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## A SURVEY OF THE CURRENT CASE LAW

**written by**

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# Current Commercial Cases

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# *NUCLEAR FUELS CORPORATION OF SA (PTY) LTD v ORDA AG*

A JUDGMENT BY HOWIE JA
(HEFER JA, FH GROSSKOPF JA, MARAIS JA and PLEWMAN JA concurring)
APPELLATE DIVISION
25 SEPTEMBER 1996

***Contract***

***When a State body amends or withdraws a permission which is necessary for the performance of a contract, supervening illegality of performance takes place and the parties are relieved of their respective obligations in terms of the contract. A debtor under such a contract will only remain liable to the other party where it is reasonably foreseeable at the time of contracting that the supervening illegality will take place. Its liability then arises because the debtor either guaranteed performance of the contract or assumed the risk of the supervening impossibility of performance.***

## THE FACTS

In 1983, Mr Sinclair-Smith, the general manager of Nuclear Fuels Corporation of SA (Pty) Ltd, met with Mr Hugelshofer, the executive vice-president of Orda AG with a view to concluding a contract for the supply of uranium. Nuclear Fuels intended the uranium to be on-supplied to Technabsexport, a Russian trading entity, which had appointed Orda as Russia's procurement agent for various commodities including uranium. The negotiations which then ensued, culminated in the execution of a document in Zurich in 1985, entitled 'Memorandum of Understanding' in which it was recorded that the parties intended to enter into an agreement for the sale of 520 metric tons of uranium from Nuclear Fuels to Orda. The sale was to be subject to the approval of the board of Nuclear Fuels, of the Atomic Energy Corporation of South Africa Ltd (AEC), and of Technabsexport.

The AEC was formed under section 2 of the Nuclear Energy Act (no 92 of 1982). The Act conferred on the AEC the sole right to produce nuclear energy in South Africa, but entitled the AEC to confer a licence to do so on other entities. Section 49 of the Act provided that no person was to be in possession of any source material, or dispose of any source material, except with the written authority of the Minister of Mineral and Energy Affairs. The Minister was entitled to delegate such powers to the AEC.

After the signing of the Memorandum of Understanding, Dr de Villiers, the executive chairman of the AEC, gave Nuclear Fuels permission to sell 520 metric tons of uranium to Orda for on-sale to Technabsexport. The permission given was subject to certain conditions, one of which was that Orda was to procure an undertaking in writing, given by appropriate Soviet authority, that all uranium to be supplied would be used exclusively within the Soviet Union for peaceful non-explosive purposes. After receiving this permission, Sinclair-Smith informed De Villiers that it would not be possible to comply with that condition. He obtained from De Villiers what he considered to be a relaxation of this condition, ie its amendment by an acceptance of a substitute written undertaking from Orda that it had obtained such an undertaking from the Soviet Union.

Sinclair-Smith obtained this undertaking from Orda, and thereafter signed a contract for the supply of the uranium to Orda. Orda signed the contract after concluding the on-sale agreement with Technabsexport. Sinclair-Smith sent De Villiers a copy of the contract.

Approximately one week after furnishing De Villiers with the copy of the contract, De Villiers wrote to Sinclair-Smith and stated that the contract failed to comply with the conditions for permission granted by the AEC, in that it failed to record that the uranium was to be sold to Orda for resale to Technabsexport subject to the procurement of a written undertaking by appropriate Soviet authority that the uranium was to be used within the Soviet Union for peaceful non-explosive purposes. De Villiers suggested that the parties enter into a revised agreement, and required that Nuclear Fuels' application for authority to export the uranium be accompanied by an original copy of the peaceful uses undertaking given by Technabsexport to Orda.

Sinclair-Smith informed Hugelshofer of the AEC's insistence on compliance with this condition. Orda's response was to reject the request for compliance. Orda alleged that Nuclear Fuels

had repudiated their contract, and brought an action for payment of damages. Nuclear Fuels defended the action on the grounds that the contract had been brought to an end by supervening impossibility of performance. Orda replicated on the grounds that on a proper construction of the contract, or by having entered into the contract, Nuclear Fuels guaranteed performance, alternatively assumed the risk that performance might become impossible.

## THE DECISION

In the light of the aims and objects of the Act, it was plain that the State was empowered to exercise absolute control over the use and disposal of nuclear matter in South Africa. This meant that even if De Villiers on behalf of the AEC had given unqualified permission to Nuclear Fuels to export the uranium to Orda, he would have been able later to alter or withdraw that permission. The AEC had lawfully altered its grant of permission. It was clear that it was not prepared to give an export authority without compliance with the further conditions, and that Orda was not prepared to comply with those conditions: supervening impossibility of performance had taken place. It was important to note that the supervening impossibility was a case of supervening *illegality* of performance.

The general rule is that if supervening impossibility of performance occurs, the parties are relieved of their obligations. Whether foresight of the event rendering performance impossible rules out the occurrence of supervening impossibility, or constitutes an important factor in determining whether one of the parties assumed the risk of supervening impossibility, was an open question. However, the issue was to be decided upon the propositions raised by Orda in its replication.

It was clear that Nuclear Fuels had never contracted with Orda on the understanding that it would undertake liability for damages in the event of authority not being forthcoming or being withdrawn. A guarantee had not been proved.

As far as an assumption of risk that performance might become impossible was concerned, there is no rule of law that where supervening impossibility of performance is foreseeable, the debtor under the contract remains bound when such impossibility in fact supervenes. The indications are to the contrary: that the debtor is not bound, unless it is reasonably foreseeable that the supervening impossibility will take place. In the present case, initially Nuclear Fuels foresaw the possibility that authority to export the uranium might not be granted. It was only because the AEC indicated it would grant authority that Nuclear Fuels then proceeded to enter into the contract with Orda. In these circumstances, it could not be said that Nuclear Fuels reasonably foresaw the amendment or withdrawal of that authority. The AEC's initial permission in fact induced a belief on the part of Sinclair-Smith that all the conditions necessary for the sale and export authority would be met. He was entitled to conclude that whatever earlier reservations the AEC might have had as to the export of uranium to the Soviet Union, they were no longer a problem. It could therefore not be said that Nuclear Fuels had assumed the risk that performance might become impossible.

Because the facts of the case indicated an instance of supervening *illegality* of performance, it was possible that policy considerations should influence the determination whether or not Nuclear Fuels ought to pay damages as a result of its failure to perform under the contract. The contract contained no term that it should do so, but even so, policy considerations would point to a determination that the contract had been discharged. In view of the nature of the commodity involved, and the political and humanitarian considerations involved in deciding whether or not to permit the export of it, the gravity of any contravention of any prohibition would indicate that the contract should be considered to have been discharged.

The appeal was accordingly upheld.

# *MOTOR RACING ENTERPRISES (PTY) LTD (IN LIQUIDATION) v NPS (ELECTRONICS) LTD*



A JUDGMENT BY VAN HEERDEN JA
(KUMLEBEN JA, HARMS JA, SCHUTZ JA and PLEWMAN JA concurring)
APPELLATE DIVISION
26 SEPTEMBER 1996

1996 (4) SA 950 (A)

***The defence that the party seeking to compel the other party to a contract to perform cannot expect performance until he himself has properly performed (the exceptio non adimpleti contractus) may be raised where the respective obligations of the parties to the contract are reciprocal to each other.***

## THE FACTS

Motor Racing Enterprises (Pty) Ltd (MRE) and NPS (Electronics) Ltd (Panasonic) entered into an agreement in terms of which Panasonic undertook to sponsor the South African Formula 1 Grand Prix Motor Race in 1993. The sponsorship fee to be paid by Panasonic was R22m. Of this sum, R5m was payable before the event was to take place, and the balance was payable after the event was to take place. Panasonic's obligation to make the payments prior to the event taking place was conditional upon MRE delivering guarantees that the sums so paid would be repaid if the event did not take place, and if guarantees were not delivered, upon the occurrence of the first business day after the event had been held.

MRE undertook to (i) hold the event and permit Panasonic's sponsorship, and (ii) procure that all public references to the event would make mention of Panasonic's sponsorship, and not to give any other person naming rights in respect of the event.

MRE brought an application for payment of the final instalment of the amounts due from Panasonic after the event had taken place. Panasonic raised the defence (the exceptio non adimpleti contractus) that MRE had been in breach of its own undertakings as referred to in (ii) so that it (Panasonic) was not obliged to make the final payment. MRE argued that its obligations as referred to in (ii) were not reciprocal to the obligation to make payment, and that accordingly that defence could not be raised against it.

## THE DECISION

MRE's obligations as referred to in (ii) were a part of MRE's obligation to hold the event and permit Panasonic's sponsorship. They were the concrete form of those more generally expressed obligations. Accordingly, they could be seen to be reciprocal with Panasonic's obligation to pay the full sponsorship fee. Panasonic was therefore entitled to raise the exceptio non adimpleti contractus in response to MRE's claim.

The fact that the payment claimed by MRE was in respect of a liability which arose only after the event had taken place, as compared with the obligations to be performed by MRE as referred to in (ii), which were to be performed up to the taking place of the event, did not affect this conclusion. The guarantees for repayment of amounts paid before the event took place were provided for only because certain of the payments were to be made before the event was to take place, and not because the counter-performance in respect of them was separable from MRE's other obligations toward Panasonic.

Panasonic's defence was a good one.

# *McALPINE v McALPINE N.O.*



A JUDGMENT BY CORBETT CJ (NIENABER JA, HOWIE JA, OLIVIER JA and SCOTT JA concurring)
APPELLATE DIVISION
12 NOVEMBER 1996

[1997] 1 All SA 264 (A)

***An agreement which postpones the vesting of some right to be obtained from one of the parties until the death of that party is an agreement relating to the devolution of property upon death (a pactum successorium) and because of that, invalid.***

## THE FACTS

McAlpine and his brother entered into an agreement in terms of which his brother sold to McAlpine 50% of the issued share capital of Stand 37 Anderbolt Extension 11 (Pty) Ltd. They then entered into a second agreement which provided that in the event of either party's death, the other party would get 100% of the shares in the company, ie the deceased party's share would go to the one remaining alive. McAlpine took transfer of his share entitlement in terms of the first agreement.

Some seven years after conclusion of the agreements, McAlpine's brother died. McAlpine claimed transfer of his brother's shareholding in the company. The estate refused to admit the claim on a number of grounds, one of which was that the provision in the second agreement relating to the destiny of shares after the death of one of the parties was a pactum successorium (an agreement relating to the devolution of property upon death). Such an agreement is considered invalid in South African law. The question whether or not the second agreement did incorporate a pactum successorium was the sole ground for decision of the appeal.

## THE DECISION

A pactum successorium is either an agreement purporting to bind a party to a post-mortem disposition of property, or an agreement relating directly to the contents of a will. The question was, the former being the alleged agreement in the present case, whether it constituted a donation between living persons (inter vivos) or mortis causa (in contemplation of death). In the first event, the agreement would have been that the donation was made immediately with enjoyment postponed until death; in the second event, the agreement would have been that the rights established in the donation would vest only upon the death of the other party. The first would be unobjectionable, the second a pactum successorium.

Applying the vesting test to the facts of the present case, it appeared that the right to the shares in the company would arise only upon the happening of the uncertain event of survivorship, ie that the party to enjoy the right would survive the other party. The presumption that arose was that the parties intended vesting to be postponed until the death of the first-dying. It was certain one of the brothers would die first, but this did not take away the uncertainty of which was to die first—this uncertainty was what brought about the later vesting upon the death of the first-dying.

The agreement therefore did constitute a pactum successorium. The appeal was dismissed.

# *NAMIBIAN MINERALS CORPORATION LTD v BENGUELA CONCESSIONS LTD*



A JUDGMENT BY HARMS JA FH GROSSKOPF JA and PLEWMAN JA concurring, EM GROSSKOPF JA and SCHUTZ JA dissenting)
APPELLATE DIVISION
27 NOVEMBER 1996

[1997] 1 All SA 191 (A)

***An agreement which creates uncertain obligations is void for vagueness. Where it contains a suspensive condition which includes provision for the completion of terms still to be agreed, fulfilment of the condition depends on completion of those terms, and it cannot be said that the parties intended there to be a complete agreement merely upon fulfilment of the condition.***

## THE FACTS

After discussions aimed at establishing a joint venture for the exploitation of marine diamond concessions along the West coast of South Africa, in March 1992, Namibian Minerals Corporation Ltd (Namco) and Benguela Concessions Ltd (Benco) signed a document headed 'Heads of Agreement'. The document recorded that Namco would use its best endeavours to provide finance and backing for the project in the sum of C$1,5m. The marine concession was held by CDM (Pty) Ltd, and Benco held the right to exploit this concession in terms of a work contract which remained in force until July 1993.

The operation of the March Heads was conditional upon the fulfilment of a number of conditions. The fourth of these was the entering into of an agreement to give full force and effect to the terms and conditions expressed in the March Heads and to more fully define the parties' relationship.

In July 1992, the parties entered into an agreement providing for Benco's exploitation of the marine concession, and Namco's funding of it. It referred to the March Heads and certain conditions provided for in them, and recorded that despite CDM not having agreed to an extension of the work contract, the project would proceed nevertheless. Clause 4 of the agreement provided that the laws of the Republic of South Africa would apply, and that other rights and obligations reflected in the March Heads would remain.

The March Heads also contained a 'farm-in' clause. It provided that in the event that the parties were unable to obtain CDM's consent to a further extension beyond the three-year period, or in the event of Namco not being satisfied by the venture returns, Benco would offer the right of a farm-in to Namco in one or more concession areas it held in the Republic of South Africa of similar attraction on terms no less favourable than those stated therein.

Namco wished to enforce the agreement. Benco resisted enforcement on the grounds that the agreement was void for vagueness.

## THE DECISION

Benco's obligation to offer the right of farm-in—essentially an option—would only have arisen after the expiration of the three-year period referred to in the farm-in clause, ie in 1995. The question then was upon what terms (admittedly 'no less favourable' to Namco) the offer had to be made.

As regards many of these terms, certainty could be obtained upon a proper interpretation of the agreement. However, the fourth suspensive condition contained in the March Heads created uncertainty: it referred to a number of outstanding matters still to be provided for. Because the provisions referred to in it were couched in a suspensive condition, it could not be said that the parties intended to have a binding agreement simply upon the exercise of the option. Fulfilment of the condition was dependent on completion of the arrangements referred to in it, by negotiation and agreement. Since this had not been done, exercise of the option could not have given rise to a contract with certain or ascertainable terms. The farm-in clause was therefore void for vagueness.

The farm-in clause was also vague in that it created uncertainty as to what Benco had to offer. This would have depended on what the attractive features of the Namibian venture were to Namco, a matter which could not be determined with any certainty.

The agreement was therefore void for vagueness.

# *GOLDROAD (PTY) LTD v FIDELITY BANK (PTY) LTD*

*Contract*

A JUDGMENT BY NGOEPE J
TRANSVAAL PROVINCIAL DIVISION
19 JUNE 1996

1996 (4) SA 1151 (T)

***When a payment is made under protest because it is made involuntarily, the person alleging that it made such a payment must be able to show that the only option available to it was to make the payment, or that the payment was made under duress.***

## THE FACTS

Goldroad (Pty) Ltd signed an acknowledgement of debt in favour of Fidelity Bank (Pty) Ltd, in terms of which it undertook to repay the capital of a loan from the bank together with interest over a certain period. While the repayments were still taking place, Goldroad requested the bank to accept early termination of the loan. The bank acceded to this request, and furnished Goldroad with an amount which it required for complete repayment of the loan.

Goldroad stated that it did not accept the settlement amount given by the bank. However, it did pay this sum to the bank. It did so at a time when the bank was threatening to foreclose on mortgage bonds it held as security for Goldroad's debt, and at a time when a new creditor was threatening to withdraw its offer of substitute funds it had offered to Goldroad.

Prior to paying the settlement amount, Goldroad sent a letter to the bank stating that the money would be paid under protest, and it would later reclaim any overpayment.

Goldroad claimed R239 074,22 being the amount of the alleged overpayment.

## THE DECISION

In stating that it was paying under protest, Goldroad was not attempting to negative any inference that the debt was payable at all—Goldroad was certainly obliged to pay a settlement amount to the bank. The only basis upon which Goldroad could state that its payment to the bank was a payment under protest was that it was an involuntary payment, made under duress.

Goldroad's payment to the bank was not involuntary. The threats under which it had been at the time it made the payment were not illegitimate threats. It was not obliged to make the payment to the bank since it had a number of other options open to it: either to continue with the loan from the bank on the terms originally agreed, or to refuse any payment at all so forcing the bank into enforcement of its rights, such as they might be proved. Goldroad's payment was therefore not made under duress.

The action was dismissed.

# *McDONALD'S CORPORATION v JOBURGERS DRIVE-INN RESTAURANT (PTY) LTD*

A JUDGMENT BY EM GROSSSKOPF JA
(CORBETT CJ, NESTADT JA, SCHUTZ JA and PLEWMAN JA concurring)
APPELLATE DIVISION
27 AUGUST 1996

1996 CLR 649 (A)

*Trade Mark*

***A foreign trade mark holder whose mark is well-known in the sense that his mark is well known in South Africa as being the mark of a person who is a national of a convention country (under the Paris Convention on the Protection of Industrial Property) or a person who is domiciled in, or has a real and effective industrial or commercial establishment in a convention country, whether or not such person carries on business, or has any goodwill, in South Africa, is entitled to restrain the use of his mark in South Africa if such use is likely to cause deception or confusion. In showing that the mark is well known in South Africa, it is not necessary to show that it is well known generally by all sectors of the population, but only by those who would be interested in the goods or services to which the mark relates. The test for awareness of the mark is dependent on the degree of knowledge amongst such persons, and is measured by whether or not sufficient people know the mark well enough to entitle it to protection, not whether or not those who know of the mark have a profound knowledge of it.***

## THE FACTS

McDonald's Corporation registered fifty two trade marks in South Africa between 1968 and 1985, twenty seven of these consisting in or incorporating the word 'McDonald' or 'McDonald's'. It did not however, trade in South Africa during that period, and did not use any of its marks in this country during that period.

In 1992, Joburgers Drive-inn Restaurant (Pty) Ltd applied for the registration of some of the McDonald's trade marks, including the trade marks 'McDonald's', 'Big Mac' and the golden arches design of the letter 'M'. It also applied for the expungement of the trade marks held by McDonald's. McDonald's opposed these applications, and applied again for the registration of its trade marks in its name.

Shortly after a report in the *Sunday Times* newspaper that Joburgers intended to launch a hamburger chain in South Africa under the name 'McDonald's', McDonald's brought an urgent application against Joburgers to prevent it from infringing McDonald's trade marks and other rights. Joburgers undertook not to do so pending the determination of the parties' respective rights, and this undertaking was made an order of court. Two months later, Joburgers purchased a business operating in Durban under the name Asian Dawn and MacDonalds. In early 1994, McDonald's became aware that Joburgers was conducting this business under this name, and applied for, and obtained, an order that Joburgers was in contempt of the order of court earlier obtained against it. Joburgers sold the business to Dax Prop CC.

Dax applied for the registration of the mark 'McDonald's' in certain classes, and applied for the expungement of the trade marks relied upon by McDonald's to compel Dax to desist from using the trade mark 'MacDonalds'. McDonald's opposed Dax's application, and counter-applied for an interdict preventing Dax from infringing its trade marks.

On 1 May 1995, the Trade Marks Act (no 194 of 1993) came into force. Section 35 provides for the protection of 'well-known' trade marks emanating from certain foreign countries. On 20 June 1995, McDonald's brought an application against Joburgers and Dax under this section, and claimed that all of its 52 trade marks were well-known in terms of that section. It sought an order that Joburgers and Dax be restrained from imitating, reproducing or transmitting those marks in South Africa.

McDonald's was one of the largest franchisers of fast food restaurants in the world. At the end of 1973, there were 13 993 McDonald's restaurants spread over 70 countries, and the annual turnover of the restaurants was some $23 587 million. While McDonald's did not market itself or its products in South Africa, it spent $900 million annually on advertising, and sponsored sporting events such as the Barcelona Olympics. The chairman of the South African Franchising Association gave evidence to the effect that on numerous occasions, he was approached by numerous South Africans for advice on how to obtain McDonald's franchisees.

Two market surveys conducted by a market research company indicated that in certain areas of South Africa, a large majority of South Africans were aware of the name 'McDonald's' (77%), and more than half had both heard of McDonald's and knew the corporation's trade marks (57%). Most

associated McDonald's with hamburgers or knew of 'McDonald's Hamburgers' (80%). These results were obtained from a survey conducted amongst white adults living in households in higher income suburbs of Johannesburg and Pretoria. Similar results were obtained from a survey conducted from persons having a similar profile and living in higher income suburbs in Durban.

McDonald's application and counter-application were dismissed, and the applications and counter-applications against it upheld. McDonald's appealed.

## THE DECISION

Section 35 of the Trade Marks Act (no 194 of 1993) provides that the proprietor of a trade mark which is entitled to protection under the Paris Convention as a well-known mark is entitled to restrain the use in South Africa of a trade mark which constitutes a reproduction, imitation or translation of the well-known trade mark in relation to goods or services which are identical or similar to goods or services in respect of which the trade mark is well known and where the use is likely to cause deception or confusion. The section provides that a trade mark entitled to protection under the Paris Convention as a well-known trade mark is a mark which is well known in South Africa as being the mark of a person who is a national of a convention country or a person who is domiciled in, or has a real and effective industrial or commercial establishment in a convention country, whether or not such person carries on business, or has any goodwill, in South Africa. (The Paris Convention referred to is the Paris Convention on the Protection of Industrial Property of 20 March 1983.)

It was common cause that McDonald's was a person as described in the section (ie a person having a real commercial establishment in a convention country). The dispute was whether or not McDonald's trade marks were 'well-known' within the meaning of the section.

Section 35 was introduced in order to afford protection where before there had been insufficient protection. The deficiency had been felt in the requirement of the passing off action that the plaintiff establish that it had goodwill in the country in which it wished to enforce its rights. The section thus expressly states that the person entitled to protection need not show that it has goodwill in South Africa.

In determining whether or not the mark was well known in South Africa, the first question was whether or not the mark had to be well known to all sectors of the population. There was no reason why it should be. Given the wide differences in most aspects of life between the groups of people composing the population of South Africa, there would be very few trade marks which could be said to be well known to every segment of the population. A trade mark is well known in South Africa if it is well known to persons interested in the goods or services to which the mark relates.

The second question was what degree of awareness within the given sector was required before the mark could properly be described as well known. The test was whether sufficient persons knew the mark well enough to entitle it to protection, not whether or not those who knew of the mark had a profound knowledge of it. 'Well known' in this context could mean known by a substantial number of people. The degree of knowledge would be similar to that provided for in the law of passing off.

The evidence showed that McDonald's was known internationally. It also showed that there was in South Africa a general level of knowledge about the operations of McDonald's: so much was clear from the spontaneous interest shown in the corporation by persons interested in obtaining a McDonald's franchise in the country. It was also clear from the actions of Joburgers and Dax Prop that they themselves regarded the name 'McDonald's' as a valuable asset and a name enjoying a high reputation in South Africa.

As far as the market survey evidence was concerned, it was an open question whether this evidence was hearsay evidence or not. However, even if it was hearsay, it could be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act (no 45 of 1988). The survey evidence was tendered to show the extent to which the name 'McDonald's' and its trade marks were known amongst the public. It would be impractical however, to call members of the public to given evidence of their knowledge of the name 'McDonald's' and its trade marks. Furthermore, there was no reason to doubt the authenticity or reliability of the replies received by the interviewers in the market survey. This evidence was therefore admissible.

The survey evidence did show that the McDonald's marks were known to a substantial number of persons interested in the goods and services provided by McDonald's. The marks were well known to more affluent people in South Africa. Potential customers of the McDonald's products, particularly hamburgers, would be more affluent people, since they would have the financial

capability of purchasing prepared food. It followed from this that if the McDonald's mark was used as contemplated by Joburgers and Dax, in relation to the same type of fast food business as that conducted by McDonald's, it would cause deception and confusion within the meaning of section 35(3) of the Act. McDonald's was therefore entitled to restrain the use in South Africa of its trade mark by Joburgers and Dax.

Dax contended that section 36(2) of the Act applied to it. The section provides that the proprietor of a mark entitled to protection under the Paris Convention of a well-known mark may not interfere with the use of such a mark by a person who has used the mark continuously and bona fide. Its predecessor, Joburgers, had not used the mark bona fide. It had purchase the Durban business in order to use a mark confusingly similar to that of McDonald's. This lack of bona fides prevented Dax from depending on the protection offered in section 36(2) of the Act.

The applications and counter-applications brought by Joburgers and Dax were so closely bound up with the application brought by McDonald's that they could not be considered separately from the McDonald's application. They were accordingly dismissed simultaneously with the upholding of the McDonald's application.

