agreement. Because of Basson's conduct, which rendered specific performance impossible the respondent amended his particulars of claim so as to introduce a claim for damages in lieu of specific performance. The parties have agreed on the quantum and the mora interest rate to be awarded should the appeal fail. This means that the judgment of the court below should be corrected to the extent proposed by the parties. As regards the question of costs, there is no reason to deprive the respondent of his costs.

The Order

[43] In the result the following order is made:

1 The appeal is dismissed with costs.

2 Paragraphs 1 and 2 of the court below's order are set aside and replaced with the following:

'1 The first defendant is ordered to pay to the plaintiff the amount of R1 212 994.80.

2 The first defendant is ordered to pay to the plaintiff interest on the amount of R1 212 994.80 at the rate of 9,5 per cent per annum, calculated from 14 September 2014 to date of final payment.'

Willis JA:

[44] I agree with the order proposed by Zondi JA. I have, however, two qualifications to his reasoning, which I think need to be mentioned. The first is that, to the extent that *Isep Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981 (4) SA 1 (A) does not allow any exceptions to the principle that, in the law of contract, there are only two alternative remedies for an aggrieved party: specific performance or damages for breach, this case illustrates that such a principle cannot be sustained – at least not without qualification. There has been clear authority, in this court previously, that a claim for damages in lieu of specific performance could, in certain circumstances, succeed. See, for example *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343 at 350 and *Victoria Falls and Transvaal Power Company Limited v Consolidated Langlaagte Mines Limited* 1915 AD 1 at 22. *Mostert No v Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA), to which Zondi JA has referred, also seems to be consonant with this line of reasoning on the matter.

[45] My second qualification relates to the question of the rate of interest. In my opinion, the probabilities in this case make it much more likely that a rate of interest had been agreed upon than not. Furthermore, it is more probable, in the circumstances, that the interest rate would have been calculated by reference to the prime rate than the appellants' contention is that there was a flat rate (18%), especially as this was a long term venture. The question of the rate of interest to be applied in this case is largely irrelevant because, if I understood counsel for both sides correctly during the course of argument, they agreed that, if damages were to be awarded, the most practical and efficacious way of dealing with the issue would be to apply the prescribed rate of interest, as gazetted by the Minister in terms of the Prescribed Rate of Interest Act 55 of 1975. For this reason, I have no difficulty with Zondi JA's proposed order.

DEEZ REALTORS CC v SOUTH AFRICAN SECURITISATION PROGRAM (PTY) LIMITED

The amendment of the basis of a claim for payment does not constitute a new cause of action if the claim relates to the same debt as originally claimed

Judgment given in the Supreme Court of Appeal on 2 December 2016 by Petse JA (Bosielo JA and Fourie JA, Makgoka JA and Nicholls AJA concurring)

South African Securitisation Program (Pty) Limited (SAS) leased certain printing equipment to Deez Realtors CC. Clause 14.1 of the lease agreement provided that upon default by Deez, SAS was entitled to cancel the contract. Upon cancellation, SAS would be entitled to sue for: (a) the amounts in arrears as at the date of cancellation; (b) liquidated damages representing the aggregate of all rentals which would, but for the cancellation, have been payable for the remaining period of the agreement; and (c) the market value of the goods, as determined in accordance with one or the other of the ways provided for in the agreements, would be deductible from the quantum of the liquidated damages.

SAS averred that Deez had breached the agreements in material respects. It brought an action for payment, alleging that Deez had defaulted in the punctual payment of moneys as they fell due in terms of the agreements. In consequence, SAS was entitled to claim immediate payment of all the amounts which would have been payable in terms of the agreements until the expiry of the rental period regardless of whether or not such amounts were then due for payment.

In response, Deez alleged that SAS had, on 16 July 2010, elected to terminate the agreements and communicated its decision to Deez. SAS then amended its particulars of claim, and alleged that on 16 July 2010 and as a result of Deez's breach of the agreement it had elected to cancel the agreement and communicated such election to Deez. It further alleged that pursuant to their cancellation of the agreement it was entitled to payment of all arrear amounts outstanding as at the date of cancellation together with the aggregate amounts of rentals which would, but for the cancellation, have been payable to it for the unexpired period of the agreements. The amount representing the value of the goods on cancellation was, in respect of each claim, to be deductible from the aggregate amount of rentals claimed.

Deez then gave notice of intention to amend its plea by contending that SAS's claims had prescribed in that by the time SAS's amendment was effected on 23 June 2014, a period of more than three years had, since 16 July 2010, elapsed.

SAS objected to the proposed amendment.

Held—

The essential question was whether the debt sought to be recovered prior to and post SAS's amendment was substantially the same. To determine this, it was necessary to compare the allegations and relief claimed in both instances

If the service of the plaintiffs' summons on 8 September 2010 did not interrupt the running of prescription of SAS's claim, then its claim had long become prescribed by the date on which the amendment was effected.

In the context of clause 14.1, whichever way the election was exercised, it gave rise to a single debt. This therefore necessarily meant that the debt owed by the debtor did not change its essential character. In reality, what SAS did was invoke a wrong remedy in their particulars of claim – one which was not available to them having previously elected to cancel the agreements – to sue for the debt then due by the defendants. Deez's plea alerted them to this mistake. What SAS then sought to achieve with their amendment was to allege, the correct 'material facts that begot the debt' owed to them in the first place. That self-same debt flowed from the breach of the two agreements.

The effect of the amendment of SAS's particulars of claim was merely to cure a defective cause of action, ie mistakenly claiming accelerated rentals when they had already cancelled the contracts, by introducing the correct cause of action for liquidated damages pursuant to the election that they had exercised. The nature of the debt claimed remained the same. In substance, the remedies provided for in clause 14.1 both sought to place SAS in the position in which it would have been, had the breach not intervened.

Advocate S C Vivian instructed by:T G Fine Attorneys, Johannesburg, appeared for the appellant
Advocate A G Sawma SC instructed by:Wright Rose-Innes Inc, Johannesburg, appeared for the respondent

Petse JA:

[1] On 2 September 2010 the respondents, South African Securitisation Program (Pty) Ltd, as first plaintiff, Utax Rentals (Pty) Ltd, as second plaintiff, Sunlyn Investments (Pty) Ltd, as third plaintiff, and Sasfin Bank Limited, as fourth plaintiff (the plaintiffs), instituted an action in the Gauteng Local Division of the High Court, Johannesburg. The present appellants, Deez Realtors CC, Denese Zaslansky and Solomon Zaslansky were the first, second and third defendants respectively (the

defendants). In what follows I shall, for convenience, refer to the appellants as the defendants and the respondents as the plaintiffs. The summons was served on the defendants on 7 and 8 September 2010.

[2] The plaintiffs' action comprised two claims, styled Claim A and Claim B in terms of which the plaintiffs claimed the sum of R586 239.34 and R582 088.93 respectively. The plaintiffs also claimed, in each instance, payment of interest at the rate of 15% per annum and costs of suit. These amounts were alleged to be due and payable to the plaintiffs, in respect of certain printing equipment, pursuant to clause 14.1 of two written lease agreements, concluded between the second plaintiff and the first defendant on 14 December 2009. The first, third and fourth plaintiffs are cessionaries of the second plaintiff's right, title and interest accruing under the two lease agreements, in terms of two agreements of cession concluded between the parties during July 2005 and March 2006. The plaintiffs averred in their particulars of claim that the first defendant had breached the agreements in material respects. The second and third defendants had bound themselves as sureties and co-principal debtors for all amounts that were or might be due and payable under the agreements.

[3] Common in relation to both claims was the allegation in the plaintiffs' particulars of claim that the first defendant had defaulted in the punctual payment of moneys as they fell due in terms of the agreements. And in consequence, the first plaintiff was entitled to claim immediate payment of all the amounts which would have been payable in terms of the agreements until the expiry of the rental period regardless of whether or not such amounts were then due for payment.

[4] In their plea the defendants, inter alia, alleged that the plaintiffs had, on 16 July 2010, elected to terminate the agreements and communicated their election to the first defendant. This allegation prompted the plaintiffs to amend their particulars of claim. The plaintiffs' amended particulars of claim consequently alleged that on 16 July 2010 and as a result of the first defendant's breach of the agreements each of the plaintiffs elected to cancel the agreements and communicated such election to the first defendant. The plaintiffs further alleged that pursuant to their cancellation of the agreements they were entitled to payment of all arrear amounts outstanding as at the date of cancellation together with the aggregate amounts of rentals

which would, but for the cancellation, have been payable to the plaintiffs for the unexpired period of the agreements. The amount representing the value of the goods on cancellation was, in respect of each claim, to be deductible from the aggregate amount of rentals claimed.