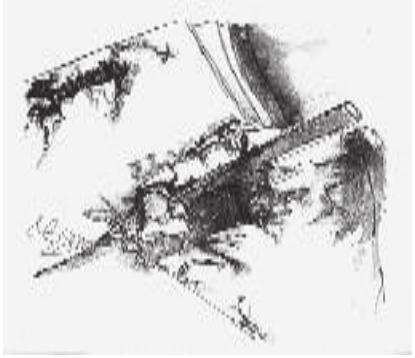
*`... at least a substantial portion of persons who would be interested in the goods or services provided by McDonald's know its name, which is also its principal trade mark. At least this mark is in my view well-known for the purposes of section 35 of the new Act. Since McDonald's has not in fact carried on business in South Africa, people who know its mark will also know it as a foreign (and, more particularly, American) business. It almost goes without saying that if the McDonald's mark is used as contemplated by Joburgers and Dax in relation to the same type of fast food business as that conducted by McDonald's, it would cause deception or confusion within the meaning of section 35(3) of the new Act.'*

# *FRY v FIRST NATIONAL BANK OF SOUTH AFRICA LTD*

A JUDGMENT BY VAN DER WESTHUIZEN AJ
(KING J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
15 DECEMBER 1995

1996 (4) SA 924 (C)

***Suretyship***



***A creditor may not do anything in his dealings with a principal debtor which has the effect of prejudicing a surety. If therefore, the creditor advances money to the principal debtor in breach of terms limiting the circumstances of such an advance, the sureties are prejudiced thereby and the creditor may not enforce its security against the sureties to that extent.***

## THE FACTS

Fry and Margot Investments signed deeds of suretyship for the debts of Hagra Developments (Pty) Ltd in favour of First National Bank of South Africa Ltd. The bank lent money to Hagra under an overdraft agreement, to enable it to conduct business as a property developer.

On 1 November 1990, the bank recorded a notice given by Hagra in which it was stated that all of Hagra's bank documents had to be signed by two of three named persons.

In March 1991, one of the directors of Hagra, a certain Mr McVitty requested the bank to lend the sum of R150 000 to Hagra. When doing so, McVitty told the bank that the money was required to facilitate a restructuring of the company finances brought about by an adjustment in ownership of the shares in the company, and that he would use the money obtained from the loan for the purchase of a yacht. Upon receiving this request, the bank lent this money to Hagra. It did not then have the consent or authorisation for the advance from any of the other two named persons referred to in the notice of 1 November 1990.

The deeds of suretyship contained terms that the extent, nature and duration of the overdraft facility would always be in the discretion of the bank.

The bank brought an action for repayment of R161 004,94, and joined Fry and Margot Investments on the strength of their suretyship obligations. The sureties alleged a breach of the agreement incorporating the terms of the notice of 1 November 1990, failure of authorisation of the loan of R150 000, and pleaded that they were accordingly not obliged to abide the terms of their suretyship obligations.

## THE DECISION

The sureties depended on the rule that the creditor may do nothing in his dealings with the principal debtor which has the effect of prejudicing the surety. This rule is not based on the exercise of a broad equitable discretionary power, but is founded on a principle of law which requires creditors to act bona fide in their dealings with sureties. The rule could be applied against the bank in the present circumstances.

It was clear that the loan of R150 000 made by the bank was not made in the ordinary course of business. The bank manager who approved the loan must have known that the loan would not have been approved by the other authorised signatories. His approval was in breach of the instructions given on 1 November 1990 and to the prejudice of the sureties. The actions of the bank were affected by the rule.

The fact that a term of the deeds of suretyship was that the extent, nature and duration of the overdraft facility would always be in the discretion of the bank, did not assist the bank. This term had to be read with the term that the suretyship was to be a continuing security for the whole amount due or owing to the bank. It postulated a contractual relationship which had to be adhered to in the banker/customer relationship. This was a term which the bank had not adhered to, in that it had not abided the terms of an agreement (that of 1 November 1990) which would limit the whole amount due or owing to the bank.

The sureties' plea was upheld.

# *SNAID v VOLKSKAS BANK LTD*



A JUDGMENT BY KUPER AJ
(PLEWMAN J concurring)
WITWATERSRAND LOCAL DIVISION
16 AUGUST 1994

1997 (1) SA 239 (W)

***Where a deed of suretyship provides that the surety is liable for payment of the principal debtor's indebtedness including interest, discount, commission, law costs, stamps and all other necessary charges and expenses, the surety's liability as provided for therein does not cover mora interest only but includes the ordinary interest accruing against the principal debt from time to time.***

## THE FACTS

Snaid signed a deed of suretyship in favour of Volkskas Bank Ltd, the total amount recoverable thereunder being limited to the sum of R10 000 together with such further sum for interest charges and costs as might have accrued. The principal debtor's indebtedness was said to include interest, discount, commission, law costs, stamps and all other necessary charges and expenses.

In May 1990, Volkskas Bank alleged default by the principal debtor, and demanded payment of R10 000 from Snaid, together with interest thereon. In response, on 10 June 1990, Snaid paid R10 000 to the bank.

In November 1990, the bank instituted action against Snaid for payment of R10 000 said to be interest incurred on the capital amount as capitalised monthly from 26 May 1984 to 30 May 1990. Snaid defended the action on the grounds that when she paid the R10 000, she discharged her indebtedness to the bank in full and that the bank was therefore not entitled to any further sums arising out of the deed of suretyship.

## THE DECISION

Snaid argued that the reference to the principal debtor's indebtedness as including interest meant that the R10 000 she had paid must have covered payment of the interest claim now being made against her. However, in the deed of suretyship, her liability was also said to include interest charges and costs as might have accrued. This did not refer merely to mora interest, but to all interest arising on the principal debt, and accordingly interest not paid by the R10 000 payment.

The reference to the principal debtor's indebtedness as including interest was intended to convey that Snaid also stood surety for any interest indebtedness for which the principal debtor might have been liable arising from his own suretyship in favour of another. It did not limit the extent of Snaid's indebtedness as she had alleged.

Snaid's appeal was dismissed.

# *KUNNEKE v EERSTE NASIONALE BANK VAN SUIDELIKE AFRIKA BPK*

STAFFORD J
TRANSVAAL PROVINCIAL DIVISION
20 DECEMBER 1996

1997 CLR 76 (T)

***Banking***

***A bank which acts contrary to a mandate authorising the honouring of cheques only after specific signing arrangements have been complied with is not entitled to debit its customer's account in the amount of such cheques.***

## THE FACTS

West Transvaal Computer College BK held a cheque account with First National Bank of SA Ltd. The close corporation gave the bank a mandate to honour cheques drawn on it, provided that the cheque bore the signature of both Kunneke and Mrs JM Kruger, the sole member of the close corporation. Kunneke bound himself as surety for the indebtedness of the close corporation in favour of the bank, and invested R60 000 in the bank as security for the discharge of this liability.

The bank honoured cheques to the value of R32 322,80 drawn on the close corporation's account which had not been signed by both Kunneke and Kruger. The cheques were drawn to discharge a debt owing by the close corporation. The bank applied portion of the R60 000 to the discharge of the close corporation's indebtedness including the indebtedness created by the honouring of the cheques.

Kunneke alleged that as a result of the bank having breached its mandate in having honoured the cheques, it had not been entitled to debit the close corporation's account with them. The debt of R32 322,80 not having validly arisen, the surety, Kunneke, was also not liable for payment of this amount. Kunneke brought an action against the bank for payment of R32 322,80.

## THE DECISION

The mandate given by the close corporation to the bank expressly indicated that the bank was not entitled to honour cheques not signed by both Kruger and Kunneke. The fact that cheques other than those comprising the R32 322,80, and bearing the signature of only Kruger, had been honoured by the bank could not affect the express terms of that mandate.

The close corporation had done nothing to give the bank the impression that it could honour cheques signed by only one of the two authorised signatories. The bank could therefore not raise the argument that terms different from the mandate given it by the close corporation applied to the honouring of the cheques.

Having honoured the cheques, the bank had acted in breach of the mandate. It was therefore not entitled to raise a debit against the close corporation's account. The surety was accordingly not liable for payment of this debt. Kunneke was entitled to payment of R32 322,80.

# *THE* WAVE DANCER*: NEL v TORON SCREEN CORPORATION (PTY) LTD*

A JUDGMENT BY OLIVIER JA (VAN HEERDEN JA and SMALBERGER JA concurring, HOWIE JA and SCOTT JA dissenting)
APPELLATE DIVISION
23 AUGUST 1996

1996 (4) SA 1167 (A)

***Insurance***

**Insurance**

***In the face of an unexplained loss, the insured is required to show that the loss was not brought about by causes excluded by the insurance policy. If the probabilities are that the loss was brought about by causes included by the policy during the currency of the policy, the insurer is then obliged to indemnify under the policy.***

## THE FACTS

Toron Screen Corporation (Pty) Ltd hired a 32-foot motor cruiser, the *Wave Dancer*, from Nel for use in the production of a film off the Grande Comore in the Indian Ocean. In terms of the agreement, Toron insured the cruiser under a standard Yacht and Motorboat Insurance Policy for R250 000. The policy provided cover for loss or damage to the cruiser caused by fire, external accidental means, or by certain other specified events, including latent defects in the hull or machinery. The insurer was not liable for wear and tear, depreciation, or deterioration from use. Prior to inception of the hire, a surveyor reported that the cruiser was in excellent condition.

Near the end of the hire of the cruiser, a heavy swell developed. Nel, who had by then joined the cruiser, had the cruiser moved to calmer waters off the Grande Comore island. While doing so, it was discovered that the vessel was shipping water. The pumps could not contain the leak and Nel radioed for help. Attempts to tow the vessel to safety were unsuccessful, and she sank about four kilometres off the island.

With the consent of Toron, Nel later submitted a claim on the policy to the insurer. The insurer repudiated the claim on the grounds that Nel had scuttled the *Wave Dancer.* Nel brought an action in contract against Toron, alleging that Toron was obliged to compensate him for the loss of the vessel while she was in the Comores.

The parties agreed that their agreement was subject to the tacit term that in the event of loss of the *Wave Dancer*, Toron would pay to Nel the amounts it recovered from the insurer. Toron however, repudiated Nel's claim on the grounds that Nel had scuttled the vessel.

## THE DECISION

Assuming that Toron had properly complied with its obligation to obtain an 'all risks' policy, the question was whether the policy covered the loss of the *Wave Dancer*.

The policy did not cover accidental external damage prior to the inception of the insurance cover, and it was for Nel to show that the loss was not caused by this. The probabilities however, pointed to such damage having occurred after the inception of the insurance cover. Had the vessel been damaged earlier than this, Nel would have noticed this, and the effect of the damage would have become apparent much sooner than it did. The cause of damage must have been more immediately preceding the loss of the vessel than before inception of the policy.

The loss of the *Wave Dancer* having been covered by the insurance policy, Toron should have taken steps to claim the indemnity from the insurer. Its failure to do so, and remit the proceeds to Nel, constituted a breach of contract. Nel was entitled to payment of the amount of it loss from Toron.

**Scott JA:** Assuming the vessel was not scuttled, the possible causes of loss were (i) the vessel sustained some external accidental damage which was aggravated by the side-swell, (ii) there was a failure of the fibreglass hull in consequence of a latent defect, or (iii) failure of the hull resulted from wear and tear or a patent defect.

Whereas certain possible causes of the loss of the vessel could be ruled out, such as loss due to wear and tear, the actual cause of the loss of the vessel was unknown. There was no clear evidence indicating what brought about the loss. There was therefore also no explanation of the cause of loss,

**[continued bottom of next page ...]**

# *PARKER v DORBYL FINANCE (PTY) LTD*

A JUDGMENT BY SCHUTZ JA (HEFER JA, VIVIER JA, HOWIE JA and PLEWMAN JA concurring)
APPELLATE DIVISION
21 NOVEMBER 1996

[1997] 1 All SA 74 (A)

*Credit Transactions*

***Where an instalment sale agreement provides that the purpose for which the goods are bought may be varied by the consent of the seller, the agreement is not subject to the proviso of section 2(1) of the Credit Agreements Act (no 75 of 1980) and is therefore subject to the provisions of that Act.***

## THE FACTS

Parker bought a motor passenger bus from Dorbyl Finance (Pty) Ltd in terms of an instalment sale agreement. After conclusion of the sale, Parker cancelled the agreement and claimed repayment of the deposit paid in terms of it, as well as damages, on the grounds that Dorbyl had made certain misrepresentations to him prior to conclusion of the agreement.

In terms of clause 5.2 of the agreement, Dorbyl enjoyed an exclusion from liability for misrepresentations or breaches of warranty. In terms of clause 11.2 of the agreement, the bus was to be used only for the purpose for which it was designed and/or intended, and only in connection with mining, engineering, construction, road building or a manufacturing process, unless otherwise agreed in writing by Dorbyl.

After conclusion of the sale agreement, Parker used the bus for purposes other than those described in clause 11.2. In his claim based on his allegations of misrepresentations, Dorbyl alleged that the provisions of clause 5.2 were invalid in that the agreement was governed by the Credit Agreements Act (no 75 of 1980) which prohibits the inclusion of such provisions in a credit agreement. Dorbyl pleaded that the Act did not apply to the agreement because the proviso to section 2(1) of the Act applied. That proviso provides that the Minister shall not have power to apply the provisions of the Act to credit agreements in terms of which a person purchases or hires goods 'for the sole purpose of selling or leasing them or using them in connection with mining, engineering, construction, road building or a manufacturing process'. Dorbyl argued that clause 11.2 of the agreement put the agreement squarely within the terms of the proviso. Parker argued that because he had used the bus for purposes other than those referred to in the proviso, the agreement was subject to the provisions of the Act.

## THE DECISION

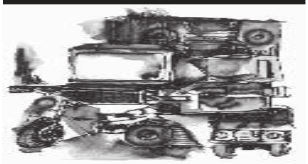
The party seeking to rely on the proviso contained in section 2(1) of the Act bears the onus of proving the purpose for which the lease is concluded. In doing so, that party is not confined to the terms of the agreement itself, but may depend on evidence such as the purchaser's subsequent conduct. The seller need not have knowledge of the purchaser's intention as regards the use of the goods.

In the present case, clause 11.2 referred to the sole use of the bus, as opposed to the sole purpose. It could be assumed however, in favour of Dorbyl, that the obligation to use translated into the purpose to use in the designated manner.

The possibility of use for a purpose other than that stipulated for in the clause was specifically envisaged by the addition of the words 'unless otherwise agreed in writing by the seller'. This addition meant that Dorbyl could consent to other uses, and that other uses were contemplated, so that the designated uses were not the only ones. The purpose for which the bus was bought was

**The *Wave Dancer* continued ...**

and therefore no way of deciding which of the three causes referred to above was applicable. The onus of proof being on Nel to show which cause of loss was the applicable one, his claim against Toron should be dismissed.



therefore not necessarily one referred to in section 2(1) of the Act. What the purpose was, did not have to be determined—the important fact was that the purpose as stated in clause 11.2 was not the sole purpose.

The Credit Agreements Act did apply to the agreement.

## *INFLO PLUS v SCHEELKE*

A JUDGMENT BY STREICHER J
WITWATERSRAND LOCAL DIVISION
28 JUNE 1996

1996 CLR 719 (W)

***An instalment sale agreement which reserves to the seller ownership of the item until full payment of the amount due under the agreement requires delivery of the item to the purchaser with the intention that he shall become the owner in order for ownership to pass to the purchaser. Such delivery is not effected when the item is first delivered to the purchaser, since the intention at that point is not that the purchaser shall become the owner of the vehicle. If such delivery is effected when full payment is made, then one of the forms of delivery, such as traditio brevi manu, must take place in order for the purchaser to become the owner of the item. If the purchaser is not in possession of the item at that point, traditio brevi manu cannot take place since for this form of delivery, the transferor must be in possession of the item.***

### THE FACTS

Info Plus purchased a vehicle from Wesbank in terms of an instalment sale agreement. Ownership of the vehicle was reserved to Wesbank until payment by Info Plus of all money due in terms of the agreement. Before full payment, Info Plus requested a Mr Sharman of Sharman Motors to sell the vehicle, and assumed that for this purpose, the vehicle would be displayed at the premises of Sharman Motors. The parties agreed that if Sharman found a buyer, he would refer the buyer direct to Info Plus, which would attend to documentary formalities of the sale, and receive payment.

Sharman sold the vehicle to McCarthy Retail. It furnished McCarthy Retail with a registration certificate in the name of Sharman Motors, and a 'Used Vehicle—Clearance Form' which stated that no amount was owing on an instalment sale agreement in respect of the vehicle. Sharman Motors had obtained registration of the vehicle in its own name on the strength of a transfer of ownership document signed by a person who had not been authorised to sign the document on behalf of Info Plus.

McCarthy Retail later sold and delivered the vehicle to Scheelke. After Info Plus discovered this, it paid Wesbank the full amount owing to it in terms of the instalment sale agreement. It brought an action for delivery of the vehicle, alleging that it was the owner of the vehicle. Scheelke and McCarthy Retail denied that Info Plus was the owner of the vehicle.

### THE DECISION

After conclusion of the instalment sale agreement, the vehicle was delivered to Info Plus, but not with the intention that it should hold the vehicle as owner. The intention was that it would have physical control of the vehicle while Wesbank remained the owner.

In order for Info Plus to become the owner, it would have to take delivery with the intention that it was to become the owner. The means by which this would be achieved would be traditio brevi manu (delivery to a transferor who already has possession of the goods) upon payment in full of all amounts due under the instalment sale agreement. However, Info Plus did not already have possession of the goods when it made full payment to Wesbank. It could therefore not have become the owner of the vehicle by this means.

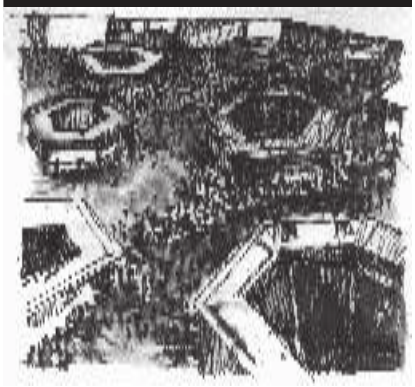
The action was dismissed.

# *HAYGRO CATERING BK v VAN DER MERWE*

A JUDGMENT BY VAN NIEKERK J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 OCTOBER 1993

1996 (4) SA 1063 (C)

***Corporations***



***A court has a wide discretion, under section 65 of the Close Corporations Act (no 69 of 1984) to order that the members of a close corporation are jointly and severally liable for the debts of the close corporation, and may do so when the close corporation has conducted a business in a trading name which fails to disclose that the business is controlled by the close corporation.***

## THE FACTS

Haygro Catering BK supplied meat to a business known as Mr Meat Man. Payment was effected by means of cheques drawn by Mr Meat Man, and in all of the documentation associated with these supply contracts, there was no indication that any entity other than Mr Meat Man either traded under that name, or was the owner of the business.

In February and March 1992, Haygro supplied meat to Mr Meat Man to the value of R85 305. The account in respect of this supply of meat was not paid and Haygro issued summons for payment of the sum of R85 305. After default judgment was obtained, Haygro could not execute on the judgment because the business could not be located. At this point, Haygro became aware for the first time that a close corporation existed which traded under the name of Mr Meat Man.

Haygro then applied for a declaratory order that Mr P van der Merwe and Mr W A Cilliers were, in terms of section 63(a) of the Close Corporations Act (no 69 of 1984), jointly and severally liable for payment of the sum of R85 305. Section 63(a) provides that any member of a close corporation who is responsible for or knowingly permits the omission of the abbreviation 'CC' after the name of the close corporation shall be liable to any person who enters into any transaction with the close corporation from which a debt arises, while he is not aware that he is dealing with a close corporation. Haygro based its claim in the alternative on section 65 of the Act which provides that whenever a court finds that the incorporation of, or any act by, a corporation constitutes a gross abuse of the juristic personality of the corporation as a separate entity, the court may declare that the corporation is deemed not to be a juristic person in respect of the rights and obligations of the corporation.

Van der Merwe and Cilliers were the members of Toitbert Vleismark CC which traded as Mr Meat Man at the premises known to Haygro. They denied that they were the managers of the business and alleged that others, related to them, were the managers of the business.

## THE DECISION

Haygro had not known of the existence of Toitbert Vleismark CC when it entered into transactions with Mr Meat Man. There had been no reference to the close corporation in any of the paperwork connected with the transactions, and it had accordingly not taken any precaution, such as the obtaining of suretyships from the members of the close corporation, for its own protection. The result of this was that the close corporation had abused its juristic personality as a separate entity.

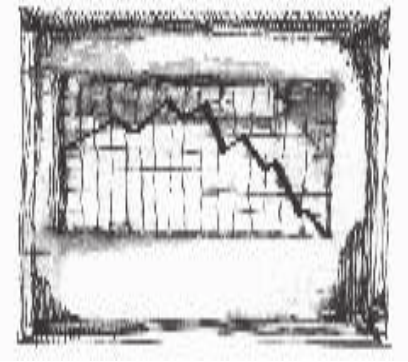
Section 65 of the Act conferred on the court a wide discretion in circumstances such as these. The court was entitled to make an order in terms of this section, as well as in terms of sections 63(a) and 23 of the Act. It was accordingly ordered that both Van der Merwe and Cilliers were jointly and severally liable to Haygro for payment of the sum of R85 305.

# *MILLMAN N.O. v MASTERBOND PARTICIPATION BOND TRUST MANAGERS (PTY) LTD (UNDER CURATORSHIP)*

A JUDGMENT BY FRIEDMAN JP and FARLAM J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
19 AUGUST 1996

1997 (1) SA 113 (C)

***Insolvency***



***In determining whether a person's assets exceed its liabilities, that person's obligations undertaken as surety and co-principal debtor may be taken into account for the purposes of assessing the extent of liabilities, subject to any necessary adjustment for the purposes of bringing into account the person's right of recourse against the principal debtor.***

## THE FACTS

In January 1992, Fancourt Properties (Pty) Ltd ('Properties') bound itself as surety and co-principal debtor with Fancourt Holdings (Pty) Ltd ('Holdings') in favour of the Masterbond Group of companies for the due performance of all of Holdings' obligations toward the Masterbond Group. As security, Properties agreed to pass a bond over all of its immoveable property. The Masterbond Group included Masterbond Participation Bond Trust Managers (Pty) Ltd and the other two defendants.

In August 1992, Properties passed mortgage bonds over its immoveable properties. The total amount secured by the bonds was R24,9m. In December 1992, the curators of the Masterbond Group placed Properties under provisional liquidation, and a final order of liquidation was granted in March 1993.

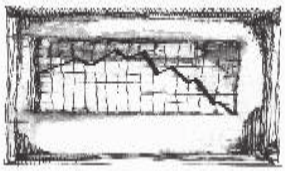
The liquidators of Properties brought an action in terms of sections 26 and 29 of the Insolvency Act (no 24 of 1936) against the Masterbond Group companies to set aside the suretyship agreement and the mortgage bonds. They alleged that at the time the suretyship agreement was entered into, Holdings' obligations toward the Masterbond Group exceeded R83m, so that the effect of Properties' suretyship undertaking was to cause Properties' liabilities to exceed its assets, having regard to the absence of any counter-performance to be given for the suretyship undertaking, and the limited right of recourse Properties had against Holdings. The liquidators alleged that the suretyship agreement was a disposition without value, alternatively a disposition preferring the Masterbond Group companies over other creditors, alternatively a disposition made with the intention of preferring those companies over other creditors at a time when Properties' liabilities exceeded its assets.

The Masterbond Group companies excepted to the claim on the grounds that it did not allege facts to support the allegation that the liabilities of Properties exceeded the value of its assets as required by sections 26 and 29 of the Act. The exception was based on the contention that by entering into the suretyship agreement, Properties had undertaken only a contingent liability, which was not a liability as referred to in either of those sections. The liquidators contended that the liability incurred by Properties was not a contingent liability.

## THE DECISION

The fact that the surety's liability is accessory does not mean that it is also contingent. There is no authority to this effect, and no authority to indicate that the liability of a surety is merely contingent. The debt of the surety is enforceable as soon as the principal debtor is in default, subject to the surety's right to require that enforcement first be directed at the principal debtor. Where the surety is also a principal debtor however, that proviso does not apply, and the surety's debt is enforceable immediately and without condition.

The liability of a surety and co-principal debtor is not contingent unless the principal debt is itself contingent. The facts of the present case did not show the principal debt—that of Holdings—to be contingent. To determine whether the liabilities of the surety—those of Properties—exceeded its assets, its obligations undertaken as surety and co-principal debtor had to be taken into account. Equally, to the extent that it had a realisable right of



recourse, a corresponding amount had to be taken into account as an asset. The claim as framed by the liquidators included an acceptance of the potential effect of a right of recourse.

The claim did allege sufficient facts to support the allegation that the liabilities of Properties exceeded the value of its assets. The exception was dismissed.

## *MONDI LTD v MASTER OF THE SUPREME COURT*

A JUDGMENT BY COMBRINCK J
NATAL PROVINCIAL DIVISION
28 NOVEMBER 1996

[1997] 1 All SA 36 (N)

***An application to review and set aside a decision by the Master of the Supreme Court to institute an enquiry in terms of section 417 must be made by way of review of the Master's decision, or temporary interdict. Such an application may not however, be made before the applicant has raised its objections to the enquiry at the enquiry instituted by the Master, if the Master's decision was regularly and properly made.***

### THE FACTS

Following the liquidation of Republic Stationery (Pty) Ltd, the liquidators requested the Master of the Supreme Court to authorise an enquiry into certain matters pertaining to the company, in terms of section 417 of the Companies Act (no 61 of 1973). The Master acceded to the request and subpoenaed the second applicant to appear at the enquiry.

The applicants brought an application for the setting aside of the subpoena and for an order that the respondents examine the second applicant by written interrogatory in terms of section 417(2) of the Act. Its reasons for seeking these orders were that the applicants had had dealings with Republic Stationery over a period of 20 years, and that the task of obtaining the documents relevant to that experience for the purposes of the enquiry was oppressive to them. The applicants gave as further reasons that the respondents had refused to advise them of the relevance and purpose of the enquiry, and that the second applicant was a very busy man who travelled frequently.