[5] The amendment of the plaintiffs' particulars of claim in turn elicited, from the defendants, a notice of intention to amend their plea in terms of rule 28(1) of the Uniform Rules of Court. In that notice, the defendants sought to introduce a special plea of prescription, alleging that the plaintiffs' claims were prescribed in that by the time the plaintiffs' amendment was effected on 23 June 2014, a period of more than three years had, since 16 July 2010, elapsed. The plaintiffs objected to the defendants' proposed amendment, inter alia, on the grounds that, if allowed, it would render the defendants' plea excipiable.

[6] Following the plaintiffs' objection, the defendants lodged an application for leave to amend in terms of Uniform rule 28(4). In their affidavit in support of their application, the defendants averred that the plaintiffs' amendment as effected on 23 June 2014 relied on their right to cancel the agreement which they had exercised on 16 July 2010. And as the election to cancel 'creat[ed] a debt of a different nature to the debt arising from the election to accelerate payments' the summons issued on 2 September 2010 and served on 8 September 2010 did not interrupt the running of prescription of the debt flowing from the cancellation of the agreement. The plaintiffs opposed the application for leave to amend. They, in essence, contended that their right to sue the defendants both prior to and post the amendment of their particulars of claim derived from clause 14.1 of the two rental agreements in issue. And that such right arose from the breach of the agreements. Consequently, the debt claimed in the pre and post amendment of the particulars of claim was in reality the same or substantially the same debt.

[7] In due course the application for leave to amend came before Windell J in the court a quo. After her analysis of the case law, the learned judge stated the following:

> '[26] A right to claim performance under a contract ordinarily becomes due according to its terms or, if nothing is said, within a

reasonable time, which, in appropriate circumstances can be immediately. When the contract fixes the time for performance mora is said to arise from the contract itself (mora ex re). The rental agreements in casu contained a lex commissoria entitling the creditor to cancel the contract if [the first defendant] fails to perform by the time fixed for performance.'

[8] She then continued:

'[28] Extinctive prescription commences to run as soon as the debt is due. In terms of clause 14 the debt "became due" when [the first defendant] defaulted in the payment of the monthly installments. Prescription started to run from the date of [the first defendant's] breach. At the time of the breach the plaintiff had all the necessary facts to institute action for specific performance or alternatively cancelation.'

[9] Ultimately, she concluded:

'[35] The allegations and relief need not be identical for the purpose of the interruption of prescription. I am satisfied that the plaintiffs' amended claim is not a different debt from the one initially pleaded. The issuing of the summons therefore interrupted prescription. The proposed special plea is accordingly excipiable and bad in law.'

[10] Consequently, the court a quo dismissed the application with costs. The appeal now before us is with its leave.

[11] Counsel were agreed that **in order to determine whether the debt sought to be recovered by the plaintiffs prior to and post the amendment is substantially the same, it is necessary to compare the allegations and relief claimed in both instances**.[1] A comparison of the particulars of claim before and after the amendment reveals that the plaintiffs sued on two lease agreements. In both instances the plaintiffs relied on clause 14.1 – which is in identical terms in both agreements – and which affords the plaintiffs two inconsistent remedies. The one remedy is to cancel the contract. Upon cancellation, the creditor would be entitled to sue for: (a) the amounts in arrears as at the date of cancellation; (b) liquidated damages representing the aggregate of all

[1] *Wavecrest Sea Enterprises (Pty) Ltd v Elliot* 1995 (4) SA 596 (SE) at 600H-J, cited with approval by this court in *CGU Insurance Ltd v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) para 7.

rentals which would, but for the cancellation, have been payable for the remaining period of the agreement; and (c) the market value of the goods, as determined in accordance with one or the other of the ways provided for in the agreements, would be deductible from the quantum of the liquidated damages.

[12] Alternatively, in the event that the creditor elects to keep the contract in force the following remedies would then accrue. The creditor would be entitled to sue for: (a) arrear rentals as at the date of election; (b) accelerated payment representing all of the rentals which would have become due and payable under the contract for the remaining unexpired period of the contract; and (c) repossession of the goods pending full settlement of the amounts claimed.

[13] As already mentioned, clause 14.1 of the agreements accorded the plaintiffs a right to cancel the agreements, if the first defendant, as lessee, failed to comply with any of its obligations under the agreements. This occurred when the defendants failed to pay certain instalments as they fell due and payable. In that event, the plaintiffs would have a right, without prejudice to any other rights which they might have in law, to cancel the agreements without prior notice. In addition, the plaintiff's would have a right to: (a) take possession of the goods; (b) demand payment of arrear rentals due on the date of cancellation; and (c) claim liquidated damages. The liquidated damages would be the aggregate of all rentals which would, but for cancellation, have been payable for the unexpired period of the contract less the market value of the goods as at the date of their return to the possession of the plaintiffs.

[14] The alternative remedy, upon breach by the first defendant, was to sue for the immediate payment of the aggregate amount of all rentals which would otherwise have become due and payable in terms of the agreements for the unexpired period of the agreements, and all arrear rentals in terms of the agreements. In addition, the plaintiffs would be entitled to be placed in possession of the goods until full payment of the amounts due under the agreements.

[15] As already indicated, on 16 July 2010 the first plaintiff addressed a letter to the first defendant advising that the first defendant was in arrears with its instalments and calling upon it to pay the total amount then in arrears and also the amount representing the aggregate value of

the rentals which would have been payable had the agreements continued until the expiry of the rental period. The first plaintiff also intimated in that letter that should the first defendant fail to pay the amounts claimed within seven days of the date of demand, the first plaintiff would issue summons without further notice.

[16] As previously mentioned, the plaintiffs instituted an action against the defendants on 2 September 2010. In this action the plaintiffs claimed payment of all the amounts which would have been payable in terms of the agreements until the expiry of the initial period. The defendants pleaded to this claim and averred that the plaintiffs, having elected to cancel the agreements, were precluded from claiming accelerated payments, but were obliged to sue for liquidated damages.

[17] The point taken by the defendants in their plea that the plaintiffs could not sue for accelerated payments prompted the plaintiffs to amend their particulars of claim. In the latest amendment of their particulars of claim, the plaintiffs, relying on the self-same breach by the defendants, claimed liquidated damages representing the aggregate of all rentals which would have been payable in terms of the agreements but for the early termination of the agreements.

[18] As already indicated, the defendants sought to amend their plea by introducing a special plea of prescription to the plaintiffs' amended particulars of claim. In the court a quo, the plaintiffs successfully opposed the proposed amendment. The defendants' case was, and still is, essentially that the debt in the plaintiffs' amended claim is an entirely different debt from the one that was claimed in the previous claim. And that the right which the plaintiffs sought to enforce in their original claim derived from their election to sue for accelerated payments, thus, in effect, enforcing the agreements. But in the amended claim, the right sought to be enforced flowed from the cancellation of the agreements. As the original claim (namely, for accelerated payment of rentals) did not serve to interrupt the running of prescription of the right derived from the cancellation of the agreements, it followed that the debt claimed in the amended claim, it being a different debt, has become prescribed.

[19] Counsel for the defendants emphasised, as did counsel in *CGU Insurance v Rumdel (Pty) Ltd*[2], that if the plaintiffs had pursued their claim in its unamended form it would have eventually failed at the trial. In that event, a defence of res judicata would not be available to the defendants if the plaintiffs were to institute a fresh action based on the cancellation of the agreements. It was argued that these factors underscore the material distinction between what counsel contended were two different debts.

[20] As I see it, **this appeal raises the fundamental question whether the debt in the amended claim is the same or substantially the same debt as originally claimed by the plaintiffs. If it is, the appeal must fail[3]. But if it is not, then the appeal must succeed.**

[21] If the service of the plaintiffs' summons on 8 September 2010 did not interrupt the running of prescription of the plaintiffs' claim now advanced in the amended particulars of claim, then the plaintiffs' claim had long become prescribed by the date on which the amendment was effected. It is to that question that I now turn.