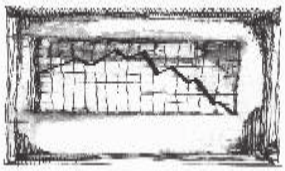
### THE DECISION

When ordering an enquiry in terms of section 417, and subpoenaing persons to attend, the Master acts independently and in the exercise of his discretion. If it is alleged that in doing so, the Master has acted oppressively, vexatiously or unreasonably, his actions may be challenged by way of review, or by way of temporary interdict pending a review.

However, because the subpoena was regularly issued in the present case, the proper procedure would have been for the applicants to attend the enquiry on the stipulated date, and raise the objections now being raised in the present application. If the Master had then ruled against them, they would have been entitled to approach the court for the relief they presently sought. The court at this stage had no power to intervene. The application was accordingly dismissed.

# *TURNOVER HOLDINGS (PTY) LTD v S.A.P.H.I. (PTY) LTD*





A JUDGMENT BY HORWITZ AJ
TRANSVAAL PROVINCIAL DIVISION
27 SEPTEMBER 1996

1996 CLR 819 (T)

***A liquidator's powers are confined to those given to him by the Master of the Supreme Court. If he acts beyond those powers, even if on the authority of an order of court which has expressly, but incorrectly, conferred on him the power to so act, his actions may be set aside and any contract concluded on the strength of them may also be set aside.***

## THE FACTS

S.A.P.H.I. (Pty) Ltd was placed under a provisional winding up order by an order of court which included orders that the Master of the Supreme Court appoint the provisional liquidator as a matter of urgency, that the provisional liquidator be authorised to raise funds against the assets of the company for the conduct of the business of the company, and that the provisional liquidator be authorised to sell and dispose of any assets of the company and receive and accept offers in respect of the assets of the company.

The Master appointed Powell provisional liquidator of the company, and expressly conferred on him the powers as set out in section 386(1)(a)(b)(c)(e)&4(f). Powell accepted a written offer from Turnover Holdings (Pty) Ltd for the purchase of two trading divisions of the company. The following day, the Master appointed two further provisional liquidators jointly with Powell. They refused to proceed with the sale. Turnover applied for an order compelling the company to proceed with the sale.

## THE DECISION

The final order, that the provisional liquidator be authorised to sell and dispose of any assets of the company and receive and accept offers in respect of the assets of the company, was not sanctioned by the Companies Act (no 61 of 1973).

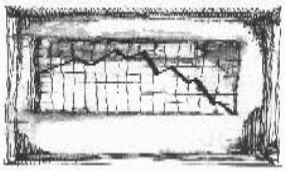
Section 386(5) of the Companies Act provides that the court may grant leave to a liquidator to do any other thing which the court may consider necessary for winding up the affairs of the company. This section, however, can only be invoked by a liquidator, and provides no ground upon which any other person can ask for relief. The liquidator not having been appointed at the time the order was granted, that section could not have provided any basis upon which the final order was granted.

The fact that the Master conferred on Powell the powers as set out in section 386(1)(a)(b)(c)(e)&4(f) indicated that all other powers were excluded. This interpretation of the section was in accordance with the interpretation of those provisions of the Companies Act (no 46 of 1926) which preceded those of the section. Such an interpretation was to the effect that powers outside of the provisions of the section were excluded from the liquidator's competencies. The power to sell and dispose of any assets of the company in liquidation, and receive and accept offers in respect of the assets of that company, were amongst those so excluded. It followed that Powell could have derived no power from the final order to sell the assets forming the subject matter of the sale to Turnover. Had he wanted to do so, he would have had to approach the Master for authority to act.

Turnover was therefore not entitled to enforce the sale. The application was dismissed.

# *GRAHAM N.O. v MASTER OF THE SUPREME COURT*





A JUDGMENT BY WILSON J
DURBAN AND COAST LOCAL DIVISION
20 JULY 1995

1996 CLR 797 (D)

***A liquidator is entitled to charge his commission on the gross proceeds of the sale of the assets in an insolvent estate, including the value added tax charged on the sale of such assets. For the purposes of calculating the value added tax payable on his own fee however, the value added tax component of the gross proceeds must be left out of account.***

## THE FACTS

Graham and the other applicant were the co-liquidators of SA Carpet Mills (Pty) Ltd. In the course of their administration of the winding up of that company, they charged value added tax on the sale of the company's assets. The liquidation and distribution account prepared by the joint liquidators showed their fee to be calculated on the sale price including the value added tax. The Master of the Supreme Court refused to confirm the account because of this.

The liquidators contended that the charge for value added tax constituted proceeds of the property of the company within the meaning of the word in the tariff governing the amount of their remuneration, and brought an application for an order that the Master's decision refusing to confirm the account be set aside.

## THE DECISION

Section 384(1) of the Companies Act (no 61 of 1973) provides that a liquidator is entitled to reasonable remuneration for his services to be taxed by the Master in accordance with the prescribed tariff. The prescribed tariff provides for remuneration as a percentage of the gross proceeds of assets sold from the insolvent estate. The difference between the parties was therefore whether the value added tax charged and collected by the liquidators was part of the gross proceeds of the property.

The 'proceeds' included whatever was received upon the sale of the assets. 'Gross' proceeds conveyed the idea of 'all' and excluded any idea of limitation. The phrase 'gross proceeds' thus was intended to mean the total receipts from the sale of the goods. In terms of the tariff, the liquidators were therefore entitled to charge a commission on the total amount received from the sale of the assets, including the value added tax.

In terms of the Value Added Tax Act (no 89 of 1991) the liquidators were responsible for the payment of any tax charged under the Act. The obligation was imposed on them in their representative capacity, ie representing the insolvent estate, and not only representing the Commissioner for Inland Revenue. The implication of section 67(3) of that Act was however that the liquidators were not entitled to charge value added tax on their own commission calculated on the VAT-inclusive price of the assets sold, but were to exclude the VAT component of the price when calculating the VAT payable on their own fee.

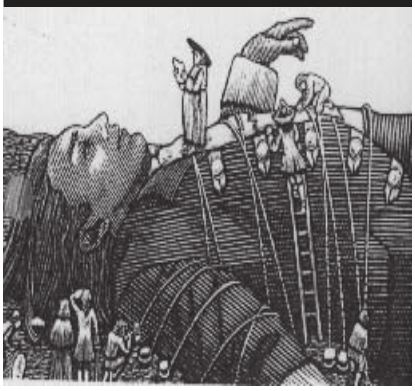
The Master's decision was set aside, and the calculation of the liquidator's remuneration confirmed.

# *PAM GOLDING FRANCHISE SERVICES (PTY) LTD v DOUGLAS*

A JUDGMENT BY PAGE J
DURBAN AND COAST LOCAL DIVISION
14 JUNE 1996

1996 (4) SA 1217 (D)

***Restraint of Trade***



***In deciding whether a covenant in restraint of trade should be enforced, it is necessary to determine that the interest apparently protected by the restraint is an interest actually held by the person in whose favour the restraint operates. A franchisor of an estate agency business will not have an interest in enforcing a restraint which merely restricts the business activities of that person upon termination of the franchise, the effect of which is to assist a competitor of the erstwhile franchisee but not the franchisor.***

## THE FACTS

In terms of a written agreement, Pam Golding Franchise Services (Pty) Ltd granted Douglas a franchise to conduct the activities of an estate agent under the name 'Pam Franchisor' within the Umhlanga Rocks/Durban North. Douglas was entitled to use the name 'Pam Golding' and logo, and was obliged to attend to the franchise business and account to Pam Golding for royalties of 7,5% on gross monthly income.

In terms of clause 12.1 of the agreement, Douglas undertook for a period of two years after termination of the agreement, not to be interested or concerned in any business, firm, company or close corporation which carried on a business similar to or competitive with that carried on by Douglas under the agreement, within the franchise area.

During the operation of the agreement, a dispute arose between the parties concerning the payment of royalties. As a result, Douglas closed the business premises in which she had been trading, and moved her activities to another office where she traded under the name Seeff Properties, an estate agency.

Pam Golding instituted proceedings against Douglas seeking various forms of relief, one of which was that Douglas be interdicted from being interested or concerned in Seeff Properties within the franchise area. Douglas opposed the application on the grounds that the restraint included in clause 12.1 was a covenant in restraint of trade which would be contrary to public policy to enforce inasmuch as it would amount to an unreasonable restriction on her freedom of trade.

## THE DECISION

Clause 12.1 undoubtedly incorporated a covenant in restraint of trade. One of the requirements for the successful enforcement of such a restraint is that the person desiring enforcement have an interest which it is entitled to protect.

Pam Golding's interest was that of a franchisor. Its interest lay in protecting the goodwill attaching to the Pam Golding name and insignia and the exclusivity of the right it could offer to franchisees. This interest however, was not protected by prohibiting Douglas from conducting the business of an estate agent within the prescribed area under an entirely different name. Such a prohibition might protect a competitor to whom Pam Golding might give a franchise, but it would not protect Pam Golding itself. While Pam Golding derived its franchise royalties from the income such a competitor might earn, this return would be attributable not to the business activities of the competitor, but to the exclusive right such a competitor would have to the Pam Golding name and insignia.

Clause 12.1 did not seek to restrain any protectable interest held by Pam Golding and was designed solely to eliminate competition unrelated to any matters which were the subject of the franchise agreement. The application was dismissed.

# *TEDCO MANAGEMENT SERVICES (PTY) LTD v GRAIN MARKETING BOARD*

A JUDGMENT BY GUBBAY CJ (McNALLY JA and EBRAHIM JA concurring)
ZIMBABWE SUPREME COURT
8 FEBRUARY 1996

1997 (1) SA 196 (Z)

***Cheques***

***A cheque is complete when issued by a computer on a pre-printed form on which details of the payee and signatures are then added. Where a signature is added to such a cheque without the authority of the signatory, the cheque may still be regarded as complete and operative as a cheque. In bringing an action against one who has taken the cheque and given consideration therefore, the true owner of such a cheque must allege that it was paid in circumstances which did not render the bank liable in terms of the cheque to the true owner of the cheque.***

## THE FACTS

A fraudulent employee of the Grain Marketing Board obtained cheques drawn by the board in favour of various payees to whom the board did not owe money. He did so by causing a computer and printer used by the board for the issuing of cheques to issue the cheques in favour of the various payees. He then unlawfully appropriated the cheques, indorsed them and obtained payment in terms of them from Tedco Management Services (Pvt) Ltd. Tedco presented the cheques to the drawee bank and obtained full payment according to their tenor.

The board brought an action for payment of the full amount of the cheques, basing its claim on section 85(1) of the Bills of Exchange Act Chap 277 (Z). The section confers on the true owner of a cheque marked 'not negotiable' which has been lost or stolen, a right of recovery against any person who has been the possessor of the cheque after the theft or loss and who either gave consideration for the cheque or took it as donee. The section requires that the cheque has been paid by the bank on which it is drawn in circumstances that do not render the bank liable in terms of the cheque to the true owner of the cheque.

Tedco excepted to the claim on the grounds that when the cheques were stolen, the particulars of the payee, amount, date and signature, were indorsed on them without authority, that accordingly they were not cheques as referred to in the Act and section 85(1) of the Act therefore did not apply. Tedco's second ground of exception was that because the signatures placed on the cheques were placed on them without the board's authority, the drawee bank had not been entitled to pay the cheques and it was therefore liable for payment of them to the true owner of the cheques, the board.

## THE DECISION

Section 85(1) of the Act certainly refers to a cheque which is complete. It does not apply to the theft of an incomplete, pre-printed cheque. However, the employee did not steal an incomplete cheque. He manufactured a complete cheque, and then stole it.

It could also not be said that the cheques were incomplete because the signatures on them were unauthorised. Even if they did bear forged signatures, the cheques were properly regarded as cheques and not wholly inoperative. The first ground of exception was dismissed.

As far as the second exception was concerned, it was true that the drawee bank would be liable to the board if it had paid forged cheques or cheques upon which signatures had been placed without the authority of the signatories. There were exceptions to this liability, and it was possible that the bank fell within these exceptions. To accommodate these, the board's claim ought to have alleged that the bank had paid the cheques in circumstances which did not render it liable to the true owner of the cheques. The second exception was therefore upheld.

# *BASIL READ SUN HOMES (PTY) LTD v NEDPERM BANK LTD*

*Cheques*

A JUDGMENT BY STREICHER J
WITWATERSRAND LOCAL DIVISION
24 OCTOBER 1996

1996 CLR 830 (W)

***It is only the true owner of a cheque that can bring an action under section 81 of the Bills of Exchange Act (no 34 of 1964). If therefore the cheque in question is stolen, either directly or by false pretences, the theft may prevent the payee from becoming the true owner of the cheque, and thus deny him any right of recovery under this section.***

## THE FACTS

The United Building Society drew 12 cheques in favour of Basil Read Sun Homes (Pty) Ltd, crossed them and marked them 'not negotiable'. The cheques were taken from the United and paid into a suspense account and used by the depositors for their own purposes. The depositors stated that they considered themselves entitled to the money and that in depositing the money they were not doing anything wrong. In fact, they knew that they were not entitled to the cheques, and took them with the intention to steal.

United Bank paid the cheques in the belief that the first defendant or Nedperm was entitled to the cheques. The cheques were paid by the drawee bank under circumstances which did not render that bank liable in terms of the Bills of Exchange Act (no 34 of 1964). Nedperm Bank Ltd became a possessor of the cheques after the theft, and gave consideration for the cheques.

Basil Read Sun Homes (Pty) Ltd took cession of United Building Society's right of claim against Nedperm, and brought an action against Nedperm for payment of the total amount of the cheques.

## THE DECISION

Section 81(1) of the Bills of Exchange Act provides that if a cheque is stolen or lost while it was crossed and marked 'not negotiable' and paid by the drawee bank under circumstances that do not render that bank liable in terms of the Act to the true owner of the cheque for any loss he may sustain owing to the cheque having been paid, the true owner shall be entitled to recover any loss from any person who was a possessor of the cheque after the theft or loss and either gave consideration therefor or took it as a donee.

To recover loss under this section, the plaintiff must show that the cheque was stolen and that it is the 'true owner' of the cheque. On the facts of this case, the defendants had no authority to collect the cheques on behalf of Basil Read. Accordingly, Basil Read could not have become the true owner of the cheques.

Even if it were held that ownership of the cheques had passed to the defendants because the theft from United had been one by false pretences, Basil Read would still not be the owner of the cheques, and therefore not entitled to recover in the particular circumstances of the case.

Basil Read's claim was accordingly dismissed.

# *STROUD v STEEL ENGINEERING CO LTD*

A JUDGMENT BY FLEMMING DJP
WITWATERSRAND LOCAL DIVISION
30 APRIL 1996

1996 (4) SA 1139 (W)

***Prescription***

***An amendment to particulars of claim may operate with retrospective effect, but this cannot mean that the Prescription Act (no 68 of 1969) does not apply to the amended claim. A defendant faced with an amendment to a claim brought against him is therefore still entitled to defend the claim on the grounds that it has prescribed, if the relevant time period for extinction of the debt as described in the amended summons has run by the time the amendment was served on him.***

## THE FACTS

Stroud brought an action against Steel Engineering Co Ltd based on the alleged repudiation of an employment agreement entered into between the parties. He later sought to amend his particulars of claim by depending not on a repudiation of the agreement, but on enforcement of rights to which he would have been entitled as employee under Steel Engineering's benefit fund rules, in particular the rights pertaining to disablement benefits.

Steel Engineering opposed the amendment on the grounds that by allowing the amendment, it would be precluded from raising the defence of prescription, a defence it would have been entitled to raise if the new cause of action had been instituted by the issue of a separate summons.

## THE DECISION

Assuming that the amendment would have introduced a new cause of action not previously pleaded, Steel Engineering would still be entitled to plead the defence of prescription. It was therefore in no worse position than it would have been were the amendment to be disallowed and Stroud forced to institute a separate action.

If Stroud were to argue that section 15(1) of the Prescription Act (no 68 of 1969) protects him—because that section provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt—this could be answered by pointing out that prescription is not interrupted by any summons issued by a plaintiff, but only by a process whereby the plaintiff claims payment of a 'debt'. The question would be whether or not Stroud's claim, as set forth in the amendment, was discernible in the unamended summons. If not, and the relevant time period in respect of it had passed, prescription would have run against it, and the claim would be successfully met with the defence of prescription.

The amendment was allowed.

# Current Commercial Cases

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# *SINGH v SANTAM INSURANCE LTD*

A JUDGMENT BY SCHUTZ JA (CORBETT CJ, FH GROSSKOPF JA, MARAIS JA and OLIVIER JA concurring)
SUPREME COURT OF APPEAL
17 SEPTEMBER 1996

1997 (1) SA 291 (A)

***Enrichment***

***A lien created because of work done to the property of another is extinguished as soon as the person having effected the work is paid.***

## THE FACTS

Santam Insurance Ltd insured Singh's car. The car was involved in an accident, and Santam, in terms of its obligation to indemnify, instructed Hutton Panelbeaters to repair the car. It paid Hutton R48 341,09 for the repairs it had effected. The insured removed the car from Hutton Panelbeaters, and then returned it to that firm, not being satisfied with the repairs as effected. Santam then took possession of the car from Hutton Panelbeaters.

Santam refused to return the car to Singh because none of the insurance premiums had been paid. It alleged that it had a lien over the car as a result of its payment to Hutton Panelbeaters representing the necessary repairs which had been effected to the car.

Singh applied for return of the car, alleging that she was the owner of the car and that Santam had unlawfully dispossessed her of it.

## THE DECISION

The lien which originally arose was one enjoyed by Hutton Panelbeaters. It ended when Santam paid Hutton. This was so whether the lien was considered an enrichment lien, prevailing against Singh, the owner, or a debtor and creditor lien, prevailing against Santam, the party with which Hutton contracted. Payment to Hutton had the effect of ending the impoverishment brought about by the work it had done on the car.

Santam contended that it acquired its own lien. However, after it obtained possession of the car, it incurred no expenditure on the car and made no improvement to it. This would be required for Santam to establish that it had a lien. Santam contended that it possessed the car through Hutton having held the car as its agent alternatively having authorised Hutton to proceed with the repairs. However, although in terms of the insurance policy, Santam had the right to take possession of the car, this power had not been exercised, and there was no ground upon which Santam could lawfully take possession of the car.

The appeal was upheld.

# *BOWMAN N.O. v FIDELITY BANK LTD*



A JUDGMENT BY HARMS JA (VAN HEERDEN JA, EKSTEEN JA, NIENABER JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 1996

[1997] 1 All SA 317 (A)

***A payment made ultra vires (beyond the power) of a statute is a prime example of a payment entitling the person having paid to recovery of the amount so paid.***

## THE FACTS

The liquidators of a company and trustees of two individuals associated with the company agreed to pay Fidelity Bank Ltd the sum of R640 000 in respect of three secured claims it had against the insolvent company and estates of the individuals. The court assumed that the bank should have been paid in terms of section 113(3) of the Insolvency Act (no 24 of 1936) and that because it was not, the agreement was ultra vires (beyond the powers) of the liquidators.

When the bank was paid, it was overpaid R220 000. The liquidators claimed repayment of this sum. The court decided the question whether or not the liquidators had framed a claim entitling them, in law, to repayment.

## THE DECISION

A basis upon which the liquidators were entitled to bring their claim was unjustified enrichment. The condictio indebiti entitled recovery where a payment had been made to someone to whom nothing was owed. An ultra vires payment was a prime example of such a payment, and upon this basis, the liquidators would be entitled, in law, to claim repayment.

The fact that no dividend had yet been declared in the insolvent estates did not mean that there was still no proof that the overpayment was made to persons to whom nothing was owed (the dividend being an amount that might yet become owing to the bank). The dividends would only become payable upon confirmation of the liquidation and distribution account. At the time of overpayment, it was still uncertain whether any dividend would be payable and if so, how much. This therefore provided no reason for holding that the liquidators owed anything to the bank, and therefore did not pay to someone to whom nothing was owed.

Whether or not the overpayment was negligently made was not a matter which the liquidators had to satisfy the court about: the onus was not on them to prove that the overpayment was not negligently made.

The liquidators therefore had framed a claim entitling them, in law, to payment.

# *WILKENS N.O. v BESTER*



A JUDGMENT by VAN HEERDEN JA (EM GROSSKOPF JA, MARAIS JA, SCHUTZ JA and STREICHER AJA concurring) SUPREME COURT OF APPEAL 13 MARCH 1997

1997 CLR 213 (A)

***A payment made in the mistaken belief that a condition for payment has been fulfilled may be recovered under the enrichment action of the condictio indebiti, as can a payment made in the mistaken belief that the debt is not conditional at all.***

## THE FACTS

Bester was the managing director and employee of Bester Beleggings Bpk, and a member of Die Bester Beleggings Pensionfonds.

In April 1992, the administrator of the pension fund paid Bester the sum of R500 000 being an 'advance on actuarial reserve pending completion of solvency test by actuarial section'. The payment was made on the understanding that an amendment to the pension fund rules allowing the payment was valid. The payment was in fact not valid because the amendment had not been approved and registered as required by section 12(1) of the Pension Funds Act (no 24 of 1956).

In January 1993, the administrator of the fund made a further payment to Bester of R830 000, this payment being described in the same manner as the first payment. Bester signed an acknowledgement that he had received both advances on the terms as described when they were made. In March 1993, Bester's estate was sequestrated.

The pension fund was then put into liquidation, and in the distribution account of the fund drawn up by the liquidators, an amount of R1 843 590,99 was attributed to Bester as his total share in the assets of the fund. The account noted that the payments already made to Bester were unlawful, and that the amount of Bester's share attributed to him in the account did not include these amounts.

Bester brought an application against Wilkens, the liquidator of the pension fund, and the Registrar of Pension Funds, in which he sought an order declaring that he was entitled to payment of the sum of R1 843 590,99 from the assets of the pension fund. Bester contended that because the two payments he had received were unlawful, they were not pension payments so that he remained entitled to payment of his share of the assets of the pension fund. The liquidators of the fund contended that the two payments made to Bester were pension money and could therefore be deducted from the amount due to him as his share of the assets of the pension fund.

## THE DECISION

**per Van Heerden JA (Schutz JA and Streicher JA concurring)**

The two payments made to Bester could not constitute discharge of the pension fund's indebtedness to Bester because when they were made, Bester was not entitled to payment of any amount from the pension fund. The payments were made without there being any indebtedness, and accordingly the pension fund had been immediately entitled to repayment of them when they were made. The result of this was that, had Bester's estate not been sequestrated, the pension fund would have been entitled to apply set off, and subtract the amounts paid to Bester from the amount due to him from the assets of the fund. The effect of the sequestration was however, to require determination of the basis of the pension fund's right of recovery (since if the amounts paid did constitute pension money, set off could not apply).

When the payments were made to Bester, Bester had a conditional right to payment of them— provided the conditions for payment prescribed in the pension fund rules existed, Bester would be entitled to payment. It is trite law that if a conditional debt is paid in the belief that thecondition has been fulfilled, the amount paid can be recovered under the condictio indebiti. Such

a right of recovery exists where the debtor pays mistakenly thinking that the condition has been fulfilled, or where the debtor pays mistakenly thinking that the debt was not conditional at all. In the present case, the pension fund administrator paid thinking that the debt was not conditional at all, ie thinking that the amendment to the pension fund rules allowing the payment was valid. In these circumstances, the fund was entitled, under the condictio indebiti, to repayment of the amount mistakenly paid.

**per Marais JA (EM Grosskopf JA concurring)**

The debt which the pension fund intended to discharge was not conditional on anything. The parties intended it to be the discharge of a debt then existing and without condition. Both considered the payment to be the payment of a claim which Bester had against the assets of the pension fund, and the performance of a contractual obligation by the pension fund. Bester was therefore not entitled to claim further performance by way of payment of money which he had already received.

The claim made by Bester was itself unacceptable. The ground upon which he asserted that the payment made to him did not constitute discharge of the pension fund's indebtedness to him was that it had been made unlawfully. However, the performance of the fund's obligations in this manner, while thus appearing not to be based on a pre-existing debt, could properly be regarded as an effective discharge of its obligations toward him.

The appeal was upheld.

## *SANDTON SQUARE FINANCE (PTY) LTD v VIGLIOTTI*

A JUDGMENT BY DE VILLIERS J
WITWATERSRAND LOCAL DIVISION
18 OCTOBER 1996

1997 (1) SA 826 (W)

***The owner of property may secure the ejectment of a person from property who asserts a right of retention by furnishing a guarantee for the improvements effected to the property.***

### THE FACTS

The second respondent occupied certain premises owned by Sandton Square Finance (Pty) Ltd but failed to pay rent for a period of ten months. It had effected improvements to the premises, enhancing them in value by R280 900.

Sandton Square sought the ejectment of the second respondent. In applying for the order of ejectment of the second respondent, it tendered a guarantee of R280 900 to justify the exercise of the court's discretion to issue such an order. The second respondent denied that the court had a discretion to deprive it of its right of retention arising from the improvements effected to the premises.

### THE DECISION

The court did have a discretion to allow security to be given in substitution of an improvement lien. There was no reason in law or logic why the court should have such a discretion in the case of a debtor and creditor lien and not in the case of an improvement lien.

There were no reasons why the guarantee offered by Sandton Square should not be accepted as a suitable guarantee. The order of ejectment was accordingly granted, subject to delivery of the guarantee as tendered by Sandton Square.