[22] The parties were agreed that the Prescription Act 68 of 1969 (the Act) applies to a debt of the kind in issue in this appeal. Section 10(1) of the Act provides that a debt shall, subject to Chapters 3 and 4, be extinguished after a lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. Section 12(1) of the Act, which is the relevant law referred to in s 10(1), in turn, provides, subject to subsections (2), (3) and (4) which are not material for the present purposes, that prescription shall commence to run as soon as the debt is due. Section 15(1) which provides for judicial interruption of prescription reads:

> '15 (1) The running of prescription shall, . . . , be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.'

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[2] Ibid at para 4.

[3] See for example, *Mazibuko v Singer* 1979 (3) SA 258 (W) at 265D-266C; *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A) at 15A-16D; *Associated Paint & Chemical Industries (Pty) Ltd t/a Albestra Paint and Lacquers v Smit* 2000 (2) SA 789 (SCA) paras 13-15.

[23] I propose dealing briefly with the general principles relating to applications for amendments of pleadings. First, it must be emphasized that the primary object of allowing an amendment is 'to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done'. (See, for example, D E van Loggerenberg Erasmus *Superior Court Practice* 2016 5I2 at D1-332; *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* 2004 (3) SA 160 (SCA) para 12; *Cross V Ferreira* 1950 (3) SA 443 (C) at 447A-H.)

[24] As to the general approach to be adopted, the Constitutional Court made plain in *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) that (para 9):

> 'The practical rule that emerges . . . is that amendments will always be allowed unless the amendment is mala fide . . . or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or "unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed". . . . The question in each case, therefore, is, what do the interests of justice demand?'

[25] But, where an amendment would render a pleading excipiable it will, save in exceptional circumstances, not be allowed. This is so because generally speaking the issue that the amendment seeks to introduce must be a triable issue.[4]4 By a triable issue is meant an issue that is viable or relevant for adjudication at the trial and which, as a matter of probability, will be proved by the evidence foreshadowed in the notice of intention to amend[5].5

[26] In *The Standard Bank of South Africa Ltd v Miracle Mile Investments 67 (Pty) Ltd & another* [2016] ZASCA 91; [2016] 3 All SA 487 (SCA) this court said (para 26):

[4] *Gross v Ferreira*, ibid at 450A-F. See also *Caxton Ltd v Reeva Forman (Pty) Ltd & another* 1990 (3) SA 547 (A) at 565H-J.

[5] *Ciba-Geigy (Pty) Ltd v Lushof Farms (Pty) Ltd & 'n ander* 2002 (2) SA 447 (SCA) para 34.

> 'The election and communication thereof in the form of the requisite notices are essential pre-conditions to create a cause of action in the first place. . . . Prescription would therefore commence to run only from the date of a notice claiming the outstanding balance . . .'

[27] In this case, the requisite notice cancelling the agreements and demanding: (a) payment of the amount in arrears as at the date of cancellation; (b) payment of the liquidated damages; and (c) return of the goods, was given on 16 July 2010. As already mentioned, the first plaintiff instituted an action against the defendants on 2 September 2010 and by 8 September 2010 summons had been served on the defendants. Consequently, it must be accepted that when the plaintiffs instituted action against the defendants, the process commencing action interrupted the running of prescription when it was served on the defendants by 8 September 2010 at the latest.

[28] I have, to the extent necessary for the present purposes, already set out the similarities between the plaintiffs' claim as pursued in the plaintiffs' summons both prior to and post the amendment. It is now apposite to make reference to the differences resulting in two different debts as perceived by the defendants. The defendants rely on four bases for their contention. First, that prescription did not commence to run until the decision to cancel was taken and communicated to the first appellant. It bears mentioning that the election to cancel was exercised and communicated to the defendants on 16 July 2010. Second, the original claim was for payment of accelerated rentals under the agreement whereas the claim pursued post the amendment was for liquidated damages. And the quantum of the damages is different to the quantum of the amount of accelerated rentals. Third, the facta probanda necessary to sustain the two claims differ. Fourth, cancellation brought the agreements to an end, whereas the claim for accelerated rentals did not, but on the contrary sought to enforce the agreements.

[29] Counsel for the defendants referred us to a number of cases in support of the proposition that in this case we were dealing with two substantially different debts. That being so, proceeded the argument, the proposed amendment sought to be introduced by the defendants should have been allowed by the court a quo. I do not find it necessary to analyse and discuss each of those cases. The defendants strongly relied on *National Sorghum Breweries Ltd (t/a Vivo African Breweries)*

v International Liquor Distributors (Pty) Ltd 2001 (2) SA 232 (SCA) – a case concerned with a defence of res judicata – and contended that 'a claim for liquidated damages remains a claim for damages' and that it does not avail the plaintiffs that the liquidated damages arose from a contract. And, that such liquidated damages were quantified in accordance with the formula stipulated in the agreements was of no consequence.

[30] The facts in *National Sorghum Breweries* were briefly as follows. In the first summons the plaintiff relied on a contract that had been breached and sought cancellation of the contract and repayment of the purchase price. In the second summons, whilst the plaintiff relied on the conclusion of the contract, its breach and cancellation thereof, it claimed damages alleged to have been suffered as a consequence of the breach. The court of first instance dismissed the defence of res judicata on the ground that the two claims were different despite the presence of common elements in the allegations made. The appeal against that finding was dismissed by this court. In my view that case is distinguishable on the facts and cannot assist the defendants. Indeed, it aptly demonstrates the dangers of arguing by analogy.

[31] The defendants also heavily relied on a passage in *Imprefed (Pty) Ltd v National Transport Commission* 1990 (3) SA 324 (T) in which the following is stated (at 329I-330A):

> 'It is true that the amount claimed is the same as the amount previously claimed (after an increase) as contractual remuneration. The fact remains that contractual remuneration and damages are not the same thing.'

Whilst accepting that this statement might well be obiter, the defendants were nevertheless emboldened by its apparent approval by this court in *CGU Insurance*. However, this court in *CGU Insurance* found Imprefed (Pty) Ltd to have been distinguishable on the facts from the facts of that case. It also noted that the nature of the other debt in Imprefed (Pty) Ltd was different. Similarly, for the present purposes, it offers no support to the defendants that is tenable on the facts of this case.

[32] The defendants made much of the fact that enforcement of agreements gives rise to consequences different to those that would flow from cancellation of agreements. For this reason it was argued that

the two inconsistent remedies provided for in clause 14.1 give rise to two different debts. It is of course true that different consequences flow from either enforcing or cancelling a contract. But the defendants' contentions on this score are only correct as far as they go. Beyond that, they falter. **In the context of clause 14.1, whichever way the election is exercised, it gives rise to a single debt. This must therefore necessarily mean that the debt owed by the debtor does not change its essential character. In reality, what the plaintiffs did in this case was to invoke a wrong remedy in their particulars of claim – one which was not available to them having previously elected to cancel the agreements – to sue for the debt then due by the defendants. The defendants' plea alerted them to this mistake. What they then sought to achieve with their amendment was to allege, in the words of Jones AJA in *CGU Insurance*, the correct 'material facts that begot the debt' owed to them in the first place. That self-same debt flowed from the breach of the two agreements.** (Compare *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 910A-911D.) Indeed, the terms of clause 14.1 themselves contemplate a single debt arising in the event of breach.

[33] To my mind, the contentions advanced by the defendants are unsustainable. They manifest a misconception of the concept of a 'debt' within the meaning of s 10(1) of the Prescription Act. This court has repeatedly emphasized that the word 'debt' bears a 'wide and general meaning' and that it 'does not have the technical meaning given to the phrase "cause of action" when used in the context of pleadings.'[6] In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 825F-G, Trollip JA was at pains to explain the distinction between a 'debt' on the one hand and 'cause of action' on the other in these terms:

> ' "Cause of action" is ordinarily used to describe the factual basis, the set of material facts, that begets the plaintiff's legal right of action and, complimentarily, the defendant's "debt", the word used in the Prescription Act.'[7]

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[6] *CGU Insurance* para 6; *Drennan Maud & Partners v Pennington Town Board* 1998 (3) SA 200 (SCA) at 212G-I.

[7] See also *FirstRand Ltd v Nedbank (Swaziland) Ltd* 2004 (6) SA 317 (SCA) para 4.

[34] This meaning of 'debt' was, most recently, elaborated upon by the Constitutional Court in *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC) which, with reference to the *New Shorter Oxford English Dictionary,* 3 ed (1993) vol 1 at 604, said (para 85):

'1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.'

[35] **In my view, the effect of the amendment of the plaintiffs' particulars of claim was merely to cure a defective cause of action (namely, mistakenly claiming accelerated rentals when they had already cancelled the contracts) by introducing the correct cause of action for liquidated damages pursuant to the election that they had exercised. The nature of the debt claimed remained the same. In substance, the remedies provided for in clause 14.1 both sought to place the plaintiffs in the position in which they would have been, had the breach not intervened. Hence they gave rise to a single debt.** As emphasised by this court in *CGU Insurance*, 'the debt is not the set of material facts' required to sustain the cause of action but rather 'that which is begotten by the set of material facts.'

[36] In these circumstances, it follows that the appeal must fail for substantially the same reasons that the court a quo gave. In the result the following order is made:

The appeal is dismissed with costs.

SHOPRITE CHECKERS (PTY) LTD v MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, TOURISM AND ENVIRONMENTAL AFFAIRS: KWAZULU-NATAL

Section 48(5)(e) of the KwaZulu-Natal Liquor Licencing Act (no 6 of 2010) is not applicable to applications for conversions under section 101(1).

Judgment given in the Supreme Court of Appeal on 2 December 2016 by Petse JA (Maya AP, Swain JA, Zondi JA and Schippers AJA concurring)

Shoprite Checkers (Pty) Ltd was licensed to sell liquor in its grocery stores and liquor outlets throughout the country for consumption off its licensed premises. It was the holder of 110 licences operative in the province of KwaZulu-Natal, as contemplated in section 39(b) of the KwaZulu-Natal Liquor Licencing Act (no 6 of 2010). Most of these licences were granted under the Liquor Act (no 27 of 1989).

Twelve of these licences relate to premises which are situated within approximately 80 metres of religious and learning institutions. They were all granted under the 1989 Liquor Act, substantial parts of which were repealed on 28 February 2014 in terms of section 100 of the 2010 Act.

On 1 August 2012 certain of the sections of the 2010 Act came into operation. Shoprite Checkers applied to the Liquor Authority established under that Act to grant liquor licences, for licence certificates in respect of its pre-existing liquor licences. Section 101(1) provides that a licence granted under the 1989 Liquor Act and in force immediately before the commencement of the KwaZulu-Natal Liquor Act is regarded as a licence in its relevant category from the date of commencement of the 2010 Act subject to certain conditions.

Shoprite Checkers applied for its pre-existing liquor licences to be converted to licences as contemplated in s 39 of the 2010 Act. The Liquor Authority declined to issue the requested licence certificates. It stated that it was precluded from doing so because the terms and conditions of Shoprite Checkers' pre-existing liquor licences that permitted it to operate its liquor outlets within 500 metres of religious and learning institutions were affected by section 48(5)(e) read with s 101(1)(a)(ii) and (iii) of the 2010 Act. It also took the view that Shoprite Checkers ought instead to apply for temporary amnesty for the removal of the affected licences to premises which were not located within 500 metres of a religious and learning institution.

Shoprite Checkers asserted that the Member of The Executive Council for Economic Development, Tourism And Environmental Affairs: Kwazulu-Natal

(the MEC) was not empowered to render unlawful, by way of a regulation, that which the 2010 Act had not declared unlawful. Nor was the MEC empowered to compel it to apply for temporary amnesty when it had not contravened any law or to oblige it to apply for the removal of its licences from the licenced premises when its operations on such licenced premises were not unlawful.

Shoprite Checkers then brought an application for an order declaring that the 2010 Act did not per se prohibit and/or render unlawful the sale or continued sale of liquor for consumption off the licensed premises by a person in circumstances where (i) such premises were situated within 500 metres from a learning institution and/or a religious institution as defined in the Act, and (ii) the said person was the holder of a liquor licence granted pursuant to the provisions of the 1989 Act which licence was in force immediately before the commencement of the 2010 Act, and which licence was regarded as a licence for the retail sale of liquor referred to in the 2010 Act.

Held—

Section 101(1)(a) of the 2010 Act provides that every licence in force immediately before the date of commencement of the Act, is regarded as a licence, provided that (i) the terms and conditions and trading days and trading hours applicable to such licence continue in force until the date upon which such licence is required to be renewed, (ii) the said terms and conditions and trading days and trading hours are not inconsistent with the provisions of the Act, and (iii) in the event that the said terms and conditions or trading days and trading hours being inconsistent with the provisions of the Act, then the provisions of the Act are applicable.

Sectio n 48(5)(e) provides that before granting an application, the Liquor Authority must satisfy itself that the proposed premise is not located within 500 metres of any religious or learning institutions.

Section 101(1)(a) is made subject to the provisos that the terms and conditions, trading days and trading hours relating to pre-existing licences continue in force. It is clear from the provisions of section 101 that holders of pre-existing licences are entitled to licence certificates in terms of section 62 of the 2010 Act without having to comply with the application procedure for such licence. Section 62(1) in turn provides, in peremptory terms, that the Chief Executive Officer must, once a licence has been granted by the Liquor Authority, issue a licence certificate in the prescribed form. It follows that section 48(5)(e) of the 2010 Act is not applicable to applications for conversions under s 101(1).

Had the provincial legislature intended to impose an absolute prohibition also in respect of pre-existing licences in relation to licenced premises located within 500 metres of religious or learning institutions, it would have done so in the clearest of terms, as it had done in section 95(1) of the 2010 Act in relation to sale of liquor in convenience stores franchised to service stations selling petrol, diesel or other petroleum products to the public.

The appeal was upheld.

Advocate J J Gauntlett SC and Advocate G A du Toit) instructed by:
Werkmans Attorneys, Tygervalley, appeared for the appellant
Advocate A J Dickson SC instructed by PKX Attorneys, Pietermaritzburg, appeared for the respondent

Petse JA:

[1] This is an appeal against a judgment of Chetty J in the KwaZulu-Natal Division of the High Court, Pietermaritzburg. The appellant, Shoprite Checkers (Pty) Ltd, which is a well-known supermarket chain with a national footprint, applied for an order declaring:

> '1. That the KwaZulu-Natal Liquor Licensing Act 6 of 2010 ("the KZN Act") does not per se prohibit and/or render unlawful the sale or continued sale of liquor for consumption off the licensed premises (being either a liquor store or a grocers' store) by a person in circumstances where:
>
> 1.1. such premises are situated within a circumference of 500 metres from a learning institution and/or a religious institution as defined in s 1 of the KZN Act; and
>
> 1.2. the said person was the holder of a liquor licence granted pursuant to the provisions of the national Liquor Act 27 of 1989 which licence was in force immediately before the commencement of the KZN Act, and which licence is regarded from the said date of commencement, by virtue of s l0l(l)(a) of the KZN Act, as a licence for the retail sale of liquor referred to in s 39(b)(i) and/or (ii) of the KZN Act, and which licence has not otherwise been validly cancelled or terminated;

2. Reviewing and setting aside regulation 47 of the KwaZulu-Natal Liquor Licensing Regulations, 2014 (PN 45 published in PG 1081 of 13 February 2014) ("the Regulations");

3. Extension of the period of 180 days for the launching of this application, as envisaged in s 9 of the Promotion of Administrative Justice Act 3 of 2000, to the extent that it may be necessary;

4. In the alternative to paragraph 2 above, declaring that regulation 47 of the Regulations is inconsistent with the Constitution and invalid;

5. Directing the first and second respondents to pay the costs of this application jointly and severally, alternatively (should the third respondent oppose this application) directing the respondents to pay the costs of this application jointly and severally;

6. Granting the applicant such further and/or alternative relief as this Court may deem fit.'

[2] In the court a quo, the respondents resisted the application as they still do in this court. They, in essence, contended that granting the relief sought by the appellant would result in a two-tier system of licences. And this would allow licensees under the national Liquor Act 27 of 1989 (1989 Liquor Act), such as the appellant, to enjoy preferential treatment above persons granted licences under the KwaZulu-Natal Liquor Licencing Act 6 of 2010 (the KwaZulu-Natal Liquor Act) which, inter alia, prohibits the granting of licences to persons where the proposed liquor premises are within a circumference of 500 metres from a religious or learning institution. Such a situation the first respondent, the Member of the Executive Council for Economic Affairs, Tourism and Environmental Affairs, Province of KwaZulu-Natal (the MEC) asserted, would be inequitable.