# *FUNDSTRUST (PTY) LTD v VAN DEVENTER*

A JUDGMENT BY HEFER JA
(EKSTEEN JA, NIENABER JA, HARMS JA and SCHUTZ JA concurring)
SUPREME COURT OF APPEAL
8 NOVEMBER 1996

[1997] 1 All SA 644 (A)

***Corporations***

***The liability imposed on directors in terms of section 53(b) of the Companies Act (no 61 of 1973) is a liability arising from debts contracted during the period of office of the directors and not a liability arising from any other cause such as the liability to repay payments amounting to preferences which are voidable under the Insolvency Act (no 24 of 1936).***

## THE FACTS

After the winding up of Fundstrust (Pty) Ltd, the liquidators of the company brought an action against George Huysamer & Partners Inc for payment of R80,5m. The action was brought upon the allegation that the sum paid by Fundstrust to George Huysamer was paid shortly before the winding up, and was impeachable as a voidable or undue preference in terms of sections 29 and 30 of the Insolvency Act (no 24 of 1936).

While this action was pending, the liquidators brought an action against Van Deventer and twelve co-defendants for an order declaring them liable jointly and severally with George Huysamer & Partners Inc for any amount the latter might be ordered to pay in the action brought against that company, and directing them to pay such amounts in the event of the alleged preferences being set aside. Van Deventer and the twelve co-defendants were directors of George Huysamer & Partners Inc, and the action brought against them was based on the provisions of section 53(b) of the Companies Act (no 61 of 1973). That section provides that the memorandum of a private company may provide that the directors and past directors shall be liable jointly and severally together with the company, for such debts and liabilities of the company as were contracted during their periods of office, in which case the directors shall be so liable.

Van Deventer excepted to the claim against him on the grounds that the directors' liability referred to in section 53(b) is restricted to contractual liability and does not include the company's statutory liability such as that imposed by sections 29 and 30 of the Insolvency Act.

## THE DECISION

The question was what is meant by 'contracted' in the phrase 'for such debts and liabilities of the company as were contracted during their periods of office': is the word descriptive of the *type* of debt for which the directors are liable, or is it merely descriptive of the *fact* that the debt arises during the period in question? If the former, the exception raised by Van Deventer was good.

It was impossible to determine the answer to this merely upon a linguistic interpretation of the phrase itself—recourse to the history of the Companies legislation was required. It appeared that section 53(b) followed the introduction of personal liability in previous legislation, the motivation for which had been to enable members of organised professions to incorporate while retaining liability for debts of their companies contracted during their period of office. It was not an attempt to impose the liability of partners. Had such extensive liability been intended, the provisions of section 185bis(1) of the Act would have been employed. The director's liability appeared therefore to be a liability arising from contractual obligations assumed for the duration of the director's office.

The fact that this interpretation might lead to anomalies—principally in that the director might be liable for contractual obligations but not delictual obligations or those arising from enrichment or the imposition of statutory charges—was not a reason to reject it. Such anomalies were equally counterbalanced by others—liability arising from voidable or undue preferences arose upon the winding up of the company, a date on which the directors then in office might not have been in office when the payments giving rise to the undue preferences were made.

The exception was upheld.

# *GOLF ESTATES (PTY) LTD v MALHERBE*



A JUDGMENT BY FRIEDMAN JP and FARLAM J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
19 AUGUST 1996

1997 (1) SA 873 (C)

***A shareholder may not bring an action against a person alleged to have committed a wrong against his company resulting in the diminution in the value of his shares if the company itself has a right of action against the wrongdoer. This principle may be equally applied whether the wrong arises from contractual obligations or delictual obligations.***

## THE FACTS

Fancourt Properties (Pty) Ltd owned land on which a hotel was being constructed, in conjunction with the development of a country club on adjacent land. A company in the Masterbond Group of companies financed the development which was attended to by Group Five Construction (Pty) Ltd.

In October 1991, the Masterbond Group companies were placed in curatorship and Malherbe and the other respondents were appointed the curators. Group Five did not receive the payments due to it in terms of its building contract. It refused to continue the devlopment and asserted its builder's lien.

A compromise was then agreed to. In it, Fancourt and its associated company, Fancourt Holdings (Pty) Ltd, were given a moratorium for the payment of capital under the bonds passed in favour of Masterbond, and Fancourt bound itself as surety for the fulfilment of Holdings' obligations toward Masterbond. Fancourt passed surety bonds over its property. The compromise was sanctioned by the court.

The compromise failed, both Fancourt companies were placed in liquidation, and their properties were sold.

Golf Estates (Pty) Ltd, the sole shareholder of Fancourt Properties, brought an action against the curators alleging that in promoting the compromise, they had breached a duty of care owed to them. The duty of care was alleged to consist in a failure to disclose that in their opinion the compromise was fatally flawed and probably could not work, and in the event that it did not work, they would liquidate the Fanourt companies and rely on the suretyship obligation undertaken by their company. As a result of having done so, the hotel owned by Fanourt Properties had been sold, and the value of Golf Estates' shareholding had been rendered worthless.

The curators excepted to the claim on the grounds that (i) Golf Estates as shareholder had no right of action in respect of damages allegedly suffered by its company, the company being a separate legal persona, and (ii) since the curators' actions were taken in terms of a court order, they were not actionable.

## THE DECISION

It is a rule of company law that a shareholder who complains that a wrong done to his company has resulted in a diminution in value of his shares has no claim against the wrongdoer, if the company itself has a claim against the wrongdoer for the loss suffered by it as a result of the wrong. This is because to allow a shareholder a claim in such circumstances would result in a potential double recovery against the wrongdoer, one by the shareholder and the second by the company.

Golf Estates argued however, that in this case Fancourt had no right of action against the curators on the basis of the claim as set out in the summons because the curators owed no duty of care to it. However, in reaching the compromise in which Fancourt undertook the obligations of a surety, Fancourt had contracted with the curators in their capacity as curators (and not in their personal capacities) and on the basis of that contract could bring a claim against them. Even assuming that Fancourt had no claim against the curators based on the contract, as one of the parties which might be affected by the court order, the curators owed it a duty of care based on delict.

The loss sought to be recovered

by Golf Estates was therefore merely a reflection of the loss suffered by Fanourt. The first exception was upheld.

As far as the second exception was concerned, it was contended that Golf Estates was not entitled to go behind the court's order sanctioning the compromise. The court's sanction of the compromise was however, merely an instruction in terms of section 6(5) of the Financial Institutions (Investment of Funds) Act (no 39 of 1984) and it was doubtful whether this was an 'order' which Golf Estates was not entitled to go behind. Golf Estates was in any event not attempting to 'go behind' the court order, nor to set it aside.

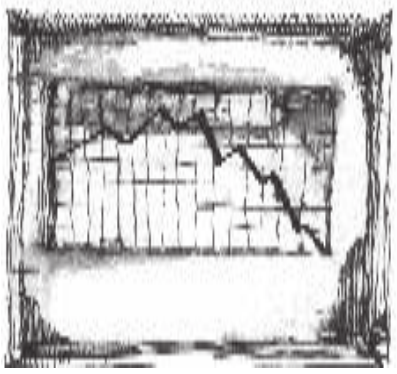
The second exception was dismissed.

## *SYFRETS BANK LTD v SHERIFF OF THE SUPREME COURT SCHOERIE N.O. v SYFRETS BANK LTD*

A JUDGMENT BY COMBRINK J
DURBAN AND COAST LOCAL DIVISION
29 OCTOBER 1996

1997 (1) SA 764 (D)

***Insolvency***



***The attachment of property by the Sheriff in execution proceedings creates a judicial pledge over the property so that the judgment debtor loses the right to reclaim the property after a sale pursuant to such attachment. The judicial pledge comes to an end upon the liquidation of the judgment debtor and the liquidator is then entitled to decide whether to abide any such sale or abandon it.***

### THE FACTS

Syfrets Bank Ltd obtained held a mortgage bond over a property owned by a close corporation. It foreclosed, and obtained judgment against the close corporation.

At a sale in execution conducted by the Sheriff of the Supreme Court, the bank bought the property. Directly afterwards, the bank, the Sheriff and a trust, which had been competing for the purchase of the property, agreed that the trust could purchase the property at the price at which it had been knocked down to the bank. A representative of the trust then signed the conditions of sale.

Some weeks later, the close corporation was put into liquidation. The liquidator gave notice that he repudiated the sale. The bank then applied for an order that it had lawfully purchased the property. In a separate application, the liquidator applied for an order that he was entitled to and lawfully cancelled the sale.

### THE DECISION

The first question was whether the property was sold to the bank or the trust. The Sheriff sold the property in terms of Rule 46 of the Uniform Rules of Court. The rule provides that such a sale is to be by public auction, without reserve, and to the highest bidder. In terms of this rule, the property was validly sold to the bank when the hammer fell on its bid at the auction. No substitution of purchaser was later possible, because at the fall of the hammer and upon conclusion of the first sale, the Sheriff had completed his duties and could not undo the sale other than by obtaining cancellation thereof by a judge in chambers, as provided for in Rule 46(11). The property was therefore purchased by the bank and not the trust.

The second question was whether the liquidator was entitled to and lawfully did cancel the sale of the property to the bank. The attachment of the property by the Sheriff created a judicial pledge, which had the effect that as soon as the sale of the property took place, the close corporation was no longer able to redeem its property. Liquidation having supervened following the sale, the liquidator would normally have had an opportunity of

deciding whether to abide by the sale or abandon it. The existence of the judicial pledge however, raised the question whether this option still lay with the liquidator, or had been removed from him because of its existence.

The liquidation of the close corporation brought to an end the judicial pledge. So much was clear from a reading of the various provisions of the Companies Act (no 61 of 1973) which are concerned to ensure an even-handed distribution of assets amongst creditors. In this respect, the rule relating to a judicial pledge in the case of insolvency of an individual is similar to the case of the liquidation of a corporate entity. The judicial pledge having been brought to an end, nothing stood in the way of the liquidator exercising the option to abide the sale or abandon it.

The liquidator had therefore lawfully repudiated the sale in execution at which the bank had purchased the property.

## *FITTINGHOFF v HOLLINS*
## *FITTINGHOFF v STOCKTON*

A JUDGMENT BY HOFFMAN AJ
WITWATERSRAND LOCAL DIVISION
25 JUNE 1996

1997 (1) SA 535 (W)

***1. When a creditor furnishes a calculation of the amount due from a debtor and the debtor fails to furnish an alternative calculation, then the amount due will be that which is reflected in the creditor's calculation, and the debtor will not be entitled to dispute the creditor's calculation because it has been provided in an acknowledgement of debt that the amount there stated to be due is subject to the debtor's own reconciliation of that amount. 2. A creditor does not waive its right to hold its debtors jointly and severally liable, as provided for in its security documentation, merely because it calculates the amounts due from each such debtor in separate schedules. 3. A debtor which passes a bond in order to secure its indebtedness to a creditor makes a disposition of property. Such a disposition prefers one creditor above another where the debtor is then in a precarious financial position and has stopped paying his creditors.***

### THE FACTS

Fittinghoff and the other applicants sold to Hollins, Stockton and a certain Thorp, 50% of the members' interest in and claims against Grasshopper Projects CC. The buyers jointly and severally undertook liability to Fittinghoff to pay the purchase price.

The buyers did not pay the second and final instalment of R470 000 due on 31 December 1992. In November 1995, Hollins and Stockton signed an acknowledgement of debt in favour of the sellers for payment of the sum of R630 606,74 being the amount then due. The document recorded that its signing was subject to the debtors' own reconciliation of this amount.

In November 1994, the sellers had obtained judgment against Thorp for payment of R729 301,85 being the amount then outstanding under the sale agreement. In January 1996, Stockton bonded his house to secure an indebtedness to Norville Hardware & Trading Co (Pty) Ltd.

The sellers applied for payment by Hollins of the sum of R630 606,74, and as against Stockton, for the sequestration of his estate. The application for sequestration was based on the allegation that the bonding of Stockton's house was an act of insolvency in terms of section 8(c) of the Insolvency Act (no 24 of 1936).

### THE DECISION

The claim for R630 606,74 was supported by a schedule setting out a reconciliation of the amount owing. Hollins had not prepared any alternative schedule, and Stockton's alternative schedule differed from that of the sellers in their favour. There being no answer to the calculations produced by the sellers, the requirement of reconciliation referred to in the acknowledgement of debt fell away.

It was argued that the liability of the buyers was not joint and several because the schedule of calculations prepared by the sellers had been divided equally. This however, did not show that the sellers had waived their right to hold the buyers jointly and severally liable. At best, the schedules were equivocal on this issue, having merely applied payments made by the buyers to

their one-third share of the debt. The agreement in any event, provided that no amendment or extension of time, waiver or relaxation of any term of the agreement would be binding unless recorded in a written document signed by the parties.

It was also argued that because the buyers had a counterclaim in excess of any claims the sellers might have, they were excused from payment. The counterclaim alleged by them were that a company in which they were shareholders and directors, Stockmark (Pty) Ltd, had been subjected to malicious rumours spread by the sellers, that these rumours had worsened Stockmark's already precarious financial position causing it to lose the profits from projects expected to have materialised from them. The counterclaim was however, unsubstantiated. Stockmark was admittedly already in a precarious financial position and there were no indications as to how the company would have extracted itself from this position and start making profits again.

The sellers were therefore entitled to an order for payment of R630 606,74 by Hollins, such liability to be joint and several with that of Thorp.

Section 8(c) of the Insolvency Act provides that a debtor commits an act of insolvency if he makes any disposition of property which has the effect of prejudicing his creditors or preferring one creditor above another. The passing of the bond over Stockton's property was a disposition of his property. The question was whether or not that had the effect of preferring one creditor above another.

It is not uncommon that a bond is passed by a businessman to secure his debts. In the present case, Stockton did so at a time when he was indebted to the sellers in the amount of R630 606,74 and having last made a payment (of R20 000) in satisfaction of this debt seven months prior to passing the bond. His business interests had fallen on difficult times, and he had ceased paying his creditors. The passing of the bond did therefore have the effect of prejudicing creditors.

The sequestration of Stockton's estate being of advantage to creditors, an order for sequestration was granted.

## *GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL v GALLOWAY N.O.*

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
29 SEPTEMBER 1995

1997 (1) SA 348 (W)

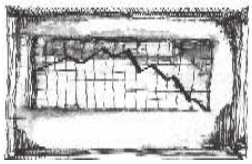
***A local authority may not prevent transfer of property in terms of section 50(1) of the Local Government Ordinance no 17 of 1939 (T) were the amounts referred to in that section are not amounts due in respect of the property but are due in respect of services provided to a consumer owning or occupying the property and section 89 of the Insolvency Act (no 24 of 1936) applies.***

### THE FACTS

The Greater Johannesburg Transitional Metropolitan Council supplied water and electricity to Demax (Pty) Ltd in terms of by-laws promulgated by the council , that is, after Demax had entered into a consumer agreement with it. Galloway, the liquidator of Demax, sold a property owned by Demax to the second respondent. At that time, the company had not paid for the consumption of water on the property, as well as electricity and refuse removal charges for longer than the period of two years preceding its date of liquidation.

In terms of section 89(1) of the Insolvency Act (no 24 of 1936) any tax due on the sale of immovable property in respect of any period not exceeding two years preceding the date of liquidation forms part of the costs of realisation, and is payable out of the proceeds of the property. Section 89(5) defines 'tax' as any amount payable periodically in respect of the property to the State or provincial administration, if that liability is an incident to the ownership of the property. Section 89(4) entitles the liquidator to transfer of immovable property if he has paid the tax due on that property in respect of the two-year period referred to in section 89(1).

Galloway brought an application for an order declaring section 89



applicable to the amounts due to the council in respect of the charges imposed against it, and directing the council not to require payment for these disputed items. The application was granted by default. The council then applied for rescission of the judgment, and for this purpose had to show that it had grounds of opposition to Galloway's application which carried some prospect of success.

THE DECISION

Section 50(1) of the Local Government Ordinance no 17 of 1939 (T) provides that no transfer of land shall be registered unless all amounts for a period of three years immediately preceding the date of registration of transfer due in respect of such land for sanitary services or for water or electricity have been paid. If any of the amounts referred to in this section were, properly considered, not a tax as defined in section 89(5), the effect of section 89(4) was to relieve the liquidator from payment thereof. The question therefore was whether or not these amounts were taxes as defined in section 89(5).

The purpose of section 89(1) was to limit the impediment on a liquidator of realising property in the insolvent estate. There was nothing in the context or object of the section therefore to indicate that the amounts referred to in it, ie those in respect of the land to be transferred, were anything other than amounts merely causally or directly connected with the property itself. The charges were in respect of electricity, water and the removal of refuse and not in respect of the property. Since the charges were not in respect of the land at all, but in respect of the services themselves, the council was therefore not entitled to depend on section 50(1) toprevent transfer of the property.

The application for rescission was refused.

## *LANE N.O. v OLIVIER TRANSPORT*

A JUDGMENT BY PINCUS AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
19 AUGUST 1996

1997 (1) SA 383 (C)

***A court may exercise its discretion to validate a void payment made by a company after the commencement of its liquidation. In doing so, a court will take into account a number of factors including whether the liquidator consents to the disposition and there is a benefit to the company or its creditors.***

THE FACTS

On 20 January 1993, an application for the winding up of Cape Transport & Cargo Suppliers CC was lodged at the Bellville magistrate's court. On 10 February 1993, the close corporation paid R81 573,12 to Olivier Transport which was owned by a relative of the sole member of the close corporation. The close corporation was indebted to Olivier Transport in the amount of this payment. Olivier Transport alleged that the payment was made in terms of a cession of the close corporation's claim against a third party, the cession having been effected in favour of it.

The sum of R81 573,12 was paid to Olivier Transport from money collected from debtors of the close corporation by the attorney representing the close corporation, and on the instructions of its sole member. By arrangement with the petitioning creditor, the money so collected was to be held in trust by that attorney. The attorney also acted on behalf of Olivier Transport.

On 11 March 1993, the close corporation was finally wound up and Lane was appointed the liquidator. The close corporation was at all times unable to pay its debts.

Lane brought an action against Olivier Transport under section 341(2) of the Companies Act (no 61 of 1973) for repayment of the R81 573,12. Section 341(2) provides that every disposition of property by any company being wound up and unable to pay its debts made after the commencement of the winding-up shall be void unless the court otherwise orders. (Section 66 of the Close Corporations Act (no 69 of 1984) made section 341(2) applicable to the close corporation.)

THE DECISION

The obvious purpose of section 341(2) is to ensure that the property of a company threatened with winding up is not improperly distributed prior to the winding up, but is available for the satisfaction of the claims of creditors equally.

The payment made by the close corporation to Olivier Transport was clearly a disposition of property. The disposition would, in terms of section 341(2) be void, unless by the exercise of the court's discretion, it were ordered otherwise. The court's discretion would depend on the assessment of a number of factors, including whether the disposition was made in the ordinary course of the company's affairs or was an improper alienation, whether it was made to keep the company afloat or augment its assets, whether it was made to secure an advantage to a particular creditor, whether the recipient was aware of the winding up, the relative interests of creditors and recipient. Generally, a court will not validate such a disposition after the winding-up has commenced unless the liquidator consents and there is a benefit to the company's creditors.

In the present case, the payment was made by the close corporation. It therefore did not constitute payment in terms of a cession, but a disposition of the close corporation's property which in terms of section 341(2) was void. There were no reasons to exercise a discretion to validate the disposition. Olivier Transport was therefore obliged to repay the R81 573,12 to the close corporation's liquidator.

## *MILLMAN N.O. v PIETERSE*

A JUDGMENT BY FRIEDMAN JP and FARLAM J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
19 AUGUST 1996

1997 (1) SA 784 (C)

***A court retains jurisdiction to determine the expungement or otherwise of a claim made against an insolvent estate, notwithstanding the provision of determination of such claims outside the jurisdiction of the court.***

THE FACTS

After the liquidation of Fancourt Properties (Pty) Ltd, claims were lodged against the insolvent company arising from certain dividends declared by the company prior to liquidation. The claims were admitted to proof at the first meeting of creditors of the company.

The liquidators later sought the expungement of these claims. They brought an action for their expungement. Pieterse and the other defendants objected to the action on the grounds that the court had no jurisdiction to expunge the claims, its jurisdiction being limited to a review of the Master's decision in respect of the claim in terms of section 151 of the Insolvency Act (no 24 of 1936).

Section 151 provides that any person aggrieved by any decision of an officer presiding at a meeting of creditors may bring it under review by the court. Section 45(3) of the Act provides that if a trustee disputes a claim after it has been proved against an insolvent estate at a meeting of creditors, he shall report the fact to the Master, whereafter the Master may confirm, reduce or disallow the claim.

THE DECISION

A trustee may be a 'person aggrieved' as referred to in section 151 and he may bring review proceedings under that section to set aside a decision of the Master.

There is a strong presumption against the ouster of the court's jurisdiction, and the fact that there are remedies available outside of the jurisdiction of the court is not a conclusive indication that the court's jurisdiction has been ousted or curtailed. There were no words in the Act expressly excluding the jurisdiction of the court. On the contrary, the complicated nature of some factual disputes

might suggest that a court was the more appropriate forum for determination of a matter relating to a disputed claim against an insolvent estate. In the present case, the nature of the dispute suggested that the court was the more appropriate forum.

The defendants' exception was dismissed.

## *ROUX v THE MASTER*

A JUDGMENT BY ROOS J
TRANSVAAL PROVINCIAL DIVISION

1997 (1) SA 815 (T)

***A presiding officer at an inquiry in terms of section 152 of the Insolvency Act (no 24 of 1936) has the discretion to disallow the presence of the insolvent at the inquiry.***

### THE FACTS

Roux's estate was sequestrated. An inquiry into his insolvent estate was then held under section 152 of the Insolvency Act (no 24 of 1936). The presiding officer made a ruling that Roux was not entitled to be present during the presentation of evidence by a witness.

Roux applied for orders that the ruling be set aside, that he be entitled to be present during the presentation of evidence by all witnesses, to cross-examine them, to have a legal adviser during the inquiry and to present contradicting evidence.

### THE DECISION

An inquiry under section 152 of the Insolvency Act is intended to elicit information. Its object is not to secure an order which will operate against the insolvent. The presiding officer at such an inquiry may therefore exercise his discretion regarding the conduct of the inquiry without regard to the protection of those rights which would require protection were the inquiry to result in such an order.

The fact that the Constitution of the Republic of South Africa Act (no 200 of 1993) recognises the right to information required for the protection of a person's rights did not give Roux any greater right to the orders he sought.

The application was dismissed.

# *ABSA BANK LTD v BLUMBERG & WILKINSON*

A JUDGMENT BY ZULMAN JA (MAHOMED CJ, SMALBERGER JA, HARMS JA and SCOTT JA concurring)
SUPREME COURT OF APPEAL
17 MARCH 1997

1997 CLR 173 (A)

***Banking***

***A bank is entitled to debit its customer's account with the amount of any cheques drawn by the customer, despite there being no prior agreement specifically authorising the bank to do so in circumstances where the effect of paying on the cheques will be to create an overdraft not previously arranged.***

## THE FACTS

Blumberg & Wilkinson conducted a current account at Absa Bank Ltd. In terms of this arrangement, Absa was entitled to debit the current account with uncleared effects which were subsequently dishonoured. It was also a term of the arrangement that Absa was not obliged to honour cheques drawn on the account for which there were insufficient funds, or for which there were only uncleared effects.

In August 1992, five cheques totalling in value R1 145 000 were deposited in the current account. Absa confirmed to Blumberg & Wilkinson that of this amount, R995 000 was deposited to the account on 18 and 19 August. On 20 August, Blumberg & Wilkinson drew two cheques, for R70 000 and R15 000, in favour of third parties and these amounts were debited to the account. The five cheques were subsequently dishonoured, and Absa debited the current account in their total amount.

Absa brought an action against Blumberg & Wilkinson for payment of R85 000 being the total of the two cheques drawn on the account. Blumberg & Wilkinson defended the action on the grounds that Absa should not have permitted them to draw on the account while there were uncleared effects in the account and at a time when they did not know that the five cheques had been dishonoured.

## THE DECISION

The contract between the parties, as admitted by Blumberg & Wilkinson, entitled Absa to honour the cheques totalling R85 000 before the effects totalling R1 145 000 had been cleared. There was no agreement entitling Blumberg & Wilkinson to draw against uncleared effects. Absa was therefore entitled to debit the current account with the sum of R85 000.

Even if Absa in fact permitted Blumberg & Wilkinson to draw cheques against uncleared effects without there being an agreement to this effect—as it did—this would not excuse the latter from being liable to Absa to reimburse it the amount by which their account was consequentially debited. Any bank is entitled to honour cheques drawn by its customer, despite there being no prior agreement between bank and customer that cheques so honoured might result in the customer's account being brought into overdraft.

None of the facts pleaded by Blumberg & Wilkinson showed any reason why Absa should not have been entitled to debit their account with the sum of the cheques. They had not contended that Absa was estopped from holding them liable on the cheques.

Absa was entitled to payment of R85 000.