[3] In opposing the application, the respondents filed a comprehensive affidavit deposed to by the erstwhile MEC. To the extent relevant for the present purposes the MEC stated:

'18. Under s 38 of the KZN Act no person may sell liquor "unless that person is licenced in terms of this Act". Chapter 6 sets out the licensing procedure and s 48 deals with some of the matters to be considered by the Authority when dealing with licence applications.

19. Relevant to this matter is the distance of licenced premises from religious or learning institutions: The Authority must:-

19.1. satisfy itself that the proposed premises are not within a 500-metre circumference of a religious or learning institution; and

19.2. consider the harm or prejudice that the licence will have on schools and religious institutions within a radius of 500 metres of the licenced premises.

(I refer to sections 48(5)(a); 48(5)(e) and (6)(a) of the KZN Act.)

20. The effect of the term radius in s 48(5)(e) is that licenced premises may not be located within 79,6 metres of any religious or learning institution. (The distance of 79,6 metres may be rounded up to 80 metres for the sake of convenience.)

21. I submit that s 48(5)(e) constitutes an outright disqualification.

22. The 1989 Liquor Act had dealt with the social issues in a different manner: On the one hand it was less prescriptive when dealing with premises situated in the vicinity of a place of worship or school or in a residential area. (I refer to s 22(2)(d)(i)(cc) of the 1989 Liquor Act.) However, on the other hand it was more restrictive with regard to trading times and days.'

[4] The MEC went on to assert that there were compelling social reasons which moved the provincial government to adopt, inter alia, the policy relating to the minimum distance of licenced premises from religious and learning institutions. And that the provincial government was gravely concerned at the social ill-effects of liquor being sold from premises in close proximity to religious and learning institutions. The social ill-effects of sale of liquor from premises in close proximity to religious and learning institutions were explained in the MEC's answering affidavit, inter alia, as follows:

'23. Sections 48(5) and (6) of the KZN Act reflect the specific policy decision taken by the Provincial Government. Among these is the prohibition on locating licenced premises 80 metres from a religious or learning institution. I am advised that it is not necessary for me to deal with the reasons for this in great detail as sections 48(5) and (6) of the KZN Act are not being challenged. However, I can assure this honourable court there are compelling social reasons for the provincial government adopting this policy with regard to the distance of licenced premises from religious or learning institutions. The Provincial Government is extremely concerned at the social effects of liquor being sold from premises located within a distance

of 80 metres of any religious or learning institution. Learners are immature and unable to make the moral or value judgments that must be made. They are at an age where they are engaging in social experimentation. Research has shown a significant link between the availability of alcohol to learners and absenteeism and repeating an academic year.

24. The social situation is exacerbated at poorer schools, where learners often do not get the support and guidance they should, and where their schools do not have the supporting sporting and cultural facilities. In such cases learners are often tempted to move away from school premises (during or after school), and to buy alcohol. They are of an age where it cannot easily be identified that they are minors, and in certain cases they may even have reached the age of majority.

25. Similarly those engaging in religious practices are entitled to be kept some distance from a point of sale.

26. The negative effects of alcohol are well documented and the Provincial Government has adopted the provisions of s 48 as but some small steps to mitigate those effects.

27. The policies were incorporated into the KZN Act after extensive public participation processes, and after consideration of extensive comments from a number of parties, including liquor manufacturers, municipalities, wholesalers and retailers, traders' associations, the gaming industry, community organisations, licensees and those providing licensing services.

28. MEC Mchunu, my colleague responsible for Transport, Community Safety and Liaison, has drawn to my attention that there are 673 liquor outlets next to places of worship, and 930 outlets next to schools in KwaZulu-Natal. This situation is particularly notable in urban areas. For example, in the eThekwini Metro there are 222 outlets next to places of worship, and 251 outlets next to schools.'

[5] In relation to the KwaZulu-Natal Liquor Act, the MEC stated the following:

'33. I am advised that it is a common approach when repealing a law to provide for the transition from the prior legal order to the new legal order, and to do so in a manner that does not unduly affect the rights of any person when the prior legislation ceases to be of force and effect, unless there is a specific and contrary intention.

34. It is for this reason that the Provincial Government provided for the conversion process set out in section 101 of the KZN Act. Section 101 provides as follows:-

34.1 A licence in force immediately before the date of commencement of the KZN Act is regarded as a licence in the category set out in the second schedule of Schedule 2 of the KZN Act [s 101(1)];

34.2 The holders of old order licences are entitled to receive new form licences without having to apply therefor [s 101(2)];

34.3 The conversion process takes place administratively upon payment of the prescribed annual fee [s 101(3)(a)];

34.4 Old order licensees have three years to convert their licences [s 101(3)(b)].

35. The licences held by the [appellant] would therefore convert into liquor store and grocers' licences contemplated under s 39(b)(i) and (ii) of the KZN Act. This means that the [appellant] has benefited from the more permissive trading days and hours set out in Schedule 3.

36. The conversion process in s 101 is subject to certain provisos, including the proviso in s 101(1)(a)(iii) of the KZN Act, that in the event that the terms and conditions of the license are inconsistent with the provisions of the KZN Act then the provisions of the KZN Act are applicable.

37. I respectfully submit that the effect of the proviso is that any conditions in the [appellant] licences that permit it to trade less than 80 metres from a religious or learning institution are inconsistent with the provisions of the KZN Act, and the prohibitions in the KZN Act must apply.'

[6] In relation to the amnesty provisions of regulation 47(1), the MEC stated that the KwaZulu-Natal Liquor Act proscribed some of the things that were lawful under the 1989 Liquor Act, such as licenced premises being located within a circumference of 500 metres from a religious or learning institution. Because 12 of the appellant's liquor outlets are located within the prohibited distance from religious and learning institutions this meant that the Liquor Authority established under the KwaZulu-Natal Liquor Act would be compelled and justified to cancel or suspend licences in relation to such premises. But regulation 47(1)

afforded pre-existing licences hit by this prohibition a mechanism to apply for a removal of the affected licences to other premises located outside the prohibited distance whilst at the same time allowing the licensee to continue to operate without interruption, albeit for a period not exceeding three years.

[7] The court a quo upheld the respondents' contentions and, in consequence, dismissed the application with costs. It subsequently granted the appellant leave to appeal to this court.

[8] The facts in this case are substantially common cause. It is only in relation to the interpretation of the relevant statutory prescripts which apply to those facts that the parties are in sharp disagreement. And they are the following.

[9] The appellant is licenced to sell liquor in its grocery stores and liquor outlets throughout the country for consumption off its licenced premises. It is the holder of 110 licences operative in the province of KwaZulu-Natal, as contemplated in s 39(b) of the KwaZulu-Natal Liquor Act. The majority of those licences were granted under the 1989 Liquor Act. Twelve of these licences relate to premises which are situated within approximately 80 metres of religious and learning institutions. They were all granted under the 1989 Liquor Act, substantial parts of which were repealed on 28 February 2014 in terms of s 100 of the KwaZulu-Natal Liquor Act, read with schedule 1 thereof.

[10] On 1 August 2012 certain of the sections of the KwaZulu-Natal Liquor Act came into operation. Some of its provisions were materially different from those of the 1989 Liquor Act. As contemplated in s 101(1) read with s 101(2) of the KwaZulu-Natal Liquor Act – which will be dealt with in more detail later – the appellant applied to the Liquor Authority – established under the KwaZulu-Natal Liquor Act to grant liquor licences – for licence certificates in respect of its pre-existing liquor licences. It also paid the prescribed fees. Briefly, s 101(1) provides that a licence granted under the 1989 Liquor Act and in force immediately before the commencement of the KwaZulu-Natal Liquor Act is regarded as a licence in its relevant category from the date of commencement of the KwaZulu-Natal Liquor Act subject to certain conditions. Essentially s 101 provides for conversion, subject

to certain requirements, of old-order licences granted under the 1989 Liquor Act.

[11] The appellant applied for its pre-existing liquor licences to be converted to licences as contemplated in s 39 of the KwaZulu-Natal Liquor Act. But the Liquor Authority declined to issue the requested licence certificates. It adopted the position that it was precluded from doing so because the terms and conditions of the appellant's pre-existing liquor licences that permit it to operate its liquor outlets within a circumference of 500 metres of religious and learning institutions are hit by the prohibition in s 48(5)(e) read with s 101(1)(a)(ii) and (iii) of the KwaZulu-Natal Liquor Act.

[12] The Liquor Authority also took the view that the appellant ought instead to apply for temporary amnesty under regulation 47(1) – promulgated in terms of s 99(q) of the KwaZulu-Natal Liquor Act – for the removal of the affected licences to premises which are not located within a circumference of 500 metres of a religious and learning institution. The appellant asserted that the MEC was not empowered to render unlawful, by way of a regulation, that which the KwaZulu-Natal Liquor Act had not declared unlawful. Nor was the MEC empowered to compel it to apply for temporary amnesty when it had not contravened any law or to oblige it to apply for the removal of its licences from the licenced premises when its operations on such licenced premises are not unlawful.

[13] These entrenched divergent positions taken by the parties prompted the appellant to apply for a declaratory order in the court a quo in the terms mentioned in para 1 above.

[14] The court a quo rightly stated that s 101(1)(a)(iii) read with s 48(5)(e) of the KwaZulu-Natal Liquor Act was central to the determination of the dispute between the parties. It also noted that the appellant had contended 'that the prohibition [in s 48(5)(e)] is only applicable to those [persons] applying for new licences and not to those who are pre-existing holders of licences issued under the 1989 Act'.

[15] In reaching its conclusion, the court a quo reasoned as follows (paras 50-51):

> 'On a proper reading of the [KwaZulu-Natal Liquor Act], I am of the view that s 48(5)(e) applies as an absolute prohibition against all retail liquor licence holders, inclusive of new applicants and those

who acquired licences under the 1989 [Liquor] Act. The new provisions in the [KwaZulu-Natal Liquor Act] allow the liquor authority to regulate the retail industry from an even playing-field, without one category of holders able to ply their trade in the proximity of learners, despite the state's efforts to create an enabling environment for future generations to achieve the aspirational values in our Constitution of improving the quality of life for all citizens and to free the potential of each person.

In light of the above, I find that s 101 read with s 48(5)(e) per se prohibits and renders it unlawful for a person to sell or continue to sell liquor for consumption off licenced premises (being either a liquor or a grocers' store) where such premises are within a circumference of 500m from a learning institution and/or a religious institution, and that the prohibition applies equally to new applicants for licences as well as to persons granted licences under the 1989 [Liquor] Act.'

Having come to this conclusion, the court a quo deemed it unnecessary to make a definitive determination in relation to the constitutional challenge to regulation 47(1).

[16] An analysis of the relevant statutory framework is now apposite. I propose to commence with s 22 of the 1989 Liquor Act which still applies to applications pending on the date of commencement of the KwaZulu-Natal Liquor Act. It deals with consideration of applications for licences. It provides that the Liquor Board shall not grant an application for a liquor licence in certain defined circumstances. Of particular relevance is s 22(2)(d)(ii)(cc) which states that if the premises are situated in the vicinity of a place of worship or school or in a residential area, the Liquor Board shall not grant an application for a licence unless 'the business will be carried on in a manner that would not disturb the proceedings in that place of worship or school or otherwise prejudice the residents of that residential area'.

The KwaZulu-Natal Liquor Act

[17] The KwaZulu-Natal Liquor Act sets out in s 2 as one of its objects the following:

'(a) to provide for the regulation of the micro-manufacturing and the retail sale of liquor and methylated spirits;

(b) to provide for mechanisms aimed at reducing the socio-economic and other effects of alcohol abuse;

(c) to provide for public participation in the consideration of applications for registration; and

(d) to promote the development of a responsible and sustainable retail and micro- manufacturing liquor industry in a manner that facilitates—

(i) the entry of new participants into the industry;

(ii) diversity of ownership in the industry; and

(iii) an ethos of social responsibility in the industry.'

[18] Section 38, in turn, provides that no person may sell liquor for retail or micro-manufacture liquor unless that person is licenced in terms of the Act. A contravention of this section constitutes an offence.

[19] It bears mentioning that applications for licences under this Act are set out in Chapter 6. Section 41 deals in detail with the procedure for licence applications. Section 41(2) in particular provides that an application for a liquor licence must, inter alia, be accompanied by the physical address of the premises where the business will be conducted or a description of the location of the premises in terms of identifiable landmarks.

[20] Section 48(4)(a) is of importance and provides that the Liquor Authority may, in granting the application, impose such terms and conditions as it may deem fit, and such trading days and trading hours as it may determine. Of crucial importance for the present purposes is s 48(5)(e) which provides that before granting an application, the Liquor Authority must, in addition to the requirements set out in subsections (a) to (d) and (f), satisfy itself that:

'The proposed premise is not located within a circumference of 500 metres of any religious or learning institutions.'

[21] Section 101, which deals with 'conversion of licences, approvals, notices and determinations', was also considered in detail by the court a quo. Its provisions read:

'(1)Notwithstanding the provisions of section 39, and in accordance with the transitional provisions of the Liquor Act [which is defined in s 1 as meaning the Liquor Act 59 of 2003] –

(a) every licence or approval set out in the first column of Schedule 2 and in force immediately before the date of commencement of this Act, is from the commencement date of this Act regarded as a licence in the category set out in the second column of Schedule 2: Provided that—

(i) the terms and conditions and trading days and trading hours applicable to such licence, immediately prior to this Act coming into effect, continue in force until the date upon which such licence is required to be renewed in terms of the Liquor Act, 1989 (Act No. 27 of 1989);

(ii) the said terms and conditions and trading days and trading hours are not inconsistent with the provisions of this Act; and

(iii) in the event that the said terms and conditions or trading days and trading hours are inconsistent with the provisions of this Act, then the provisions of this Act are applicable;

(b) a notice issued in terms of section 33 of the Liquor Act, 1989 (Act No. 27 of 1989), and in force immediately before the date of commencement of this Act, is regarded as conditions set out in writing in terms of sections 49 and 58 of this Act; and

(c) any determination made in terms of section 51 of the Liquor Act, 1989 (Act No. 27 of 1989), and in force immediately before the date of commencement of this Act, is regarded as a consent granted in terms of section 72 (1) of this Act.

(2)(a) The holders of the licences, approvals, notices and determinations referred to in subsection (1) are entitled to a licence certificate or permit in terms of section 62 of this Act for the relevant category of licence as contemplated in section 39, without having to comply with the application procedure for such a licence or permit contemplated in Chapter 6.

(b) All existing terms and conditions and trading hours applicable to such licences, approvals, notices and determinations must be endorsed on the licence certificate in accordance with subsection (1).

(3)(a)The holders of the licences, approvals, notices and determinations referred to in subsection (1) must receive such licence certificate or permit upon presentation to the Liquor Authority of proof of their licences, approvals, notices and determinations referred to in subsection (1) and the terms and conditions and trading hours to

which such licences, approvals, notices and determinations are subject, and upon payment of the annual fee prescribed in terms of section 64.

(b) The holders of the licences, approvals, notices and determinations referred to in subsection (1) must obtain their licence certificates or permits under this Act within three years of the commencement of this Act.

(4) In the event that a holder does not convert the licences, approvals, notices and determinations within the prescribed period referred to in subsection (3) (b), such licences, approvals, notices and determinations become invalid, as provided for in the transitional provisions of the Liquor Act [59 of 2003].'

[22] Section 102(2) which, in turn, deals with the transitional arrangements and validation of pre-existing licences also bears mention. It provides that:

'(2) Notwithstanding anything to the contrary contained in this Act, on the date on which this Act comes into operation, any lawful act, determination, designation, decision, matter or any other thing done, made, taken, executed or carried out or purported to have been done, made, taken, executed or carried out by the Liquor Board or a member of staff of the Liquor Board, including a member of the Liquor Board or the Chief Executive Officer of the Liquor Board, or the responsible Member of the Executive Council, in pursuance of the Liquor Act, is regarded to have been done, made, taken, executed or carried out or issued under this Act.'

[23] Section 99 empowers the MEC to make regulations for a variety of matters. Of importance in this case is s 99(q) which provides that the MEC must make regulations regarding 'the manner and form in which an application for temporary amnesty must be made'. Pursuant to this power, the MEC promulgated the regulations, published in Provincial Notice 45 in the Provincial Gazette 1081 of 13 February 2014.