# *EERSTE NASIONALE BANK VAN SA v NOORDKAAP LEWENDEHAWE KOOPERSASIE BPK*

A JUDGMENT BY EKSTEEN JA (HEFER JA, HOWIE JA, OLIVIER JA and PLEWMAN JA concurring)
APPELLATE DIVISION
20 SEPTEMBER 1996

1997 (1) SA 299 (A)

***Suretyship***

***A Co-operative may undertake the obligations of a surety in respect of any entity, provided that the entity is reasonably necessary for the purposes of executing the objectives of the co-operative.***

## THE FACTS

First National Bank of SA Ltd lent R5,5m to Rainer Data Services (Pty) Ltd. The Northern Cape Livestock Co-operative stood surety for repayment of half of this loan. The co-operative's subsidiary acquired half of the issued shares in Rainer, it being the intention that Rainer would be used for the marketing of meat products in the Western Cape.

Rainer was put into liquidation, and the bank claimed payment from the co-operative in terms of its suretyship obligation. The co-operative defended the action on the grounds that section 52(1) of the Co-operatives Act (no 91 of 1981) prohibited the co-operative from standing surety for the obligations of Rainer.

Section 52(1) of the Co-operatives Act prohibits a co-operative from becoming a surety for any undertaking in which the co-operative has obtained shares, without the authority of a special resolution. The section applied to an undertaking as referred to in section 49(1)(f) of the Act, ie one whose shares had been acquired with the approval of the Minister of. Section 49(1)(g) entitles a co-operative to become a surety for the due fulfilment of the obligations of any person, subject to the provisions of section 52.

The co-operative contended that no special resolution as required by section 52(1) had been obtained, and that the Minister's approval to the acquisition of the shares had not been obtained.

## THE DECISION

Since the Minister did not give his approval to the acquisition of the shares, section 49(1)(f) did not apply. Section 49(1)(g) did apply: it entitled the co-operative to stand surety for Rainer, as it entitled the co-operative to stand surety for any entity, provided it was an entity which was reasonably necessary for the purposes of executing the objectives of the co-operative.

The suretyship undertaking given by the co-operative was not in conflict with the purposes of the co-operative. It was reasonably necessary for the purpose of furthering the interests of its members. The co-operative therefore had the capacity to enter into the suretyship obligation in respect of Rainer.

The appeal was upheld.

# *AMEEN v SOUTH AFRICAN EAGLE INSURANCE CO LTD*

A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
19 AUGUST 1996

1997 (1) SA 628 (D)

***Insurance***

***An exclusion of liability in an insurance policy for damage brought about by subsidence includes an exclusion of liability were subsidence of soil brings about a settlement of foundations resulting in damage.***

## THE FACTS

South African Eagle Insurance Co Ltd insured Ameen's fixed property against loss or damage to the buildings thereon caused by storm, wind, water, hail or snow, excluding loss or damage (a) by subsidence or landslip, (b) to gates, posts, fences and retaining walls.

In September 1994, a storm took place over Ameen's property, as a result of which, water permeated into the soil beneath brick paving and a storm water channel. The water caused the collapse of the soil particles composing the soil structure. The foundations settled in the voids so created, resulting in cracking in a boundary wall, cracking of channelling along the edge of another wall, uneven settling of the brick paving and further cracks in a staircase.

Ameen claimed indemnity under the insurance policy. SA Eagle repudiated liability on the grounds that the damage was that referred to in the exclusion relating to subsidence or landslip.

## THE DECISION

The policy was clear: it excluded liability for damage caused by a storm *to* gates, posts, fences and retaining walls, and *by* subsidence or landslip. The latter contemplated damage finally brought about by subsidence or landslip where a storm caused that subsidence or landslip.

The settlement of the foundations brought about by the storm was none other than the subsidence contemplated in the exclusion, there being no reason to distinguish between the portions of the building affected by the settlement and the subsidence bringing that about. It was the buildings that the policy referred to, and it was they that subsided because of the storm.

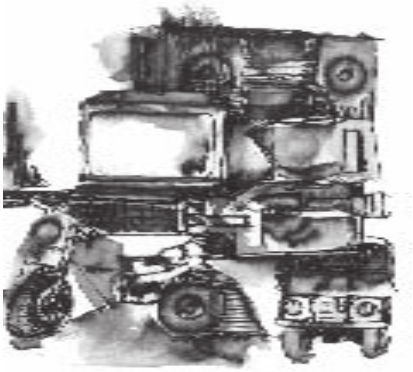
The damage caused to the building was that referred to in the exclusion provision. SA Eagle were therefore entitled to repudiate liability.

# *AVFIN (PTY) LTD v INTERJET MAINTENANCE (PTY) LTD*

A JUDGMENT BY LE ROUX J
TRANSVAAL PROVINCIAL DIVISION
9 DECEMBER 1994

1997 (1) SA 807 (T)

*Credit Transactions*



***An owner may recover its property from one who holds it after the liquidation of the person who held it in terms of an instalment sale transaction, and is not constrained by section 84(1) of the Insolvency Act (no 24 of 1936) to surrender its rights of ownership where the liquidator is not in possession of the property. The owner's rights of recovery may however, be restricted as against one who asserts a lien against the property but the lien-holder must show reasons why the owner should not be entitled to delivery of the property, even upon tender of security for payment of the lien-holder's claim.***

## THE FACTS

Avfin (Pty) Ltd agreed to buy an aircraft from Kaliko CC for R1 026 000. Kaliko issued an invoice to Avfin in this amount and Avfin paid the price, partly to Absa Bank Ltd and partly to Kaliko. Avfin paid R343 319,19 to Absa in order to settle the amount outstanding under a lease agreement subsisting between Kaliko and Absa. In terms of the lease, Absa was the owner of the aircraft.

At the same time that Avfin paid the sum of R1 026 000, it entered into an instalment sale transaction with Air Supply Charter (Pty) Ltd in respect of the aircraft. In terms of this agreement, Air Supply Charter was obliged to pay Avfin monthly instalments. It defaulted in doing so and Avfin obtained an order attaching the aircraft. By agreement, the attachment order was later lifted. Thereafter, Air Supply Charter was placed in liquidation.

Interjet Maintenance (Pty) Ltd had effected certain maintenance and repair work to the aircraft, and had possession of it. Avfin contended that it had taken cession of Absa's rights of ownership when it paid Absa the balance owing to it in terms of its lease of the aircraft. Avfin claimed an order declaring that it was the owner of the aircraft and directing Interjet to hand over the aircraft to it against the provision of a bank guarantee in respect of Interjet's charges.

## THE DECISION

Although the agreement between Absa and Kaliko was incorrectly described as a lease, the intention of the parties to that agreement had been that Absa would become the owner of the aircraft. As owner, it was entitled to transfer ownership to another party, and this it did when Avfin paid it the balance owing to it in terms of the lease. Avfin had thereby become the owner of the aircraft.

Because of the liquidation of Air Supply Charter, section 84(1) of the Insolvency Act (no 24 of 1936) applied. The section provides that if property is delivered to a person under an instalment sale transaction, the credit grantor obtains a hypothec over that property upon the sequestration of that person. The effect of this section is to deprive the credit grantor of ownership of the asset, but only if the trustee of the insolvent is in possession of the property. This further condition is imposed because section 84(1) proceeds to give the credit grantor the right to delivery of the property from the trustee, a right which implies that possession of the property by the trustee is required for the section to operate at all. In the present case, the trustee did not have possession of the aircraft, so that section 84(1) could not be applied to Avfin which remained the owner of the aircraft.

Interjet's response to Avfin's claim for delivery of the aircraft was to assert a repair and maintenance lien and an improvement lien against the aircraft. It was not clear precisely what nature of the lien asserted by Interjet was, nor the extent of Interjet's claim. The court has a discretion to refuse the owner delivery of its property when a lien is asserted against it, even if security is offered—as it had been in this case. However, in view of the uncertainty of Interjet's lien, this discretion had to be exercised in favour of Avfin.

Avfin was declared the owner of the aircraft and Interjet ordered to deliver the aircraft to it against the provision of adequate security for payment of Interjet's claim.

# *CAPE PROVINCIAL ADMINISTRATION v CLIFFORD HARRIS (PTY) LTD*

A JUDGMENT BY ZULMAN JA
(VAN HEERDEN JA,
KUMLEBEN JA, NIENABER JA
and MARAIS JA concurring)
APPELLATE DIVISION
27 SEPTEMBER 1996

1997 (1) SA 439 (A)

***Construction***

***A price variation clause which makes provision for the increase or decrease of the contract price in a construction contract dependent on price variations brought about by the operation of any enactment having the force of law may be interpreted so as to apply to the execution of the works as a whole, ie not excluding those works involving the operation of apparatus required for the execution of the works.***

## THE FACTS

Clifford Harris (Pty) Ltd as contractor and Cape Provincial Administration as employer, entered into a contract for the construction of a 38-kilometre trunk road in the Cape. Clause 6(1)(b) of the General Conditions of Contract provided that the contract price in respect of the execution of the works could be varied by the net amount of the variation in the actual cost to Clifford Harris in respect of bituminous materials used for the surfacing of roadways and of all grades of fuels and oils used for the operation of plant and for admixture with bitumens on the works, where the variation was the result of the coming into operation of any enactment having the force of law. A proviso to the clause stipulated that the price adjustments were to be made only in respect of materials actually used for the execution of the works, and in the case of bituminous materials, only in respect of such quantity of materials as had been measured and paid for under the road surfacing specifications provided for elsewhere in the contract.

Clause 6(2)(a) provided for the calculation of the variation according to a formula. The formula included a subtraction in respect of the adjustment provided for in clause 6(1) and provided that that subtraction figure would represent the cost of the petroleum-driven products calculated at the prices prevailing at the time of the closing of the tender.

The price of petroleum decreased during the period of the contract. This led to differing contentions regarding the effect of the relevant sub-clauses of clause 6.

Clifford Harris contended that the subtraction figure had to be calculated at the prices prevailing at the time of the closing of the tender, as required by clause 6(2)(a), and not at actual cost. The proviso to clause 6(1)(b) limited the fuel and oils to be taken into account to those actually used for the execution of the works, and therefore excluded fuel and oils used in the operation of apparatus for the production of materials for the execution of the works, or for rendering materials so that they complied with the contract specifications. The effect of this exclusion was to reduce the subtraction figure, thereby increasing the payment due to Clifford Harris.

The Cape Provincial Administration contended that the subtraction figure included all petroleum-driven products actually used during the operation of the plant, which itself included items of equipment and vehicles used in the execution of the works.

Clifford Harris brought an action for an order declaring its interpretation of the contract the correct one.

## THE DECISION

The reference in the proviso of clause 6(1)(b) to the 'execution of the works' was a reference to the totality of the undertaking provided for in the contract. There was no reason to limit the application of the phrase.

No limit could be applied to the use of bituminous materials in the surfacing of roadways, which would include access roads and temporary by-passes. The cost of petroleum-driven products in the use of these materials had therefore to be included in the subtraction figure. If these costs were to be so included, there was no reason to exclude other costs associated with the operation of plant, which were similarly removed from the works as defined in the contract.

If the interpretation contended for by Clifford Harris were the correct one, it would be extremely difficult to apply the formula

according to which the adjustments were to be effected. This was because it would become necessary to establish distinguishing points—where the petroleum-driven products became used for the execution of the work as opposed to the operation of the plant necessary for that work. This would produce a result which was destructive of the manifest purpose of the contract.

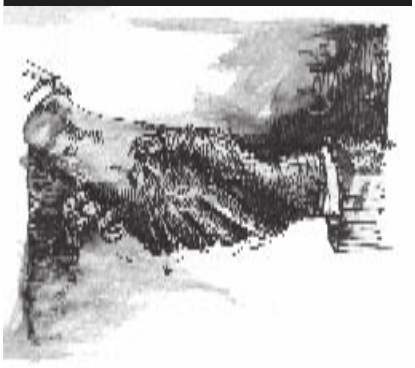
The Cape Provincial Administration's interpretation of the contract was therefore the correct one. The appeal was dismissed.

## *INVESTEC BANK LTD v LEFKOWITZ*

A JUDGMENT BY NIENABER JA (VAN HEERDEN JA, HEFER JA, EKSTEEN JA and MARAIS JA concurring)
APPELLATE DIVISION
27 NOVEMBER 1996

[1997] 1 All SA 581 (A)

***Contract***



***The terms of an agreement existing in fact, though not read by one of the contracting parties who is aware of the existence of the recorded terms of agreement, are binding on that party and there is no basis upon which such a party can contend that by mistake, another agreement subsists between the parties. Where the terms of an agreement provide for the phasing in of the right to exercise an option, the right to exercise accrues as and when the phasing-in periods pass and not as soon as the option is granted.***

### THE FACTS

Lefkowitz was employed by a subsidiary of Investec Bank Ltd. On 1 April 1992, her employer offered her an option to take up 500 Investec Bank Ltd shares, the shares to be sold subject to the terms and conditions of the Investec Bank Staff Share Option Scheme. The terms and conditions thereof were recorded in a trust deed which was stated to be available to her for inspection. Lefkowitz responded by stating her intention in principle to accept the shares in due course.

On 4 May 1993, Investec Bank addressed a similar letter to Lefkowitz offering her an option to take up 700 Investec Bank shares. Lefkowitz also accepted this offer. When accepting the offers, on neither occasion did Lefkowitz call for a copy of the trust deed.

Clause 17.2 of the trust deed provided that an option could be exercised only—as to 25% of the total scheme instruments which were the subject of the option after the second anniversary of the option date, as to 50% after the third anniversary option date, as to 75% after the fourth anniversary option date, and as to 100% after the fifth anniversary option date. Clause 17.3.3 provided that if a participant did not remain as an employee for a period of ten years from an offer date, then upon the date on which the employee ceased to be an employee, the trustees were entitled to either declare the options forfeited, or demand that the participant exercise his election where the entitlement to exercise had not yet arisen, or extend the period for election for a maximum period of two years.

In January 1994, Lefkowitz gave notice of her resignation as employee of the subsidiary company, effective from 28 February 1994. The trustees of the Scheme declined to agree to Lefkowitz exercising her options. Lefkowitz contended that she was entitled to exercise her options, and asserted that she did so. When she did so, she stated that she was doing so in terms of a trust deed that had been in force prior to the one which was in force when she was granted the options. She did so as a result of a mistake made by her employer in forwarding to her, at that stage, a copy of the earlier trust deed.

Lefkowitz applied for an order declaring that she had properly exercised her options, and was entitled to delivery of the share certificates evidencing registration of 1200 shares in Investec Bank in her name.

### THE DECISION

As a matter of objective fact, when the offers were made to Lefkowitz, the operative trust

deed was the later trust deed. Since Lefkowitz did not call for a copy of the deed, there was no mistake or misunderstanding on her part. The mere fact that the incorrect copy was eventually furnished to her could not amend the option agreements which had been concluded earlier. She was therefore not entitled to rely on the earlier trust deed in seeking to enforce her exercise of the options. She had to rely on the trust deed in force at the time when the options were concluded.

Clause 17.2 of the operative trust deed stood in the way of Lefkowitz' attempt to enforce her options. The right to exercise the options did not arise from the date on which they were given. The trust deed clearly—as appeared in clause 17.3.3—contemplated a period during which the entitlement to exercise the options had not arisen. Moreover, clause 17.2 made provision for a phasing of the right to exercise *only* on the dates therein set out, a scheme which would be rendered superfluous were the right to exercise to exist from the moment the options were granted. The plausible explanation for the phasing of the right to exercise was that it constituted an incentive to the employee to be loyal, since it established a link between length of service and the right to the shares. Viewed in this light, an earlier attempt to exercise the option would not be permissible.

Lefkowitz had therefore not been entitled to exercise the options. The appeal was upheld.

## *EPOL (EDMS) BPK v SENTRAAL-OOS (KOOPERATIEF) BPK*

A JUDGMENT BY HANCKE J
ORANGE FREE STATE PROVINCIAL DIVISION
9 MAY 1996

1997 (1) SA 505 (O)

***Delivery of goods may be effected symbolically, and may be effected by constitutum possessorium.***

### THE FACTS

Epol (Edms) Bpk purchased 10 000 tons of mielies from the third respondent for R6 061 000. The price included consideration for a levy on maize which was payable to Sentraal-Oos (Kooperatief) Bpk. Sentraal-Oos had earlier sold the mielies to the third respondent through its agent, the second respondent. Sentraal-Oos had assured Epol that it had the mielies available for Epol and that they would be delivered as soon as payment was received. It confirmed that transfer of ownership would be effected upon receipt of payment. In a later communication, Sentraal-Oos confirmed that 10 000 tons of mielies were finally transferred to Epol.

Sentraal-Oos later refused to transfer 1 050 tons of the mielies purchased by Epol. Epol brought an application for delivery, claiming that it was the owner of the mielies.

### THE DECISION

It is trite law that for one to become the owner of a thing, both transferor and transferee must intend that the transferee is to become the owner. It was clear from the communications that had taken place between the parties that this was the intention of Epol and Sentraal-Oos with regard to all of the mielies purchased by Epol.

The communications also indicated that transfer of ownership was intended. Even if the sale could be characterised as a sale of a kind (genus) of thing, so that separation of the 10 000 tons of mielies was required before symbolic delivery could be effected, the communication given by Sentraal-Oos that the 10 000 tons of mielies were finally transferred to Epol did constitute such symbolic delivery, in the form of constitutum possessorium.

The application was granted.

# *TALACCHI v THE MASTER*



A JUDGMENT BY VORSTER AJ
TRANSVAAL PROVINCIAL DIVISION
20 JUNE 1996

1997 (1) SA 702 (T)

***A party which obtains a judgment against the agent of an undisclosed principal cannot pursue its claim against the undisclosed principal, the claim against agent and undisclosed principal being alternative and not cumulative.***

## THE FACTS

In 1987 and 1988, a certain BB Lampadari and a firm Pogliani Fratelli, both of Italy, sold and delivered goods to Litesell Distributors (Pty) Ltd. The company held an import permit entitling it to import light fittings and accessories from these Italian suppliers. In 1992, the suppliers ceded their claims for payment arising from the sales to Talacchi. Talacchi ceded the claims to the second applicant. Later that year, the second applicant obtained judgment against Litesell in respect of these claims.

During 1991, Talacchi rendered professional services as an attorney to Litesell, and rendered an account for them in the sum of R18 962. In 1992, he obtained judgment against Litesell for payment of this sum.

By the end of 1991, Lite Magic (Pty) Ltd, a company with a shareholding common to that of Litesell, and which had taken over the business of Litesell in 1988, was placed in liquidation. In 1994, Talacchi and the second applicant respectively lodged claims against Magic Lite, in respect of the amount due on account of professional fees and in respect of the amount due in terms of the ceded claims. These claims were ultimately rejected by the Master of the Supreme Court.

Talacchi and the second applicant applied for the review of the Master's rejection of the claims, and directing him to the confirm them.

## THE DECISION

Talacchi contended that the Italian suppliers contracted with Magic Lite and not Litesell, and that Magic Lite had merely used the name of Litesell when contracting for the supply of the goods. This contention could however, not be sustained. Litesell held the import permit for the supply of the goods, and could only contract as principal for their supply. The Italian suppliers themselves had been under the impression that they were contracting with Litesell.

Talacchi further contended that the takeover of Litesell's business by Magic Lite constituted an agreement in favour of creditors (a stipulatio alteri) of Litesell. This contention too could not be sustained. There was no evidence that the intention had been to create a stipulatio alteri, and no evidence of notification to creditors of the intention to establish a binding contractual relationship between themselves and Magic Lite.

Talacchi's final contention was that because Magic Lite had been an undisclosed principal, Litesell being its agent, the second applicant was entitled to address its claim to Magic Lite even after having obtained judgment against Litesell. A third party such as the applicants may not however, do so after it has obtained judgment against the agent of an undisclosed principal, its claim against the two being alternative and not cumulative.

The application was dismissed.

# *PROASH CREDIT CORPORATION CC v MELANE*



A JUDGMENT BY MELUNSKY J
(MPATI AJ concurring)
EASTERN CAPE DIVISION
30 JANUARY 1997

[1997] 1 All SA 430 (E)

***An offer to contract may only be accepted by the person to whom the offer is addressed. Evidence of an intention to accept the offer may consist in a cession of the contract by the offeror to a third party. Upon conclusion of the contract by communication of the acceptance to the offeree, such a cession would then become effective.***

## THE FACTS

On 14 March 1989, Melane signed an offer addressed to Home Study Programmes (Pty) Ltd (HSP) in which she ordered a mathematics self study programme at the price of R1 786. On 10 April 1989, HSP signed a document recording that the contract of Melane was ceded to Proash Credit Corporation CC. Proash then sent the material for the mathematics self study programme to Melane.

On 13 May 1989, Melane wrote to Proash informing it that she was cancelling the programme and returning the study material to it unopened. Proash insisted on performance of the contract and brought an action for payment of the purchase price. Melane defended the action on the grounds that the offer she had signed was cancelled prior to acceptance by HSP.

## THE DECISION

Proash was not able to accept Melane's offer because the offer was not addressed to it. The question was whether HSP accepted the offer before Melane's purported revocation of it.

By the time the document recording the cession of the contract was signed, there had been no acceptance of Melane's offer, and therefore no contract which could be ceded. The cession was therefore ineffectual, though not invalid. It was however clear, from the fact that HSP signed the cession, that HSP intended to accept Melane's offer. Communication of the acceptance of the offer occurred by the receipt, if not the despatch, of the study programme—something which took place before 13 May 1989. In sending the study programme, Proash then acted on behalf of HSP. Upon completion of the contract by delivery of the study programme, the incomplete cession became effectual.

A contract had therefore come into existence before revocation of the offer. Proash was entitled to payment of the purchase price on the basis of its cession of the contract.

# *LOOTS v NIEUWENHUIZEN*

A JUDGMENT BY NAVSA J
(ELOFF JP concurring)
TRANSVAAL PROVINCIAL DIVISION
12 MARCH 1996

1997 (1) SA 361 (T)

***Partnership***

***A partner claiming payment of partnership assets and profits following dissolution of a partnership must claim a rendering and debatement of partnership accounts. If he claims payment of his alleged entitlements on the basis of an agreement allegedly entered into between the partners, this will not found a successful claim for the rendering of such accounts.***

## THE FACTS

Loots and Nieuwenhuizen entered into an agreement in terms of which Nieuwenhuizen was to manage Loots' shop, and share equally in the profits made from the business.
Nieuwenhuizen alleged that he contributed to the capital of the business and purchased stock for it. Loots alleged that in terms of the agreement, Nieuwenhuizen was not to contribute to the capital of the business and that stock would be purchased from his own funds.

As evidence of his contribution to the business, Nieuwenhuizen submitted a balance sheet dated April 1992, showing loan accounts of each party, an opening stock value and profit for the year. Loots contested the accuracy of the balance sheet.

Nieuwenhuizen brought an action against Loots, based on the agreement between the parties, claiming repayment of the capital contributed to the business, as well as half the profits. The action succeeded. Loots appealed.

## THE DECISION

On Nieuwenhuizen's evidence, and the facts mutually agreed, it was clear that a partnership existed. The essentials of a partnership were there: each person contributed something to the business, the business was conducted for the benefit of the partners, the purpose was to make a profit, and the agreement founding it was lawful.

It followed that upon dissolution of the partnership, there had to be an accounting. Nieuwenhuizen's cause of action would be based on an action for dissolution (the actio pro socio), claiming a rendering and debatement of account and payment of the amount found to be due. Nieuwenhuizen had however, not claimed this, having based his claim on an alleged agreement between the parties. It was clear, at least from the doubt surrounding the accuracy of the balance sheet, that a debatement of account was necessary in order to determine the amount due to the parties arising from the dissolution of the partnership. Nieuwenhuizen however, had not claimed a debatement of account.

Having misconceived his remedy, Nieuwenhuizen was not entitled to payment of the amount claimed. The appeal succeeded.

# *LUSTER PRODUCTS INC v MAGIC STYLE SALES CC*

A JUDGMENT BY PLEWMAN JA (CORBETT CJ, NESTADT JA, HARMS JA and SCHUTZ JA concurring)
APPELLATE DIVISION
29 NOVEMBER 1996

[1997] 1 All SA 327 (A)

***Trade Mark***

***An application for expungement of a trade mark on the grounds that the use of the mark would be likely to deceive or cause confusion may depend on evidence of matters taking place after registration of the mark, but where the alleged deception or confusion then arising is not a result of any blameworthy conduct on the part of the trade mark holder, expungement of the mark will not be allowed. The entry of a disclaimer in respect of a registered trade mark will not be allowed where seven years have elapsed from the date of registration of the trade mark, unless the registration was obtained by fraud or the trade mark offends against the provisions of section 16 or 41 of the Trade Mark Act (no 62 of 1963). The fact that a person infringing a trade mark also uses its own trade mark on the same product provides no excuse for the infringement.***

## THE FACTS

In July 1984, Luster Products Inc registered a trade mark in respect of goods. Luster Products manufactured and distributed hair care products and cosmetics, and registered the trade mark for the purpose of marketing these products.

The trade mark consisted in the word SCURL, with the S larger, italicised and in black, and the CURL presented in white lettering outlined in black. It was accepted by Luster Products that after the registration of its trade mark, the term S-curl was used in a descriptive sense on a significant scale by providers of goods and services in the hairdressing sector.

In 1989, Magic Style Sales began marketing certain of its products using on the a mark consisting in the word SCURL, the S being larger and in stylised form. Luster Products considered the use of this mark an infringement of its mark. It applied for an interdict restraining Magic Style from infringing its mark. Magic Style counter-applied for the expungement of Luster Products' trade mark and for an order directing the entry of a disclaimer of 'any right to the exclusive use of the term "S-CURL" apart from the special representation as depicted in the mark'.