[24] It is regulation 47(1) which is of relevance in this case. It provides that the Liquor Authority may grant temporary amnesty only to pre-existing and valid licence holders licenced in terms of the 1989 Liquor Act in respect of two categories of licenced premises one of which is 'licenced premises situated within an area with a 500 metre circumference from religious and learning institutions'. The second

category is in relation to convenience stores franchised to a service station selling petrol, diesel or other petroleum products to the public.

[25] The court a quo was cognisant of the fact that the resolution of the divergent contentions advanced by the parties lay in the proper interpretation of the key provisions of the KwaZulu-Natal Liquor Act and regulation 47(1) set out above (paras 19-24) in accordance with the well-established canons of construction of documents, be it a statute or contract[1]. It is to that exercise that I now turn.

Interpretation of the provisions

[26] A useful point of departure is the Constitution[2]. Section 39(2) of the Constitution enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. (See *Investigating Directorate: Serious Economic Offenses v Hyundai Motor Distributors (Pty) Ltd & others; In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) paras 21-22.) The appellant's right which is implicated in this case is the right to, inter alia, freely choose trade, namely to freely engage in an economic activity of its choice as contained in s 22 of the Constitution. However, this right may be regulated by law. And, as this court made plain in *Endumeni*[3],3 the 'inevitable point of departure is the language of the provision itself' which must be read in context and having regard to the purpose of the provisions and the background to the preparation and production of the document.

[27] In this court, counsel for the respondents strongly relied, as he did in the court a quo, on the provisions of s 101(1) read with s 48(5)(e) of the KwaZulu-Natal Liquor Act. He submitted that liquor licences granted under the 1989 Liquor Act did not, with the commencement of the KwaZulu-Natal Liquor Act, continue as deemed licences under the latter Act. Rather, so the argument proceeded, they were conversions which are subject to the provisos to s 101(1)(a). The material provisos

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[2] Constitution of the Republic of South Africa Act 108 of 1996.

[3] Above para 18.

are contained in s 101(1)(a)(ii) and (iii). These provide that the terms and conditions and trading days and trading hours attaching to pre-existing licences must not be inconsistent with the provisions of the [KwaZulu-Natal Liquor] Act. And, that if they are, the provisions of the Act prevail.

[28] In support of their contentions, the respondents asserted that the concept of 'terms' of the licence as envisaged in the KwaZulu-Natal Liquor Act includes the premises at which the sale of liquor is conducted. That is the position because s 41(2)(a) requires that the premises must be identified in the application, and the licence is granted subject to 'terms and conditions' which must of necessity include the premises. Accordingly, the conversion of the appellant's pre-existing 12 licences would be hit by the absolute prohibition imposed by s 48(5)(e) of the KwaZulu-Natal Liquor Act.

[29] To my mind the respondents' contentions are unsustainable. It is true that s 101(1)(a) is made subject to the provisos that the terms and conditions, trading days and trading hours relating to pre-existing licences continue in force unless they are inconsistent with s 101(1)(a)(i), (ii) and (iii), in which event the provisions of the KwaZulu-Natal Act would prevail and thus apply.

[30] In my view it is manifest from the provisions of s 101 that holders of pre-existing licences are entitled to licence certificates in terms of s 62 of the KwaZulu-Natal Liquor Act without having to comply with the application procedure for such licence. The entitlement of the holder of a licence to such a licence certificate is subject to the Liquor Authority being satisfied, upon presentation of proof of the licence and payment of the prescribed annual fee, that the holder had a valid licence on the date of commencement of the KwaZulu-Natal Liquor Act.

[31] Section 62(1) in turn provides, in peremptory terms, that the Chief Executive Officer must, once a licence has been granted by the Liquor Authority, issue a licence certificate in the prescribed form which must, inter alia, include: (a) the premises in respect of which a licence has been granted; and (b) the terms and conditions upon which the licence was granted, including the trading days and trading hours.

[32] It follows from the interpretation of s 101(1) discussed above that s 48(5)(e) of the KwaZulu-Natal Liquor Act is not applicable to applications for conversions under s 101(1). This must be so for at least

two reasons. First, s 48(5)(e) is contained in Part 2 of Chapter 6 which deals with applications for retail sale of liquor for consumption on or off premises. Second, s 101(2)(a), in express terms, excludes the application procedure for a licence as contemplated in Chapter 6. However, counsel for the respondents strongly relied on the third proviso to s 101(1)(a). He contended that the 'terms' of the licence include the premises. And because the appellant's premises are located within a circumference of 500 metres of religious and learning institutions as defined in s 1 of the KwaZulu-Natal Liquor Act, the appellant's 12 pre-existing licences are inconsistent with s 48(5)(e) which is an absolute prohibition applicable to all licences.

[33] These contentions, in my view, cannot be upheld. The location of the premises was not a term or condition of the appellant's licences under the 1989 Liquor Act. Nor can the location of the premises be a term or condition under the KwaZulu-Natal Liquor Act. Moreover, both the 1989 Liquor Act and the KwaZulu-Natal Liquor Act draw a clear distinction between premises relating to a licence and the terms and conditions upon which a licence may be granted. There are three clear contextual indicators of this in the latter Act. First, as previously mentioned, s 41(2)(a) provides that an application for a liquor licence must include and be accompanied by 'the physical address of the premises where the business will be conducted or a description of the location of the premises in terms of identifiable landmarks'. It therefore goes without saying that an application for a licence unaccompanied by the physical address of the premises or a description of the location would be still-born. Second, the opening words 'before granting the application' in s 48(5) serve as a clear indication that the Liquor Authority may not grant an application for a liquor licence unless all six requirements in that section have cumulatively been met. The question whether or not these requirements have been met would therefore logically arise before the approval or granting of the licence. Third, as already mentioned in para 31 above, s 62(1)(a) provides that after the Liquor Authority has granted a licence and the prescribed fee has been paid, the Chief Executive Officer must issue a licence certificate which must, inter alia, include: (a) the premises in respect of which a licence has been granted (s 62(1)(a)(iii)); and (b) the terms and conditions upon which the licence was granted, including the trading

days and trading hours (s 62(1)(a)(iv)). This is further reinforced by s 48(4)(a)(i) which states that the Liquor Authority must, after having considered an application for a licence, either grant such application 'subject to such terms and conditions [as] it may deem fit'. This must then mean that the decision to grant the application (in relation to specified premises as disclosed upfront in the application) precedes the consideration of any terms and conditions that the Liquor Authority may deem fit to impose. Put differently, the question whether or not to attach terms and conditions to a licence arises only once the requirements of sections 41(2) and 48(5) have been satisfied.

[34] To my mind, the meaning attributed to the language of the provisions of the KwaZulu-Natal Liquor Act discussed above, with due regard to the context and the purpose of the provisions, is a more plausible and sensible one. On this score I am fortified by the statement in *Commissioner, South African Revenue Service v Bosch & another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA), made in the context of statutory interpretation, which is instructive. This court said (para 9):

> '. . . There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as "excessive peering at the language to be interpreted without sufficient attention to the [historical] contextual scene".'

[35] Accordingly, even if one were to accept that the divergent interpretations for which the parties contended are both tenable, there is a compelling reason why the appellant's contentions must prevail. More than a century ago in *Curtis v Johannesburg Municipality* 1906 TS 308 at 311 Innes CJ said:

> 'The general rule is that, in the absence of express provisions to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of

their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion.'

(See also *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) para 26.)

[36] In *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) this court said (at 870I-871A):

'. . . If on one interpretation of the amended provision it would retroactively destroy vested rights acquired . . . in terms of the provision before its amendment, but on another interpretation it would not, that would provide, I think, a strong reason for preferring the latter interpretation unless the language used cannot possibly accommodate it. . . .'

As to the nature of a right inherent in a liquor licence, this court, in Pietermaritzburg Corporation v South African Breweries Ltd 1911 AD 510 at 511, pointed out that although a liquor licence operates on specified premises, it has a commercial value apart from the premises to which it relates. (See also the minority judgment of Madlanga J in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape & others* [2015] ZACC 23; 2015(6) SA 125 (CC) para 132.)