## THE DECISION

Magic Styles' counter-application was based on section 16 of the Trade Marks Act (no 62 of 1963) which in sub-section 1 provides that it shall not be lawful to register as a trade mark any matter the use of which would be likely to deceive or cause confusion. Magic Styles contended that because the term S-curl had acquired a descriptive connotation, the continued registration of the mark and its use as such would be likely to cause deception or confusion.

Evidence of facts relating to matters taking place after the registration of a trade mark is admissible in determining whether or not the use of the trade mark would be likely to deceive or cause confusion. The question was whether the use by other persons of a trade mark, contrary to the interests of the trade mark holder, could render the use of the mark deceptive or confusing. Such use could not render the use of the trade mark deceptive of confusing, unless the likelihood of causing deception resulted from some blameworthy act of the registered holder of the mark. What would constitute such blameworthy conduct was a matter which could not be decided in the present case, in which no blameworthy conduct on the part of Luster Products was apparent.

Magic Style was therefore not entitled to expungement of the trade mark.

As far as the counter-application for the entry of a disclaimer was concerned, this was based on section 18(b) of the Act which provides that if a trade mark contains matter common to the trade or otherwise of a non-distinctive character, the court may require as a condition of it remaining on the register, the entry of a disclaimer.

Section 18(b) however, could not apply, given the terms of section 42 of the Act. Section 42 provides that in all legal proceedings relating to a trade mark registered in part A of the register, the original registration of the trade mark shall, after the expiration of seven years from the date of registration, be taken to valid in all respects, unless the registration was obtained by fraud or the trade mark offends against the provisions of section 16 or 41. The terms of this section were clear—a mark is taken to be valid in all

respects, save for the exceptions referred to. This must mean that the trade mark cannot be cut down or amended by the entry of any further disclaimer, as desired by Magic Style.

As far as Luster Products' application for an interdict was concerned, Magic Styles' use of the mark SCURL was clearly the use of a mark so nearly resembling Luster Products' registered mark as to be likely to deceive or cause confusion and fell within the ambit of section 44 of the Act. The fact that it also used its own trade mark, Magic Style, on the products, made no difference—there is no principle that the use of one mark on a product excludes the possibility that any other mark thereon can be a trade mark.

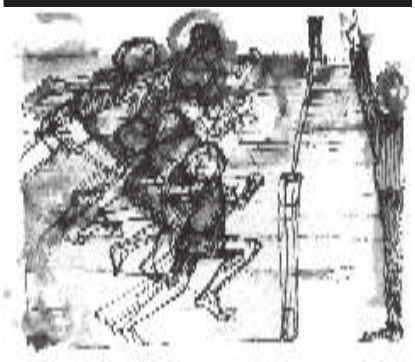
The application was granted and the counter-application dismissed.

## *SA METAL & MACHINERY CO LTD v CAPE TOWN IRON & STEEL WORKS (PTY) LTD*

A JUDGMENT BY VIVIER JA (HEFER JA, EKSTEEN JA, HOWIE JA and SCOTT JA concurring)
APPELLATE DIVISION
26 SEPTEMBER 1996

1997 (1) SA 319 (A)

***Competition***



***A contract will amount to horizontal price collusion or horizontal collusion on conditions of supply where it is provided that suppliers will not accept terms from a consumer, which are provided for in the contract, other than those accorded to another supplier. Such a contract will not merely amount to a basis on which individual contracts will be concluded, where it clearly creates reciprocal rights and obligations between the parties to which they are obliged to adhere.***

### THE FACTS

SA Metal & Machinery Co Ltd, a supplier of scrap metal, and other suppliers, entered into an agreement with Cape Town Iron and Steel Works (Pty) Ltd, a consumer of scrap metal, and other consumers. In terms of the agreement, the consumers were obliged to purchase scrap metal only from the suppliers, at regulated prices. The agreement also regulated the terms under which Cape Town Iron and Steel Works could obtain supplies of scrap metal from existing suppliers, and railage costs in respect of some scrap metal supplies from certain of the suppliers.

SA Metal brought two actions against Cape Town Iron and Steel Works, alleging that it had sustained damages arising from underpayments on deliveries made to the latter company. It raised the special defence that the agreement constituted 'horizontal price collusion' and 'horizontal collusion on conditions of supply' within the meaning of those expressions in a Government Notice published under the Maintenance and Promotion of Competition Act (no 96 of 1979). The Notice prohibited both of these practices. It defines the former as an agreement, arrangement or understanding between or among two or more suppliers of any commodity, or of substantially similar commodities, to charge a particular or a particular minimum, price or to use in any way any price as a recommended price or as a guide. It defines the latter as any agreement between two or more suppliers of any commodity, or of substantially similar commodities, to supply or tender to supply such commodities only on any particular condition or term or using any condition or term as a recommended condition or term or as a guide.

### THE DECISION

The prohibition contained in the Notice was confined so as to agreements between suppliers who were functioning horizontally, ie on the same level in the supply chain. In the present case, the suppliers were on the same level and in a horizontal relationship with each other.

The agreement was not merely a basis upon which the parties were to contract in the future—it was one in which reciprocal rights and obligations were created and which unambiguously related to the charging of particular prices in respect of the scrap metal. The suppliers were bound not to

charge prices other than those provided for in the agreement, and no supplier could accept more favourable terms from a consumer than those accorded to another supplier. It therefore fell within the definitions provided for in the Government Notice, and amounted to horizontal price collusion or horizontal collusion on conditions of supply.

The agreement was also not the same as an individual contract validly concluded between supplier and customer. The suppliers had acted together to conclude a single contract with uniform terms binding on all. It could only have been amended with the consent of all suppliers.

No element of fraud or deception was required to establish horizontal price collusion or horizontal collusion on conditions of supply, and no such element had to be shown in the present case. 'Collusion' meant only 'to act jointly' or 'to act in concert'.

The contract did amount to horizontal price collusion and horizontal collusion on conditions of supply. The special defence was upheld.

## *SAPPI MANUFACTURING (PTY) LTD v STANDARD BANK OF SA LTD*

A JUDGMENT BY HEFER JA (EKSTEEN JA, HOWIE JA, SCHUTZ JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
1 OCTOBER 1996

1997 (1) SA 457 (A)

***Cheques***

***A cheque is indorsed properly when the signatures purporting to effect the indorsement are given on behalf of a principal which is identifiable, even if the principal is not expressly identified below the signatures. Such a cheque will be complete and regular on the face of it (thereby making the holder of it a holder in due course) since a reasonable banker would read the indorsement as given by the principal so identifiable.***

THE FACTS

Sappi Manufacturing (Pty) Ltd drew two cheques payable to itself or order. The cheques were signed on behalf of Sappi by a certain Vlok and a certain De Villiers who were described as authorised signatories.

On the reverse of each cheque the signatures of Vlok and De Villiers again appeared, above the words 'Vir en names/For and on behalf of'. Sappi's name did not appear after that. A special indorsement by Prima Bank Ltd, the drawee bank, in favour of Syfrets Income Fund appeared alongside.

Standard Bank of SA Ltd, the trustee of a trust controlling Syfrets Income Fund, alleged that the signatures of Vlok and De Villiers on the reverse side of the cheques constituted indorsements by Sappi, and brought an action for payment according to the tenor of the cheques against Sappi after the cheques were dishonoured by non-payment.

Sappi contended that the signatures were not indorsements by Sappi because of the omission of the name of the principal on whose behalf Vlok and De Villiers purported to sign. It also contended that Standard Bank was not a holder in due course because the cheques were not complete and regular on the face of them as required by section 27(1) of the Bills of Exchange Act (no 34 of 1964).

THE DECISION

If Vlok and De Villiers did not intend to indorse the cheque on behalf of Sappi, then either they intended to do so in their personal capacities, or on behalf of some other company.

Having regard to the fact that on the face of the cheques, the signatures of Vlok and De Villiers were qualified by their being given on behalf of Sappi, the possibility that they did not so qualify their signatures when signing on the reverse side of the cheque and intended to sign in their personal capacities—having regard also to the fact that they did not delete the words 'Vir en namens/for and on behalf of'—could be ruled out. The possibility that they signed for another company could also be ruled out: such a company would then be signing as an aval and if such an important intervention had been intended, the name of the company would have been

inserted. The inference was irresistible that the signatures of Vlok and De Villiers were appended on behalf of Sappi.

As far as the contention that the cheques were not complete and regular on the face of them was concerned, it could not be said that just because of the omission to qualify the signatures of Vlok and De Villiers, the cheques were incomplete. They were complete because no essential element of form was lacking. They were also regular because any reasonable banker would, upon reading the indorsements, read them as indorsements on behalf of Sappi.

The appeal was dismissed.

# Current Commercial Cases

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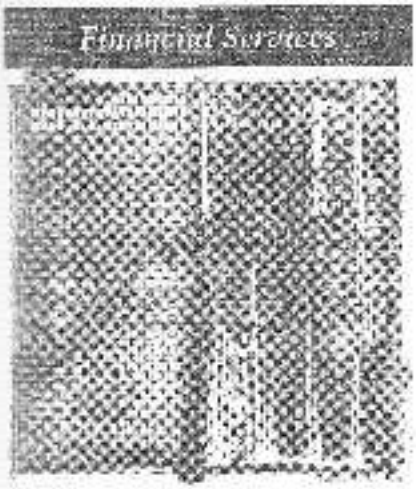
# *DURR v ABSA BANK LTD*

A JUDGMENT BY SCHUTZ J (SMALBERGER JA, NIENABER JA, MARAIS JA and STREICHER AJA concurring)
SUPREME COURT OF APPEAL
20 MAY 1997




*A person who offers investment advice is required to possess expertise in doing so to the extent that he independently investigates the company in which he advises investment before advising that investment in the company is secure.*

## THE FACTS

In 1985, Durr approached Stuart, the regional manager of the United Building Society, a company which later became a division of Absa Bank Ltd, in order to obtain advice on the most appropriate investment of her money. Stuart gave her such advice then and in succeeding years, and Durr acted on his advice by investing her money where he suggested.

In 1989, Stuart advised Durr to invest in a company named 'Supreme'. Durr did so by obtaining 'secured debentures' in the company, and later preference shares. Her husband and daughter did so as well. All of them obtained assurances from Stuart that these were secure investments. By November 1992, these parties were owed a total of R393 000 on their investments. In that month, the two companies in which they had invested, Supreme Holdings Ltd and Supreme Investments Holdings Ltd, were put into provisional liquidation.

Investments in the two Supreme companies were promoted by the company by encouraging members of the public to obtain debentures, described as secured debentures, and preference shares. This was done by offering high returns on these investments and paying high commissions to brokers who brought in such investments. The Supreme companies were said to have a sound financial base in three companies listed on the Johannesburg Stock Exchange, but no clear indication of what the relationship between Supreme and these companies (also given the appellation 'Supreme') was given. The Supreme companies were said to be associated with Supreme Bond (Pty) Ltd, a participation bond company which survived the liquidations of the other companies.

Financial statements for the Supreme companies were not given to investors or brokers, and no prospectus was produced. The debentures were not secured. Investments by the companies were made in three companies; the activities of these were suppressed to investors in Supreme as these involved loan-sharking and the repossession of properties which produced no income.

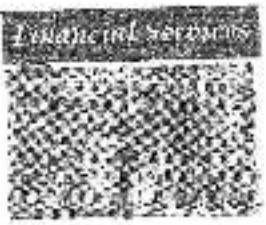
Before advising the parties to invest in Supreme, Stuart telephoned the director of the companies' Cape Town branch and requested information concerning the companies. He was given information about the companies, including marketing brochures, but he did not ask for, nor did he receive, receive financial statements or a prospectus. On one occasion, Stuart visited the director and was given assurances that the Supreme companies were secure investments.

As a result of the liquidation of the Supreme companies, Durr, her husband and daughter lost a total of R772 845.50. In her personal capacity and as cessionary of the other two parties, Durr claimed this amount from Absa and Stuart alleging that Stuart had been negligent in advising the investments in Supreme in that he had not exercised the skill and care which the investor could expect of him.

## THE DECISION

The two questions which arose were what level of skill and knowledge was required, and what standard was to be applied—that of the ordinary or average broker, or that of the regional manager of the broking division of a bank professing skills and offering investment advice?

The level of skill and knowledge required was that exercised by the members of the branch of the profession to which Stuart belonged. What standard was to be applied was less clear. This raised



the question whether the standard was set by the broking community at large or by a much smaller group, that of the expert financial and investment advisor, of which Stuart was a representative.

The applicable standard could not be that set by the broking community at large. The skills Stuart was held out to possess determined the applicable standard. These skills were those of the regional manager of the broking division of a bank professing investment skills and offering investment advice. They consisted in advising clients on different kinds of products available to them as investments, and how to plan their affairs having regard to such factors as the incidence of income tax, estate duty and the return on such investments.

In actual fact, Stuart had acted as an ordinary broker and not as an expert financial and investment advisor; so much was clear from the fact that he had little or no understanding of the precise nature of the securities offered by the Supreme companies, and little or no understanding of the requirements of the Companies Act. Had he been persistent in making a few enquiries regarding the Supreme companies, the Durrs would have invested their money elsewhere. The fact that high returns and high commissions were offered should have alerted him to make further enquiries. He should have called for a prospectus or financial statements, instead of being satisfied with the marketing material issued by the companies themselves. Furthermore, he should have realised that he might not possess the expertise to assess the companies and should have called for the advice of a professional person such as a lawyer, accountant or banker. Stuart could not however, be blamed for not realising that the Supreme companies were in effect running an illegal bank.

As an investment advisor, Stuart assumed a duty to Durr in regard to the investment in the Supreme companies when he advised her that he had investigated the companies and found them to be sound. By failing to perform an independent investigation of the companies, he failed in performing this duty and was negligent.

Absa was ordered to pay Durr R772 845,50.

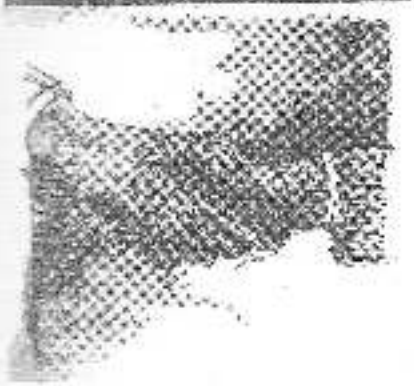
*High commission also creates temptation. It may influence the broker to promote something that is not, objectively speaking, best for his client. A broker with any knowledge of the world must know that that is sometimes the very object. And even if he is beyond temptation he might well ask himself whether the person offering the high comission does not anticipate that some other brokers might be less upright.*

# HEADERMANS (VRYBURG) (PTY) LTD v PING BAI

A JUDGMENT BY EM GROSSKOPF JA
(FH GROSSKOPF JA, MARAIS JA, SCHUTZ JA and STREICHER AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 1997

1997 CLR 505 (A)

Contract



*The test for compliance with the Act was whether or not the property could be identified by reference to the provisions of the deed of sale, without recourse to evidence from the parties as to their negotiations and consensus. The test may be complied with where the description in the deed of sale follows that of a general plan for the establishment of a township which has not yet been proclaimed, from which it is clear what property the parties were buying and selling.*

## THE FACTS

Headermans (Vryburg) (Pty) Ltd owned Portion 667 (Portion of Portion 2) of the farm Zandfontein No 42, Registration Division I.R., Transvaal, situated at 27 Linden Road, Strathaven. The property had been excised from Holding 27, Strathaven Agricultural Holdings, as a condition for the establishment of a township to be known as Sandown Ext 51. Approval for the establishment of the township was obtained, but the township had not yet been finally proclaimed when Headermans entered into a deed of sale with Ping Bai for the sale of the property. The general plan which was prepared for the establishment of the township showed that the area was to be sub-divided into three lots, numbered 567, 568 and 569, with lot number 569 to be transferred to the local authority for use as a park.

The deed of sale described the property as erf no pto 567 & 568 Township Sandown Ext 51, Situated at of erf 27, 27 Linden Road, Sandown Ext 51 together with all improvements thereon.

Ping Bai contended that the deed of sale did not comply with the provisions of the Alienation of Land Act (no 68 of 1981) in that it failed to describe properly the property sold. He applied for an order declaring that the sale was void and of no force and effect.

## THE DECISION

The test for compliance with the Act was whether or not the property could be identified by reference to the provisions of the deed of sale, without recourse to evidence from the parties as to their negotiations and consensus.

Headermans was the owner of a site at 27 Linden Road, Strathaven. The description 'erf 27, 27 Linden Road, Sandown Ext 51' was therefore close to a correct description of the property. Furthermore, the general plan description of the property accorded even more closely with the property as described in the deed of sale. Although the township had not yet been proclaimed, so that no township by the name 'Sandown Ext 51' as yet existed, sufficient particulars were given on the approved general plan to enable a land surveyor to determine the location of erven 567 and 568. There could be little doubt that the description of the property in the deed of sale referred to those two erven. The deed of sale therefore adequately described the property sold.

In view of the fact that the parties's true intention had been to sell the whole of the property on which the two erven was situated, the deed of sale could be rectified to reflect this, in order to comply with section 67 of the Town-Planning and Townships Ordinance 15 of 1986.

The appeal was upheld.

# SIRIUS MOTOR CORPORATION (PTY) LTD v KAJEE

Contract (sale)

A JUDGMENT BY MAGID J
DURBAN AND COAST LOCAL DIVISION
21 FEBRUARY 1997

1997 CLR 95 (D)

*A purchaser's right of action based on the implied warranty against eviction may be brought where the party claiming the property purchased has an unassailable right to the property, and not necessarily a right based on legal title to the property.*

THE FACTS

Sirius Motor Corporation (Pty) Ltd purchased a motor vehicle from Kajee for R350 000, and paid the purchase price. After delivery of the vehicle, the Commissioner for Customs and Excise evicted Sirius of the vehicle, claiming the right to retain the vehicle until an amount of R180 000 was paid in respect of import duty payable in terms of sections 87-90 of the Customs and Excise Act (no 91 of 1964).

Sirius gave Kajee notice of the claim and requested him to assist it in resisting the claim. Sirius alleged that Kajee failed to do so and brought an action against him based on breach of the implied warranty against eviction.

Kajee excepted to the claim on the grounds that dispossession pursuant to a claim based on a statutory right does not found an action based on breach of the implied warranty against eviction.

THE DECISION

The exception was based on the contention that a breach of the implied warranty against eviction had to be caused by a defect in title of the seller. The defendant contended that the Commissioner's claim could not be considered such a defect.

A defect in title need not be some derogation from the seller's rights of ownership. Furthermore, the person claiming against the purchaser need not have some legal title to ownership of the property. A purchaser could rely on the implied warranty against eviction where the person claiming against him has any unassailable claim. Such a claim need not be a clear right in the property itself.

The Commissioner's right being unassailable, dispossession pursuant to it could found an action based on a breach of the implied warranty against eviction.

The exception was dismissed.

# LAVERS v HEIN & FAR BK



A JUDGMENT BY CROBLER AJ (ELOFF JP concurring)
TRANSVAAL PROVINCIAL DIVISION
24 AUGUST 1995

1997 (2) SA 396 (T)

*A purchaser is not evicted of possession of an item purchased by one who has a better title to the item when the police, acting on the authority of section 20(a) of the Criminal Procedure Act (no 51 of 1977), take into possession an item considered to be connected to the commission of an offence. It is only when the purchaser is informed of the fact that the item has been returned to the rightful owner that the purchaser will be able to bring an action for repayment of the purchaser price on the grounds that the seller has breach the warranty against eviction.*

## THE FACTS

In March 1988, Hein & Far BK purchased a motor vehicle from Lavers. In May 1988, acting in terms of section 20(a) of the Criminal Procedure Act (no 51 of 1977), the police took the vehicle into their custody. In November 1988, the police informed Hein & Far that the true owner of the vehicle had identified the vehicle as its vehicle and that the vehicle would be returned to it. After the police had conducted further investigations in order to identify the person who had sold the vehicle to Lavers, they returned the vehicle to the true owner in January 1992. The police then informed Hein & Far who the true owner was and of the fact that the vehicle had been returned to it.

In July 1992, Hein & Far brought an action against Lavers for repayment of the purchase price. Lavers defended the action inter alia on the grounds that the action had prescribed in terms of the Prescription Act (no 68 of 1969) three years after May 1988. Hein & Far contended that prescription had not run from this date because from this date, the debt had not been due. Section 12(3) of the Prescription Act provides that a debt is not due before the creditor has knowledge of the identity of the debtor and the facts from which the debt arises, provided that a creditor will be considered to have had such knowledge if he could have obtained such knowledge through the exercise of reasonable care.

## THE DECISION

When the police took custody of the vehicle, they did so upon the authority given in section 20(a) of the Criminal Procedure Act. It was clear that this authority was not dependent on the question of which party had the better title to the vehicle—the right to dispossess as Hein & Far operated against it, whoever had the right to the vehicle. That right of dispossession therefore, had nothing to do with any defect in title of Lavers. That this was true was clear from the fact that had the right been exercised against Lavers himself, he like Hein & Far would have had no defence to it. It could therefore not be said that in May 1988, Hein & Far had been evicted of possession of the vehicle by one who had a better title to the vehicle.

Section 31 of that Act provides that if criminal proceedings are not instituted in connection with an item taken into custody, or if it appears that such an item will not be used at the trial for purposes of evidence, the item must be returned to the person from whom it was taken or the person lawfully entitled to it. This provision illustrates the provisional nature of the authority exercised in terms of section 20(a), so that one who has been dispossessed of property in terms of the latter section cannot contend that he has been evicted of the item which he has purchased.

It was only when the vehicle was returned to its rightful owner in January 1992 that Hein & Far obtained knowledge of one who had a better right to the vehicle. It was therefore only from that date that the debt due by Lavers arose. Its claim had not prescribed.

# RUSTENBURG PLATINUM MINES LTD v BREEDT

Contract

A JUDGMENT BY VAN HEERDEN JA
(EM GROSSKOPF JA, HARMS JA, NIENABER JA and PLEWMAN JA concurring)
APPELLATE DIVISION
28 NOVEMBER 1996

1997 (2) SA 337 (A)

*In the absence of a time limitation on a provision for payment of a higher amount to the cedent of mineral rights, such amount to be calculated by reference to higher amounts paid to other persons for similar rights, the higher amount is payable by the cedent upon the payment of such higher amount to such other owner, even after registration of the deed of cession recording the terms of the cession of mineral rights.*

## THE FACTS

In 1967, Rustenburg Platinum Mines Ltd and Breedt entered into a prospecting contract in terms of which Breedt gave Rustenburg the right to prospect for minerals and metals on three subdivisions of his farm, Uitvalgrond. In terms of clause 9, Rustenburg had the right, for three years and thirty days, to purchase Breedt's mineral rights for R150 per morg. Clause 9(e) provided that if Rustenburg paid a higher amount than R150 per morg to any owner on the farm, that higher amount would be immediately applicable to the contract and Breedt would be entitled to that amount.

In 1968, the parties entered into a further similar prospecting contract in respect of subdivisions of another farm owned by Breedt, known as Roodekopjes. Clause 9(e) provided that if Rustenburg paid a higher amount than R150 per morg to any other owner in the Brits district, that higher amount would be immediately applicable to the contract.

Rustenburg exercised its options under the two contracts, and in consequence, the parties entered into a notarial deed of cession in terms of which Breedt transferred his mineral rights to Rustenburg. In clause 5, the consideration was stated to be R150 per morg, payable on registration of transfer of the mineral rights. In clause 6(a) it was provided that notwithstanding the provisions for payment of the consideration referred to earlier, if Rustenburg paid a higher amount than R150 per morg to any other owner of property in the district of Brits, that amount would be applicable to the contract and Breedt would be entitled to that amount. The deed was registered and Breedt paid.

In 1987, Rustenburg paid higher amounts than R150 per morg to three owners of mineral rights situated in the district of Brits. Breedt claimed that in terms of clauses 9(e) and 6(a), he was entitled to the difference between the amount they were paid and the amount he was paid. Rustenburg contended that Breedt was only entitled to a higher per-morg price on his mineral rights if Rustenburg paid higher amounts to other owners of property before registration of the notarial deed of cession.

## THE DECISION

The introductory phrase 'notwithstanding the provisions for payment of the consideration referred to earlier' in clause 6(a) was not capable of a narrow interpretation suggested by Rustenburg, the interpretation being that the higher amount would only be possible if payment of a higher amount to other owners had been made earlier. Properly interpreted, it referred to clause 5 which qualified two things, the receipt of the consideration and the date of payment. It was to these two aspects of payment that the phrase referred, and not to the possibility of payment of a higher amount to other owners.

That Rustenburg's contention was unacceptable was clear from the fact that it would mean that if Rustenburg had exercised a similar option with another owner for a per-morg amount greater than R150, but had paid that amount only after registration of the deed of cession in respect of the exercise of that option, Breedt would not be entitled to the higher amount. The parties could not have intended such a result.

The question remained whether the calculation mechanism of clause 6(a) could be exercised at any time after the registration of the notarial deed of cession. The deed provided for no time limitation for the calculation of the

amount to which Breedt would be entitled upon the payment of a higher amount to another owner. It was therefore possible for the calculation to take place on more than one occasion in the future, upon Rustenburg paying a higher amount to various other owners. Rustenburg not having pleaded that the right provided for in clause 6(a) had to be exercised within a reasonable time, it could not be held that this was a requirement for the exercise of the right, nor that Breedt had to show that Rustenburg had paid a higher amount within a reasonable time.

The appeal was dismissed.

## *SOUTH AFRICAN CO-OPERATIVE SITRUS EXCHANGE LTD v DIRECTOR-GENERAL: TRADE AND INDUSTRY*

A JUDGMENT BY HARMS JA (EM GROSSKOPF JA, FH GROSSSKOPF JA, MARAIS JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
15 MARCH 1997

[1997] 2 All SA 321 (A)

*An organ of the State may not waive a benefit conferred on it in rules and procedures laid down by it in the exercise of its powers, where this benefit inures to the advantage of State interests as a whole.*

### THE FACTS

The Southern African Citrus Exchange Co-operative Ltd was a registered and approved exporter under a General Export Incentive Scheme introduced by the Department of Trade and Industry.

Under this Scheme, approved exporters were given financial rewards and tax concessions in respect of exports achieved by them within time periods laid down by the Department. In terms of Guidelines issued by the Department, claims by exporters for the financial rewards were to be prepared timeously as only claims received within three months after the claim period expired would be entertained.

The Citrus Exchange submitted a claim to the Department on 28 May 1993, for the claim period ending 31 January 1993. The Director-General rejected the claim on the grounds that he had no discretion to condone the failure to lodge the claim in good time. The Citrus Exchange applied for a review of the Director-General's decision.

### THE DECISION

The language of the Guideline was clear: only timeous claims would be entertained. This meant that late claims would not be entertained. The fact that the Guideline made provision for an exception in the case of claims posted before the expiry date but delivered after that date also showed that late claims would not be entertained.

The Citrus Exchange argued that because the time limitation was not introduced for the benefit of the public, the Director-General could renounce the benefit it conferred. However, it was not clear that the time limit was introduced solely for the benefit of the Director-General. The indications were that it was introduced to limit his jurisdiction involving the gratuitous dispensing of State funds, the scheme had important fiscal implications for the country, and the waiver of the Director-General's non-discretionary right would thwart the objectives of protecting State funds and treating the public equally.

The application was dismissed.

# STIELER v KROCH-BOU AANNEMERS BPK

Contract

A JUDGMENT BY FLEMMING DJP
WITWATERSRAND LOCAL DIVISION
28 FEBRUARY 1997

[1997] 2 All SA 526 (W)

*A party wishing to vary the terms of a contract by tendering a payment upon different terms from the existing contract will be required to do so in terms that make it clear that a variation is proposed. No new contract will be concluded in such circumstances were the other party does not clearly indicate that it accepts the variations proposed by the other party.*

## THE FACTS

Stieler was indebted to Kroch-Bou Aannemers Bpk in terms of an arbitration award. Stieler paid off some of this indebtedness, and on 27 June 1996, Kroch-bou calculated her indebtedness as R50 063,98, excluding interest and costs of an action for enforcement of the award. Kroch-bou obtained judgment in that action and issued a writ of execution for enforcement.

Stieler's attorney furnished a cheque for R50 063,98 to Kroch-bou's attorney, stating that the cheque was enclosed in full and final settlement of their taxed costs. Kroch-bou's attorney replied that the cheque could not be accepted in full and final settlement, but in part payment, and would accordingly be held on file. Later, they wrote to Stieler's attorney to say that unless they received advices to the contrary, the cheque would be accepted in part payment of the debt. They then banked the cheque.

Stieler argued that although she was not entitled to attach terms to her payment, she had in any event done so, and the deposit of the cheque constituted unambiguous acceptance of those terms. Kroch-bou argued that because there had been no dispute between the parties, it was entitled to ignore Stieler's terms and accept the cheque in part payment of the debt.

## THE DECISION

The writ of execution could not be set aside, nor could the judgment, since Stieler's offer had not encompassed either of these. Kroch-bou had not varied the offer contained in Stieler's attorney's letter, and it had not made a counter-offer. It had simply indicated that the cheque would be accepted in part payment. On the strength of this, it could therefore not be said that there had been any variation in Stieler's obligations toward Kroch-bou.

Stieler had in any event, not discharged the onus of showing that her message meant that acceptance of its terms would create a new contract between the parties. Kroch-bou's reaction could be interpreted as an inquiry into whether an offer was actually intended. The circumstances were that there was no dispute between the parties, Stieler's offer could have been construed as something other than an attempt to vary the terms of their contract, she had remained silent in response to Kroch-bou's own indications of how it was going to accept the cheque.

In these circumstances, there had been no new contract between the parties. Stieler was obliged to pay the full debt.

# *PRETORIUS v COOPERS THERON DU TOIT*

*Contract*

A JUDGMENT BY STREICHER AJA
(SMALBERGER JA, HOWIE JA, FLEWMAN JA and SCHUTZ JA concurring)
SUPREME COURT OF APPEAL
14 MARCH 1997

*Interpretation of a contract dissolving a partnership*

## THE FACTS

Pretorius entered into a written dissolution agreement with his former partners. In terms of the agreement, Pretorius was to leave the partnership, Coopers Theron Du Toit, on 30 June 1992.

Clause 7 of the agreement provided that clients of the partnership would be informed of Pretorius' departure and would be contacted in order to determine whether Pretorius or the partnership would in the future render the accounting and auditing services formerly rendered to them by the partnership. Clause 8 of the agreement provided that on 30 June, the amounts due to the partnership from clients preferring Pretorius in terms of clause 7, and the value of uncompleted work done for such clients, would be calculated and the sum thereof would be the amount due from Pretorius to the partnership. Clause 8.3 provided that on 30 September, the amounts due to the partnership from clients preferring the partnership in terms of clause 7, and the value of uncompleted work done for such clients, would be calculated and the sum thereof would be subtracted from the amount due from Pretorius as calculated on 30 June. The amount then found to be due from Pretorius would be set off against the amount due to him from the partnership as reflected in his current account and capital account with the partnership. Whichever party then owed money to the other would be obliged to pay the balance within six months.

Notices were sent to clients of Coopers informing them of Pretorius' departure from the partnership, but they were not in accordance with the notices as referred to in clause 7 since they did not ask clients to make a choice between Pretorius and the partnership.

Pretorius contended that clients who did not expressly agree to stay with him chose by implication to stay with the partnership, and the amounts due from them and the value of uncompleted work done for them should, in terms of clause 8.3, be subtracted from the amount due by him to the partnership in terms of clause 8.1. Coopers contended that only the amounts due from clients who had expressly agreed to stay with the partnership should be subtracted from the amount due by Pretorius to the partnership.

## THE DECISION

Upon the dissolution of the partnership and its reconstitution, the clients of the previous partnership did not become clients of the new partnership automatically, nor were the debts owed by them to the old partnership transferred to the new partnership. Clients of the old partnership had to make a choice to give their custom to the new partnership. It was therefore incorrect to say that those clients who had not expressly chosen Pretorius had, by implication, chosen Coopers. Had the parties intended that the failure to exercise a choice in favour of Pretorius would be treated as the exercise of a choice in favour of Coopers, their agreement would have provided that only the amount of the uncompleted work done for Pretorius' clients and the amount due to him from them would be payable by Pretorius.

It followed that Pretorius was obliged to pay the sum of R438 240,13 being the amount due after subtraction of the amounts due to Coopers from clients electing to remain with it. From this amount, the amount of bad debts due to Coopers was to be subtracted.

# *TRIDENT INSURANCE BROKERS (PTY) LTD v ELLWOOD*



CA JUDGMENT BY LABE J
WITWATERSRAND LOCAL DIVISION
20 DECEMBER 1996

[1997] 2 All SA 54 (W)

*A restraint on an employee preventing communication with clients of the employer after the termination of employment does not prevent the employee from communicating with clients if the intention of so communicating is not to secure the business of the client.*

THE FACTS

Trident Insurance Brokers (Pty) Ltd v Ellwood entered into an employment agreement. In terms of the agreement, Ellwood undertook not to communicate with or solicit business from any of Trident's clients for a period of 24 months after leaving Trident's employ.

Ellwood left Trident's employ. Within 24 months of having done so, Ellwood met with one of the clients of Trident in order to arrange certain sponsorship in relation to a golf tournament. During that contact, Ellwood told the client that he had left Trident's employ. The client then indicated that he wished to place the business he had had with Trident with Ellwood. On three further occasions, Ellwood had contact with clients of Trident, and as a result thereof the clients had transferred their business from Trident to him. On none of these occasions had Ellwood initially approached the client. The clients had approached Ellwood of their own accord.

Trident sought an interdict to prevent Ellwood from communicating with or soliciting business from any of Trident's clients.

THE DECISION

The word 'communicate' in the employment agreement could not mean that Ellwood was absolutely prohibited from communicating with any of Trident's clients: there could be nothing wrong with him communicating with any of them on a social level, as he had with the client who had an interest in the golf tournament.

The word 'communicate' had to be interpreted as a positive act which Ellwood was to perform with the hope of obtaining business from the client. In none of the cases referred to by the parties did Ellwood communicate with the client with this intention. The fact that Ellwood was not restrained from trading for himself or some other entity showed that no absolute prohibition on communicating with the clients was intended.

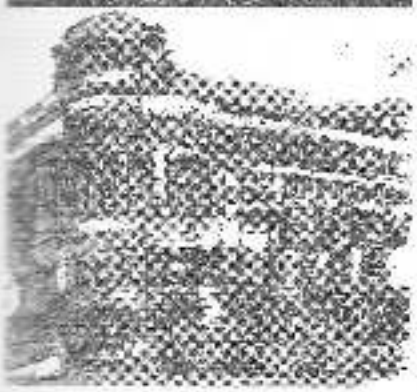
The interdict was refused.

# ABSA BANK BPK v SAUNDERS

A JUDGMENT BY STEENKAMP
DJP
NORTHERN CAPE DIVISION
11 OCTOBER 1996

1997 (2) SA 192 (NC)

Banking



*A failure to comply with the requirements of section 10(6) of the Usury Act (no 73 of 1968) when a bank omits to give written notice to its customer of changes in the interest rate applicable to a loan does not result in nullity of the transactions entered into between the bank and customer.*

## THE FACTS

Saunders was a customer at Absa Bank Bpk, and enjoyed an overdraft facility at the bank. The parties tacitly agreed that the bank would be entitled to charge interest on the overdrawn balance of her bank account, and that the interest rate would be determined in the discretion of the bank manager, subject to the constraint that he apply the best interest rate possible in the circumstances.

The bank did charge interest on the overdrawn balance, but after the introduction of section 10(6) of the Usury Act (no 73 of 1968), did not notify Saunders of the interest rate changes that were applied to her debt. Section 10(6) provides that if no advance notice in writing of an alteration in a variable interest rate has been given by a moneylender, then the moneylender shall at the first reasonable opportunity but not later than three months after the coming into effect of the altered interest rate, give written notice of the alteration. In terms of section 17 of the Act, failure to give the required notice renders the moneylender guilty of an offence.

The court was asked to determine what the effect of the failure to comply with section 10(6) of the Act was.

## THE DECISION

The overriding principle in determining whether or not the failure to comply with the provisions of a statute renders a transaction void is the intention of the legislature: in enacting the provision, was the intention that the transaction should be rendered void by the failure to comply?

The purpose of enacting section 10(6) was undoubtedly to protect the borrower, but the section also protected the lender in that it ensured certainty in respect of the interest rate. The use of the word 'shall' and the imposition of a criminal sanction suggested that the intention was that voidness should result. However, this result did not follow in view of the considerations that:

(i) The section was not stated negatively but positively

(ii) The legislature could have expressly provided for voidness as the intended result but did not do so

(iii) The legislature apparently considered a criminal sanction sufficient to achieve its intention

(iv) Were the transaction to be considered void, the consequences would be unnecessary and unacceptable: the banks would be thrown into a morass of uncertainty, compounded by the fact that they might not have records going back far enough in time to recalculate the interest properly

(v) The notice was not required to be sent by registered post, a requirement that would be expected if nullity flowing from failure to comply were intended

(vi) The requirement also extended to an alteration in the interest rate in favour of the debtor, ie a lowering of the rate, and it could not have been the legislature's intention that notice in writing also had to be given for such a variation.

The bank's failure to comply with the section did not result in the voidness of its transactions with Saunders.

# *BELLINGAN N.O. v CLIVE FERREIRA & ASSOCIATES CC*



A JUDGMENT BY TUCKTEN AJ WITWATERSRAND LOCAL DIVISION
13 MAY 1997

*The in duplum rule does not restrict the recovery of interest ordinarily contracted for since it applies to unpaid arrear interest only. A partner's claim against his co-partners before the settlement of partnership accounts arising from the payment of a partnership debt must be claimed in terms of the partnership agreement, and accordingly decided as to the aliquot share of each partner if the partnership agreement so provides.*

## THE FACTS

On 27 February 1991, Prima Bank Ltd entered into a loan agreement with Prime Timbers, a partnership constituted by Mr JA Bellingan and all of the respondents save the tenth. In terms of the agreement, Prima Bank was to lend Prime Timbers R320 000, the loan to carry interest at 17½% per annum compounded monthly and to be utilised in a plantation and farming venture.

The indebtedness was to be evidenced by a promissory note made by Prime Timbers on the date of draw down. Draw down was to be effected in one lump sum on 27 February 1991. Interest was to be calculated on the loan from date of draw down until the final maturity date which was twenty years from the commencement date of 27 February 1991.

Prime Timbers made the promissory note in favour of Prima Bank in the sum of R10 332 459, payable on 26 February 2011. Prime Timbers gave further security to the bank in the form of a cession of a lease entered into between itself and Kroonstad Lugdiens (Edms) Bpk, and in the form of a put option which conferred on the bank the right to sell the promissory note at any time after 27 February 1994 at a discount rate with 90 days notice. The bank granted Kroonstad Lugdiens a call option, ie the right to purchase the promissory note at any time after 27 February 1994 at the discount rate. Prima Bank advanced the loan of R320 000 to Prime Timbers.

In March 1996, the partnership was declared to have been dissolved on 5 July 1992, the date of death of Bellingan. The deceased estate of Bellingan took cession of Prima Bank's claim against the partnership arising from the loan agreement and the bank's rights under the put option. The bank endorsed the promissory note in favour of the deceased estate. The deceased estate then exercised its put option, and claimed payment of the amount then due from the other partners. This was R720 292,67, being the sum of R10 332 459 discounted to the date of exercise of the option, less Bellingan's partnership share.

The respondents opposed the claim on a number of grounds, one of which was that in terms of the in duplum rule, the applicant was entitled to no more than R640 000 being twice the capital sum advanced by the bank. An alternative ground was that the applicant was only entitled to claim from the co-partners their proportionate share of the debt.

## THE DECISION

The in duplum rule precludes the recovery of interest to the extent that it exceeds the capital sum. The question was whether the interest to be taken into account in determining compliance with the rule was to be arrear unpaid interest only, or all interest payable in terms of the relevant agreement between the parties.

Under the Roman-Dutch law in force in Holland and Friesland, the prohibition on interest in duplum was eventually limited to unpaid arrear interest. The policy of the prohibition was to protect debtors whose affairs were declining. The protection did not extend to a limitation on all interest payable in terms of the relevant agreement between the parties. This application of the in duplum rule was in any event entirely appropriate to an arrangement in terms of which a debtor has stipulated for a lengthy delay between the date of advance of a loan and the date of repayment. Such an arrangement anticipates the accrual of more substantial amounts of interest, which the

parties intend should be payable.

As far as the argument that the applicant was only entitled to each co-partner's proportionate share of the debt was concerned, the position of the applicant was the same as that of a debtor whose relationship with his co-debtors is determined by the terms of the contract between them. The contract between the parties in the present case was embodied in the partnership agreement which provided for the aliquot shares of each partner in the partnership profits and losses. Having taken cession of the bank's claims against the partnership before the settlement of the partnership accounts, the applicant was subject to those contractual provisions, and accordingly entitled to no more than his aliquot share of the amount paid to the bank under the cession agreement.

The applicant was entitled to payment of its claim divided proportionately between the respondents who had been partners of Prime Timbers.

## *COMMERCIAL BANK OF ZIMBABWE v MM BUILDERS & SUPPLIERS (PVT) LTD*

A JUDGMENT BY GILLESPIE J (SMITH J and BLACKIE J concurring)
ZIMBABWE HIGH COURT
30 OCTOBER 1996

1997 (2) SA 295 (ZHC)

*The in duplum rule means that a creditor may not obtain more in interest than the capital debt. This rule will be applied in the case of a fluctuating overdraft debt, whether or not the creditor has capitalised the interest from time to time.*

### THE FACTS

Commercial Bank of Zimbabwe lent money on overdraft to MM Builders & Suppliers (Pvt) Ltd and three other debtors. Interest was charged on the balance of the indebtedness from time to time, and was capitalised. By the time the bank brought actions for repayment against the debtors, the interest portion of the debt which had accrued by then, exceeded the capital repayable under the loan agreements.

The court raised the question whether the 'in duplum' rule applied, and whether the bank was entitled to more in interest than the capital debt.

### THE DECISION

Whether interest accrues as simple or compound interest, it ceases to accumulate upon any amount of capital owing. If the creditor obtains judgment for payment of the capital and interest, interest runs on the judgment debt, but again subject to the limitation that that interest may not exceed the capital debt.

This rule applies to an overdraft granted by a bank, notwithstanding the fact that the practice is for the bank to add interest to the capital sum advanced and compound this periodically. The fact that a bank does this does not mean that interest loses its identity as interest for the purposes of application of the in duplum rule.

For the purposes of application of the rule, when payments are made by the debtor, in the absence of appropriation of the payment, the payments will be appropriated firstly to the earliest capital debit, and thereafter to interest.

# *LEECH v ABSA BANK LTD*

**Banking**

A JUDGMENT BY
BORUCHOWITZ J
WITWATERSRAND LOCAL
DIVISION
27 MARCH 1997

***The in duplum rule may not be waived by contractual provision.***

## THE FACTS

Leech and the other plaintiffs were the trustees of the Koo Leech Trust, to which it was alleged, Absa Bank Ltd's predecessor, Trust Bank, lent R970 000. The Trust alleged that in full and final settlement of Absa's claims against the Trust, the Trust paid Absa R4 125 000.

The Trust brought an action against Absa for repayment of an overpayment, being the difference between the amount paid to Absa and the sum of the amount lent by Trust Bank and interest thereon in a like amount (R1 140 000). The Trust alleged that it was obliged to pay no more than R1 140 000 because any indebtedness greater than that sum was irrecoverable by virtue of the operation of the in duplum rule, ie that interest exceeding the capital sum cannot be claimed.

Absa defended the action inter alia on the grounds that the Trust waived the benefits of the in duplum rule. It contended that the Trust did so by agreeing to the loan on the condition that it renounced the legal benefit and exception 'no valid cause of debt', 'revision of accounts' and 'error in calculation'.

Leech applied for summary judgment.

## THE DECISION

Assuming that the Trust did purport to waive the benefits of the in duplum rule, the question was whether it could do so. Any person may waive the benefit of a provision intended for his protection, provided such waiver is not contrary to public policy. The question therefore was whether the in duplum rule was intended to serve public or individual interests.

The purpose of the rule was to protect borrowers from exploitation by lenders. That protection is given as a matter of public policy. The benefits of the rule could therefore not be waived, and could not be excluded by a contractual provision. The defence of waiver was not open to Absa.

Other defences were however, open to the bank. The bank might successfully defend the action on the grounds that it had not been enriched in the circumstances alleged by the Trust, which brought its action against the Trust on allegations of enrichment. Summary judgment had therefore to be refused.

# *AMALGAMATED BANKS OF SOUTH AFRICA BPK v DE GOEDE*

A JUDGMENT BY FH GROSSKOPF JA (HEFER JA, MARAIS JA, SCHUTZ JA and STREICHER AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 1997

[1997] 2 All SA 427 (A)

*Suretyship*

*By virtue of his membership of a close corporation, a person participates in the management of the close corporation. Such participation might mean that a transaction entered into in the course of such participation is a transaction entered into in the normal course of the business of the member.*

## THE FACTS

De Goede and the second respondent signed deeds of suretyship in favour of Volkskas Bank, the predecessor of Amalgamated Banks of South Africa Bpk. At the time they did so, each of them was married in community of property. They did not have the consent of their spouses to bind themselves as sureties.

Each of the sureties held a 12% interest in the close corporation for which they stood surety, and each of them had advanced a loan of R2 500 to the close corporation. They did not however, take part in the day-to-day management of the close corporation, De Goede being a teacher and the second respondent being a clerk employed in the service of the South African Air Force.

The close corporation failed to meet its obligations toward the bank, and the bank brought an action against the sureties to enforce their obligations under the deeds of suretyship. They defended the action on the grounds that because they had not obtained the consent of their spouses to entering into the deeds of suretyship, the deeds were unenforceable. Section 15(2)(h) of the Matrimonial Property Act (no 88 of 1984) prohibits a person from standing surety for another without the consent of his spouse to whom he or she is married in community of property.

The bank contended that section 15(6) of that Act applied. That section provides that section 15(2)(h) does not apply when a spouse enters into a transaction referred to therein if it is entered into in the normal course of his profession, trade or business.

## THE DECISION

It could not be accepted that the two sureties were merely members of the close corporation on paper. They were aware that the security of their suretyships was being obtained because the close corporation was being given a loan by the bank, and their signatures to the suretyship agreements was an intentional and conscious step taken by them.

A member of a close corporation stands in a peculiar relationship to the close corporation because, by reason of section 46(a) of the Close Corporations Act (no 69 of 1984), he or she is entitled to participate in the management of the close corporation, by reason of section 42, stands in a position of trust in relation to it, and in terms of section 54(1) can in principal bind the close corporation as against third parties. The question was whether or not, because of this relationship, the sureties entered into the deeds of suretyship in the normal course of their business.

The word 'business' could encompass the sureties' involvement in the trading concern in which they had an interest. The fact that they were following professions in other spheres at the same time was irrelevant and did not prevent them from being involved in the business of the close corporation. It is the business of the member of a close corporation to manage the close corporation and direct its activities; if this was done by giving a suretyship on one occasion, then this transaction would be entered into as part of the business of the close corporation.

The sureties had also entered into the deeds of suretyship in the 'normal course' of the business of the close corporation. The test of whether they had entered into the transaction in the normal course was an objective one, and in the present case it was clear from the fact that the suretyships had been taken at a time when the close corporation was being granted credit facilities from the bank, that they had been given in the normal course of the business of the close corporation.

# *HEATHCOTE v FINWOOD PAPERS (PTY) LTD*



A JUDGMENT BY JONES J (LLEWELYN J and ERASMUS J concurring)
EASTERN CAPE DIVISION
21 FEBRUARY 1997

[1997] 2 All SA 28 (E)

*If a deed of suretyship fails to indicate the nature and extent of the principal debt, the suretyship is invalid because it is not reduced to writing as required by section 6 of the General Law Amendment Act (no 50 of 1956). It will not be permissible to add to omitted details in the deed of suretyship to show the true intention of the parties where it is clear that the commission was a result of lack of consensus between the parties.*

## THE FACTS

Contract Printers CC was indebted to Finwood Papers (Pty) Ltd for over a million rands for goods sold and delivered. Finwood Papers required security for this debt, and arranged with Heathcote that he sign a deed of suretyship in its favour.

Heathcote did so, but Finwood Papers required a different deed to be entered into. To this end, it entered into discussions with Heathcote regarding the content of the final deed of suretyship. The parties discussed the date from which the suretyship was to become operative but were unable to agree on this date. The operative date on the deed of suretyship was left blank and inserted later by a director of Finwood Papers.

The deed of suretyship provided that Heathcote bound himself as surety and co-principal debtor with Contract Printers CC for the due and punctual payment by the principal debtor to Finwood Papers of the sum of R1 076 541, owing in terms of a written Acknowledgement of Debt signed by the principal debtor on ... day of ... 1994.

In a sequestration application brought against Heathcote, Finwood depended on the deed of suretyship to prove Heathcote's indebtedness. Heathcote contested his liability, arguing that the deed of suretyship was void for lack of compliance with section 6 of the General Law Amendment Act (no 50 of 1956). That section provides that no contract of suretyship shall be valid unless the terms thereof are embodied in a written document signed by the surety.

## THE DECISION

The amount of the principal debt need not be stated in a deed of suretyship, but there should be certainty about the nature and extent of the principal debt. The deed of suretyship signed by Heathcote did not state what the debt was for, what its extent was and whether or not it was unlimited. It merely stated that it was to be paid in terms of an unidentified acknowledgement of debt. The nature and extent of the principal debt was therefore not ascertainable in the suretyship document. The question why the blank spaces were left open was therefore vital to the validity of the document.

The appropriate interpretation of the negotiations entered into between the parties before the deed of suretyship was signed was that the parties intended that the blank spaces would be filled in, but were unable to agree on the particulars to be inserted. This meant that when the deed of suretyship was entered into, there was no consensus between the parties, with the result that the deed of suretyship was invalid for lack of completeness.

Finwood contended that the indebtedness referred to in the deed of suretyship was obviously that of an acknowledgement of debt entered into on the same date as the deed of suretyship. This however, was not obvious, since it was the very issue in dispute between the parties. Whatever the parties' intentions had actually been, that intention had not been recorded in writing. Extrinsic evidence was not admissible to insert the date alleged to have been intended by the parties.

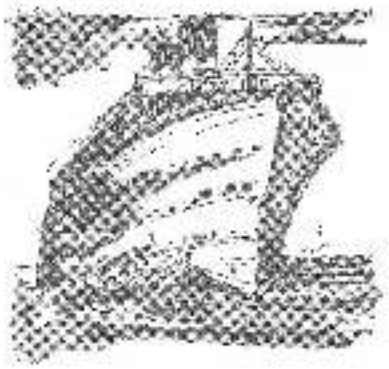
The application for sequestration was dismissed.