[37] **Thus, there is, in my view, much to be said for the appellant's submission that had the provincial legislature intended to impose an absolute prohibition also in respect of pre-existing licences in relation to licenced premises located within a circumference of 500 metres of religious or learning institutions, it would have done so in the clearest of terms as it has done in s 95(1) of the KwaZulu-Natal Liquor Act in relation to sale of liquor in convenience stores franchised to service stations selling petrol, diesel or other petroleum products to the public. Bearing the aforegoing considerations in mind, there can be no doubt that s 48(5)(e) cannot bear the meaning ascribed to it by the court a quo.**

[38] Finally, it was argued on behalf of the respondents that to hold that s 48(5)(e) does not apply to pre-existing licences would result in an untenable situation. This was so because it would mean that the appellant would retain its 12 licences free of the statutory obligation

imposed under s 22(2)(d)(i)(cc) of the 1989 Liquor Act. As mentioned earlier, s 22(2)(d)(i)(cc) provided that the Liquor Board shall not grant an application for a liquor licence if the premises are situated in the vicinity of a place of worship or school or in a residential area, unless the business will not be carried on in a manner that would not disturb the proceedings in that place of worship or school or prejudice the residents of that residential area. And, as the statutory obligation provided for in s 22(2)(d)(i)(cc) 'would not be endorsed on the licence certificate in terms of s 101(2)(b), it being not a term or condition applicable to the affected licences, the appellant would thereby obtain a licence certificate under s 101(2)(a) free of the encumbrance arising from s 22(2)(d)(i)(cc) of the 1989 Liquor Act following its repeal. In order to obviate such an anomalous result it was therefore necessary to construe s 22(2)(d)(i)(cc) as a term of the licence. Seen in this light it would thus be inconsistent with s 48(5)(e).

[39] The answer to this argument, in my opinion, is that advanced in the countering submissions on behalf of the appellant. And it is this. Section 12(2)(c) of the Interpretation Act 33 of 1957 provides that: '[w]here a law repeals any other law, then unless the contrary intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed.' And absent a contrary intention manifest from the KwaZulu-Natal Liquor Act, it must ineluctably follow that the statutory obligation incurred under s 22(2)(d)(i)(cc) remains extant. (See, for example, *Chagi & others v Special Investigating Unit* 2009 (2) SA 1 (CC) paras 31-32; *Msunduzi Municipality v MEC for Housing, KwaZulu-Natal & others* 2004 (6) SA 1 (SCA) para 21.)

[40] This then brings me to the application to review and set aside regulation 47(1)(a). Although the conclusion to which I have come in relation to the interpretation of sections 48(5) and 101 of the KwaZulu-Natal Liquor Act is dispositive of this appeal, the appellant persisted in its quest to have regulation 47(1)(a) reviewed and set aside. The review application was launched in the court a quo on 7 October 2014. As the regulations were promulgated on 13 February 2014 the review application was brought 55 days outside the 180 day period prescribed in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Consequently, the appellant applied for condonation

in terms of s 9 of PAJA. This application was not opposed by the respondents, presumably because they had not suffered any prejudice as a consequence of the delay. Thus, nothing further need be said in relation to this issue save to say that in light of the respondents' stance and the reasons proffered by the appellant for the delay and the dictates of justice it should be granted.

[41] As previously mentioned, regulation 47(1) empowers the Liquor Authority to grant temporary amnesty only to pre-existing and valid licence holders licenced under the 1989 Liquor Act in the two categories of licence holders specified therein. First, where the licenced premises are, in terms of the KwaZulu-Natal Liquor Act, situated within a circumference of 500 metres of religious and learning institutions. Similarly, it requires licence holders who sell liquor in convenience stores franchised to a service station selling petrol, diesel of other petroleum products to the public to apply for temporary amnesty.

[42] The validity of regulation 47 was impugned on two bases. First, it was submitted on behalf of the appellant that the KwaZulu-Natal Liquor Act does not prohibit pre-existing licence holders in category (i) from continuing trading in their premises. Second, in relation to category (ii) and following the insertion of s 95(1A)[4]4 into the KwaZulu-Natal Liquor Act, the prohibition on sale of liquor in convenience stores franchised to service stations does not apply to pre-existing licence holders. Consequently, so the argument went, s 99(1)(q) does not place an obligation on holders of pre-existing licences mentioned in the two categories of regulation 47(1) to apply for temporary amnesty. Second, it was contended that regulation 47(1) violates the principle of legality to the extent that it purports to render unlawful what the KwaZulu-Natal Liquor Act has not declared unlawful. And hence regulation 47 serves no rational purpose.

[43] The respondents argued that the regulation is authorised and serves a rational purpose. In support of their contentions the respondents, relying on the judgments of the Constitutional Court in *Executive Council, Western Cape v Minister of Provincial Affairs and*

[4] Subsection (1A) was inserted by s 5 of the KwaZulu-Natal Liquor Licensing Amendment Act 3 of 2013 and came into operation on 13 February 2014.

Constitutional Development & another; Executive Council, KwaZulu-Natal v The President of the Republic of South Africa & others 2000 (1) SA 661 (CC) paras 122-124; *Justice Alliance of South Africa v The President of the Republic of South Africa* [2011] ZASCC 23; 2011 (5) SA 388 (CC) paras 52-55, contended that regulation 47(1) is authorised by the KwaZulu-Natal Liquor Act and thus rational. The respondents' contentions are, in my view, predicated on the supposition that the court a quo was correct in its conclusion, namely that s 48(5)(e) also applies to pre-existing licences granted under the 1989 Liquor Act and sought to be converted under s 101(1).

[44] In *Pharmaceutical Manufacturers Association of SA & another: In Re Ex Parte President of the Republic of South Africa & others* 2000 (2) SA 674 (CC) – a case concerned with the exercise of executive powers by the President – the Constitutional Court reiterated that 'It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement.'[5]

[45] The Constitutional Court went on to say (para 86):

> 'The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational.'

In *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) para 58 the Constitutional Court stated that it was 'central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power or perform no function beyond that conferred upon them by law'. Accordingly, whenever action, by the Executive or other functionaries fails to pass the rationality requirement it will be liable to be set aside as unlawful. And in light of the earlier conclusion that sections 48(5)(e)

[5] Para 85.

and 95(1) do not apply to pre-existing licences as the court a quo found, it follows that regulation 47 does not serve any rational purpose and can therefore not survive. It is therefore liable to be set aside as irrational. Indeed, nowhere does the KwaZulu-Natal Liquor Act state under what circumstances must an application for temporary amnesty be made. The only reference to amnesty is in s 40 which finds no application in this case.

[46] It remains to note that the policy considerations that underpin the provisions of s 48(5)(e) as explained in the respondents' answering affidavit referred to in paras 4 and 5 above are undoubtedly laudable. And, as the courts are enjoined to be forever cognisant of the exclusive sphere of the executive and legislative arms of government[6]6, it is necessary to emphasise that this appeal is not about government's powers to formulate policy nor to pass legislation. Rather, it is all about interpretation of the words used in the KwaZulu-Natal Liquor Act in the context of the overall scheme of the Act. (See in this regard: *Norvartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 28.). Should the outcome of this case be regarded as undesirable, then the remedy still lies with the legislature. (Compare *Weare & another v Ndebele NO & others* [2008] ZACC 20; 2009 (1) SA 600 (CC) para 58.)

[47] It follows from all of what has been said above that the court a quo was wrong in its conclusion. Accordingly the appeal must succeed. The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and substituted with the following:

'1 It is declared that the KwaZulu-Natal Liquor Licensing Act 6 of 2010 (the KZN Act) does not per se prohibit or render unlawful the sale or continued sale of liquor for consumption off the licensed premises by a person (the licensee) in circumstances where:

[6] *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC) paras 65-68.

1.1 such premises are situated within a circumference of 500 metres from a learning institution and/or a religious institution as defined in s 1 of the KZN Act; and

1.2 if such a licensee was the holder of a liquor licence granted pursuant to the provisions of the national Liquor Act 27 of 1989 which was in force immediately before the commencement of the KZN Act, and which licence is regarded from the said date of commencement, by virtue of s 101(1)(a) of the KZN Act, as a licence for the retail sale of liquor referred to in s 39(b)(i) or (ii) of the KZN Act, and which has not otherwise been validly cancelled or terminated.

2 Regulation 47 of the KwaZulu-Natal Liquor Licensing Regulations, 2014 (PN 45 published in PG 1081 of 13 February 2014) is reviewed and set aside.

3 The applicant's failure to launch its review application within 180 days as provided for in s 6 of the Promotion of Administrative Justice Act 3 of 2000 is condoned.

4 The costs of the application shall be borne by the respondents jointly and severally, the one paying the other to be absolved, including the costs of two counsel where so employed.'