# *THE CATAMARAN TNT*
# *DEAN CATAMARANS CC v SLUPINSKI (NO 1)*

A JUDGMENT BY FOXCROFT J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 OCTOBER 1996

1997 (2) SA 360 (C)

*Shipping*



***In the exercise of its admiralty jurisdiction, a court may order that security be furnished to a defendant intending to bring a counterclaim against a peregrinus plaintiff which has submitted to the jurisdiction of the court, provided that the defendant has shown that it has a genuine and reasonable need for security.***

## THE FACTS

Slupinski, a resident of Germany, entered into an agreement with Dean Catamarans CC in terms of which Dean undertook to construct a catamaran named *TNT*. Upon discovering that the refit of the *TNT* had not been completed, Slupinski obtained the arrest of the catamaran at Langebaan. This security was later substituted for the security of R350 000 obtained from the sale of the catamaran. Slupinski obtained further security in the sum of R650 000 after the arrest and sale of another catamaran owned by Dean. Slupinski proposed to bring an action for damages against Dean for breach of contract in respect of three separate contracts for the purchase of catamarans from Dean.

Dean alleged that it had a counterclaim arising from Slupinski having repudiated an agreement for the construction and delivery of six more catamarans. It also alleged that it had a counterclaim arising from reasonable and necessary expenses incurred in returning the *TNT* from Rio de Janeiro to Cape Town. It applied for security for its action in damages to instituted by way of a counterclaim, as well as security for costs incurred in its defence of Slupinski's actions. Slupinski admitted that for the purposes of Dean's counterclaim, he was amenable to the jurisdiction of the court, but denied that he submitted to the jurisdiction of the court.

## THE DECISION

Section 5(2)(b) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) provides that a court in the exercise of its admiralty jurisdiction may order any person to give security for costs or for a claim. The question was whether such security could be given to a party wishing to institute a counterclaim as intended by Dean.

An applicant for counter-security must satisfy the court that it has a genuine and reasonable need for security. It will not be entitled to security in any amount, and not necessarily in the full amount of its claim. Dean had in the present case shown that it had a prima facie case in regard to its claim for the reasonable and necessary expenses incurred in returning the *TNT* to Cape Town, but had failed to show that its need for security in the claim it intended to bring based on Slupinski's alleged repudiation of the contract for the construction and delivery of the six catamarans was either genuine or reasonable. It was therefore entitled to security to the extent of the former claim, but not the latter.

A court will not normally exercise jurisdiction over a peregrinus in the absence of an attachment of his assets or a consent to jurisdiction by him. However, in the present case, Slupinski's statement that he was amenable to the jurisdiction of the court meant that the court did have the power to order him to provide security for Dean's counterclaim.

# *THE YU LONG SHAN*
# *GUANGZHOU MARITIME GROUP CO v DRY BULK SA*



A JUDGMENT BY HURT J
DURBAN AND COAST LOCAL DIVISION
28 NOVEMBER 1995

1997 (2) SA 454 (D)

*A counter-claimant in a maritime claim is entitled to security from the claimant where the counter-claimant has shown that it has a prima facie case against the claimant. A court will readily order that the claimant provide security where the defendant has been forced to litigate in the South African courts because of an attachment or arrest effected against the defendant's vessel.*

## THE FACTS

Dry Bulk SA, a Liberian company, time-chartered the *Fei Xia Shan* from a party described in the charterparty as the Guangzhou Zen Hua Shipping Co, a company registered in the Peoples' Republic of China. A dispute arose concerning the charter, an arbitrator was appointed in terms of the charterparty, and an award of $335 400 plus interest and costs was made against Zen Hua. Zen Hua disputed the competency of the arbitration on the grounds that the charterparty was concluded without its authority, and applied to the English High Court to have the arbitration award set aside.

While Zen Hua's application was still pending, Dry Bulk issued a summons in rem against the *Yu Long Shan* in the Durban and Coast Local Division of the South African Supreme Court, based on the arbitration award. Dry Bulk alleged that the *Yu Long Shan* was owned by Guangzhou Maritime Group Co which, along with Zen Hua, was owned and controlled by the Ministry of Communications in China. By virtue of their common corporate parentage, it was alleged that Zen Hua was deemed to be the owner of the *Fei Xia Shan* so that the *Yu Long Shan* was an associated ship as referred to in the Admiralty Jurisdiction Regulation Act (no 105 of 1983).

Maritime Group gave a form of guarantee for the release of the *Yu Long Shan*, and then applied for an order directing Dry Bulk to furnish security for three claims it had against Dry Bulk. These were a claim for $129 000 for damages resulting from the arrest of the *Yu Long Shan*, a claim for payment of costs of $79 350 awarded in an earlier successful application for the release of another associated ship in London, and a claim for costs in a counterclaim it intended to bring in the action under which the *Yu Long Shan* was arrested.

Dry Bulk opposed the application for security.

## THE DECISION

Section 5(2)(b) of the Admiralty Jurisdiction Regulation Act provides that a court may order any person to give security for costs or for any claim. Section 5(2)(c) provides that a court may order that any arrest shall be subject to such conditions as to the court appears just, whether as to the furnishing of security or liability for costs, expenses, loss or damage likely to be caused or otherwise.

The court has a discretion in applying the provisions of these sections. In doing so, it must take into account that they were enacted in order to render the court's judgments effective in cases were peregrine defendants are involved. Where the cause of action is presented as a counter-claim, security may be ordered where the counterclaimant shows no more than that it has a prima facie case. Such a policy of requiring security of the plaintiff should be adopted in view of the fact that the plaintiff may, through the procedure of attachment or arrest, force the defendant to litigate in South African courts.

As far as Maritime Group's claim for damages was concerned, it was significant that the arbitration award was not final but subject to review in the English High Court. It was also relevant that it was being argued that the arbitration award only gave rise to an action in personam against Zen Hua and could not found an action in rem required for the arrest of an associated ship. If these averments were proved, they would constitute a basis for Maritime Group's claim for damages.

As far as the claim for costs were concerned, there was merit in the

submission that these need not be taxed in order to render the claim for them a liquid claim, and that an objection to a claim for them prior to this, was merely a dilatory objection, warranting no more than a stay of proceedings until taxation.

As far as the claim for costs in the counterclaim were concerned, having shown that it had a prima facie case, Maritime Group was entitled to security for these, but in an amount to be determined by the Registrar of the Court.

# *THE MV* ZLATINI PIASATZI *FROZEN FOODS INTERNATIONAL LTD v KUDU HOLDINGS (PTY) LTD*

A JUDGMENT BY CONRADIE J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
7 DECEMBER 1993

1997 (2) SA 569 (C)

*A party which has effected a security arrest in terms of section 5(3)(a) of the Admiralty Jurisdiction Act (no 105 of 1983) may not increase its security at a later stage in terms of section 5(2)(b) of the Act.*

## THE FACTS

Frozen Foods International Ltd contracted with Kudu Holdings (Pty) Ltd to carry a cargo of fish to Nigeria. Kudu alleged that Frozen Foods had breached the charterparty and arrested the cargo of fish as security for its claim. Arbitration proceedings began in London to settle the dispute. Frozen Foods intended to counterclaim in the arbitration for an advance payment of half the freight made in terms of the charterparty, as well as the cost of transshipment. Its counterclaim amounted to $152 113,13.

As security for its counterclaim, Frozen Foods obtained an order in terms of section 5(3)(a) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) for the arrest of an amount held in trust by Kudu's attorneys, a sum of R2 420,08. It applied for further security in terms of section 5(2)(b) of the Act, being the difference between this amount and the amount of its counterclaim.

## THE DECISION

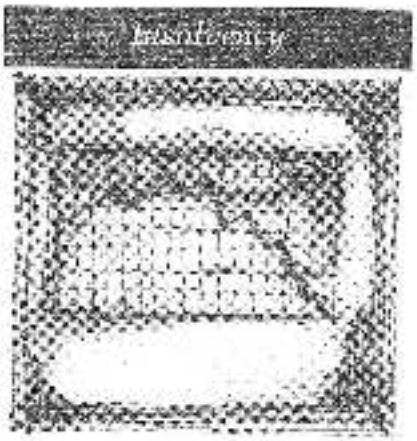
An arrest effected under section 5(3)(a) of the Admiralty Jurisdiction Act gives the claimant security to the value of the property arrested. The property is the object of the arrest and it cannot be increased at a later stage under the provisions of section 5(2)(b). A procedure whereby a party could top up the security it already had in order to obtain security for the full amount of its claim has not been adopted by our courts, and there was no warrant for introducing it. Were such a procedure to be allowed, the owner of the property would never be able to ensure the release of its property by giving security to the full value thereof, but would have to give security to the full value of the claim.

The application was dismissed.

# *STANDARD BANK OF SOUTH AFRICA LTD v MASTER OF THE SUPREME COURT*

A JUDGMENT BY ALBERTUS AJ CAPE OF GOOD HOPE PROVINCIAL DIVISION
6 DECEMBER 1996

[1997] 2 All SA 19 (C)



*The Master is entitled to conduct an enquiry in terms of section 415 of the Companies Act (no 61 of 1973) after the confirmation of the Final Liquidation and Distribution Account.*

## THE FACTS

Unique Press (Pty) Ltd was placed in liquidation, and in due course an amended Final Liquidation and Distribution Account was confirmed by the Master of the Supreme Court. A distribution was effected to the various creditors including the Standard Bank of South Africa Ltd and the fourth respondent.

The Master then subpoenaed an employee of the Standard Bank to appear at an enquiry to be held before him. The enquiry took place, and the employee as well as a director of Unique Press were interrogated. The enquiry was postponed to a later date, when the fourth respondent applied for subpoenas to be issued for the attendance of the employee at an enquiry to determine certain matters of interest to it.

The Standard Bank then applied for an interdict to prevent the continuation of the enquiry. Its grounds for opposing the continuation of the enquiry were that an enquiry under section 415 of the Companies Act (no 61 of 1973) can only be held in respect of a company which is being wound up, and not one which has already been wound up.

## THE DECISION

Section 415 of the Companies Act provides that the Master may interrogate a person present at a meeting of creditors of a company which is being wound up. When considered along with sections 414, 417 and 419, it appears that it is not a requirement of section 415 that the enquiry take place while the company is still being wound up. The common object of these sections is to facilitate the gathering of information to enable the winding-up to be properly and effectively administered with the greatest financial benefit for creditors. Given this common object, there was no reason to limit the time period for the institution of an enquiry in the case of section 415 when it was clearly not so limited in the case of these other provisions.

Section 108, which provides that the confirmation of an account will have the effect of a final judgment, could not be interpreted so as to mean that no enquiry could take place after confirmation of the account. Amendment of the account was possible at a later stage, the object of the section merely being to bring finality to a creditor's claim where this has been made against an insolvent estate and the creditor has not objected to the account so incorporating that claim.

The application was refused.

# *CRONJE N.O. v DE PAIVA*



A JUDGMENT BY CHULU J BOPHUTATSWANA PROVINCIAL DIVISION
28 FEBRUARY 1997

[1997] 2 All SA 80 (B)

*The onus of proving that a disposition was made for no value rests on the person alleging it. In relation to the sale of a business where the purchaser forfeits a substantial portion of the price paid for the business upon default, the person alleging a disposition without value must show the value of the business in order to discharge this onus.*

## THE FACTS

De Paiva sold a business to a person for R500 000. R303 000 was paid. In terms of the sale agreement, De Paiva was to retain the business until such time as the price had been paid in full. The purchaser defaulted in making full payment, and De Paiva cancelled the sale. In terms of a settlement entered into between the parties, the purchaser forfeited the amount paid for the business.

The purchaser's estate was sequestrated. His trustee sought to recover the R303 000 contending that it was a disposition without value as referred to in section 26(1) of the Insolvency Act (no 24 of 1936).

## THE DECISION

The onus of proving that the disposition was not made for value rested on the trustee. There being no evidence of the value of the business when it was returned to De Paiva, the trustee had not discharged this onus.

The action was dismissed.

# *SECHOLD FINANCIAL SERVICES (EDMS) BPK v GAZANKULU ONTWIKKELINGSKORPORASIE BPK*

A JUDGMENT BY OLIVIER JA (VAN HEERDEN JA, VIVIER JA, HARMS JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
20 MARCH 1997

1997 CLR 225 (A)


*Where a party to a contract is incorrectly named, the contract remains in force notwithstanding this mistake if the parties would in any event have contracted on the same basis had the mistake been known. A cessionary of rights is not entitled to on-cede its rights without the consent of the cedent, but if the cedent gives its consent to such an on-cession, the ultimate cessionary obtains those rights as against the cedent that it had against the first cessionary.*

## THE FACTS

Gazankulu Ontwikkelingskorporasie Bpk (GOK) entered into an agreement to borrow R80m from a company representing itself as 'Severn Holdings'. Severn required GOK to cede to it certain insurance policies issued by Sanlam, as security for the indebtedness arising from the loan. GOK did so on 2 October 1991. Severn informed GOK that it intended raising the money required for the loan from a foreign party.

The policies and cession documents were delivered to Severn's attorneys on 24 October 1991. GOK also consented to the registration of the cession of the policies by Sanlam.

Severn then began negotiations with Sechold Financial Services (Edms) Bpk for the advance of a loan of R19m. It offered Sechold the ceded policies as security for this loan. Sechold told GOK of the proposed loan and inquired whether the ceded policies could be taken as security for that loan. On 8 November 1991, Sechold agreed to lend Severn R19m.

On 12 November 1991, the cession of the policies from GOK to Severn and from Severn to Sechold was registered by Sanlam. On 13 November 1991, GOK confirmed in writing that it consented to the registration of cession of its policies in favour of Severn and that it consented to Severn obtaining a facility on the basis of that cession. GOK ceded the policies and gave its consent to the registration of the cession after having been assured by Severn's attorneys that a foreign party required this before it would proceed with a loan to Severn, and that the funds from that loan would be held in the attorneys' trust account pending the completion of the required registration.

On 14 November 1991, Sechold paid R19m into Severn's attorneys' trust account. The attorneys disbursed R5m of this to GOK on 30 December 1991. The balance was paid out to other parties.

At the time of these events, there was no company by the name of 'Severn'. There was a company by the name of 'Maranatha Mews Imports (Edms) Bpk' which the representatives of Severn thought had changed its name to 'Severn Holdings (Edms) Bpk'. The change of name had not been effected because of a mistake in the application for change of name. Severn had at all times used the registration number of Maranatha to identify Severn in the bona fide and mistaken belief that the change of name had been properly effected.

GOK applied for an order that the cessions from it to Severn and from Severn to Sechold were null and void due to the non-existence of Severn, alternatively that it was entitled to cancellation of the cessions and re-delivery of the policies. Sechold opposed the application and contended that there had merely been an irrelevant error as to the name of one of the parties. Sechold counter-applied for rectification of the contracts and cession documents by substitution of the name of Maranatha. It also applied for an order that it was entitled to the full proceeds of the policies ceded to it as security for its loan.

## THE DECISION

There are cases where had the true name of one of the contracting parties been known, the other party would not have contracted. However, this was not so in the present case. There was no evidence that had GOK known Severn's true name, this would have made any difference to GOK. GOK had made no investigation into the ownership of Severn, nor

into details of it appearing in the register of companies. It therefore appeared that the mistake in the name of Severn did not render the contract null and void. The contract and the cessions could be rectified by the substitution of the name of Maranatha for that of Severn.

As far as the cessions of the policies were concerned, the parties' intention clearly was to cede the policies to Severn, this being the security required for the loan to be made by Severn. Severn would not have been entitled to cede its rights in these policies without obtaining the consent of GOK. This it did when it obtained the letter of 13 November 1991 from GOK. The question was what the effect of this consent was: did it confer on Sechold the right to claim the full amount of the money it had advanced, or was its right limited by the extent of the rights obtained by Severn when taking cession of the policies (the operation of the nemo plus juris doctrine)? In the latter event, since Severn obtained the cession as security for GOK's indebtedness to it, this amounting only to the R5m so far disbursed, Sechold would be limited to a claim for R5m of the value of the policies.

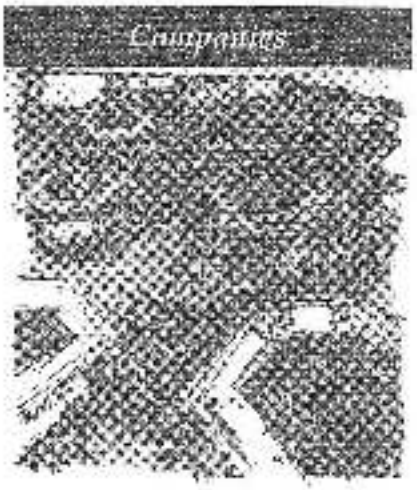
Sechold's right was not so limited, because the consent by GOK given in its letter of 13 November 1991 excluded the operation of any limiting effect. When this letter was written, GOK knew that Severn was negotiating a loan of R19m from Sechold, that Sechold required security for this loan, that the advance from Sechold would be held in the attorneys' trust account pending the completion of this security, and that once its consent was obtained the policies would be ceded to Sechold to secure the full extent of Severn's indebtedness to Sechold. Nothing in the letter limited the consent then given. Its terms were that it conferred on Sechold security for repayment of its loan to Severn, to the extent of the value of the policies.

Sechold was entitled to payment of the proceeds of the policies. The appeal was upheld.

# SEEFF HOLDINGS LTD v SEEV-PATT PROPERTIES (PTY) LTD

A JUDGMENT BY LEVINSOHN J
NATAL PROVINCIAL DIVISION
21 JANUARY 1997

1997 CLR 259 (W)




*A court will not order a company to change its name, in terms of section 45(2) of the Companies Act (no 61 of 1973) where the company's name, read as a whole, is dissimilar from that of the applicant company, even where one part of the company name is similar to that of the applicant company. A court is entitled to have regard to the criteria for the choice of name laid down by the Registrar of Companies in adjudging whether or not a company name is desirable.*

## THE FACTS

Seeff Holdings Ltd and four associated companies carried on a business involving all aspects of the property market, including property syndications, equity portfolio management, estate agencies, commercial property administration and the financing of residential home loans. The business developed from beginnings some thirty years previously, was advertised widely through, inter alia, the use of registered trade marks. The four associated companies' names all began with the name 'Seeff'.

Some four years after the incorporation of Seeff Holdings, the founders of two trusts, a certain Seevnarayan and a certain Pattundeen, incorporated a company which was to own immovable property for the purpose of generating a rental income. The trusts held the shares in the company which was named Seev-Patt Properties (Pty) Ltd, the word 'Seev-Patt' being taken from the names of the founders of the trusts. Seev-Patt did not advertise its name, nor did it display its name prominently at any of its properties. It did not have a telephone number or a telephone listing and did not print any stationery, and it was only potential tenants of its properties that came to know of Seev-Patt's name.

Seeff brought an application to declare Seev-Patt's name undesirable in terms of section 45(2) of the Companies Act (no 61 of 1973) and order it to change its name.

## THE DECISION

Section 45(2) of the Companies Act provides that a person may lodge an objection to a company's name on the grounds that the name is calculated to cause damage to the objector or is undesirable. The applicants contended that Seev-Patt's name was undesirable.

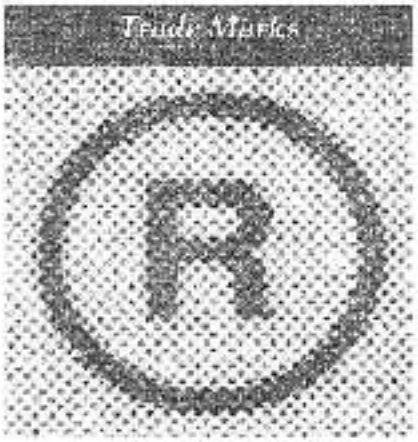
Criteria for judging the concept of undesirability are given in a directive issued by the Registrar of Companies. The directive carries no statutory force, but it does establish criteria which may be used in determining whether a name is undesirable or not. One criterion is whether or not the name is similar to that of an existing company. Similarity had however, not been shown to exist in the present case. The 'Seev' part of the name was not dominant in the name as a whole. When read as a whole, the name was strikingly dissimilar to Seeff's name, and was unlikely to cause confusion.

The application was dismissed.

# *JUDY'S PRIDE FASHIONS (PTY) LTD v REGISTRAR OF TRADE MARKS*

A JUDGMENT BY PLCKRIN AJ
(VAN DER WALT DJP and
SWART J concurring)
TRANSVAAL PROVINCIAL
DIVISION
19 SEPTEMBER 1996

1997 (2) SA 87 (T)




*The Registrar of Trade Marks is entitled to require the entry of a disclaimer in the registration of a trade mark where the mark does not have a distinctiveness adapted to distinguish goods or services with which the proprietor of the trade mark is connected in the course of trade from goods or services in respect of which no such connection subsist.*

THE FACTS

Judy's Pride Fashions (Pty) Ltd applied for the registration of a trade mark in a stylised representation of the words 'fashion world', in Class 42 in respect of services relating to the sale and promotion of apparel and the like. The Registrar of Trade Marks stated that the application would be accepted in Part A of the register, subject to the application being converted to an application in terms of section 32 of the Trade Marks Act (no 62 of 1963) and the disclaimer of the phrase 'Fashion World' being entered against the application.

Judy's Pride Fashions accepted the conditions of acceptance, but later sought to withdraw the disclaimer. It appealed the Registrar's refusal to withdraw the requirement of a disclaimer.

THE DECISION

Section 18 of the Trade Marks Act provides that the Registrar may require, as a condition for the entry of a trade mark on the register, that the proprietor disclaim any right to the exclusive use of all or any portion of the trade mark which is matter common to the trade or otherwise of a non-distinctive character.

'Distinctive' is described in section 12 as adapted to distinguish goods or services with which the proprietor of the trade mark is connected in the course of trade from goods or services in respect of which no such connection subsist. In the present case, the goods or services with which Judy's Pride Fashions was connected in the course of trade (apparel and the like) were goods and services for which the word 'fashion' could never be distinctive: the word was reasonably required for use in the trade, and for that reason, could not be considered distinctive.

The fact that the word 'fashion' was conjoined with the word 'world' did not confer any distinctiveness on the phrase. Furthermore, the fact that the phrase was always given in stylised form did not show that the words had acquired a distinctiveness entitling it to registration without the disclaimer.

The appeal was disallowed.

# Current Commercial Cases

Volume 6 Part 4 August 1997

## In this issue ...



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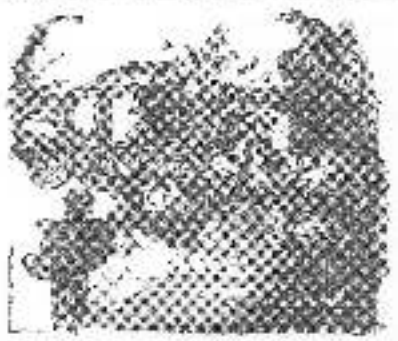
# *KENT v SOUTH AFRICAN NATIONAL LIFE ASSURANCE COMPANY*

A JUDGMENT BY BROOME AJF
DURBAN AND COAST LOCAL DIVISION
1 JULY 1996

1997 (2) SA 808 (D)

*Insurance*



***In determining whether or not a person suffers a disability defined as a condition caused by an illness manifesting itself while an insurance policy is in force, the manifestation of the illness must take place by the nature of the illness becoming known by the person suffering the illness. The awareness of symptoms of the illness manifesting themselves prior thereto does not amount to a manifestation of the illness. If however, the disability exists before the insurance policy is entered into, and the disability is the risk insured against, the insurance contract is invalid.***

## THE FACTS

Prior to May 1992, Kent lodged claims with the South African National Life Assurance Company (Sanlam) for payment of disability benefits under policies issued by Sanlam. The claims arose from Kent having experienced symptoms commonly known as ME. Sanlam repudiated the claims on the grounds that ME was not a permanent disability as defined in the policies.

In May 1992, Sanlam issued to Kent a policy providing for payment of R400 000 if Kent suffered total and permanent disability before 1 May 2014. This agreement was based on the common assumption that Kent did not then suffer from a total, continuous and permanent disability as defined in the policy. The policy defined a 'disability' as a condition directly and solely caused by a sickness rendering Kent totally and permanently and continuously unable to participate in certain activities. It defined a 'sickness' as an illness which manifested itself while the assurance was in force, or an illness which had manifested itself prior to inception of the policy if it was disclosed to Sanlam at the time of the proposal.

From July 1990, Kent was totally, continuously and permanently disabled by reason of a sickness as defined in the policy. The sickness was Anticardiolipin Antibody Positivity, a sickness of which Kent had until then been unaware.

Kent claimed R400 000 from Sanlam in terms of the policy. Sanlam contended that the policy was void by reason of the failure of the common assumption, alternatively that because the risk had materialised before the conclusion of the policy, no valid contract of insurance was, or could have been, concluded.

## THE DECISION

In order to determine whether or not there had been a failure of the common assumption, in view of the definition of 'sickness', it was necessary to determine when Kent's illness had first manifested itself.

Kent had been aware of the symptoms of his illness before the inception of the policy, but only knew of what it was and its permanency after the inception of the policy. The question was therefore when this illness manifested itself. Its manifestation took place when the parties knew the nature of Kent's illness, not when Kent first became aware of its symptoms. They first knew of the nature of the illness after inception of the policy. The common assumption being that at the time of contracting, Kent did not have a sickness which had manifested itself, and Kent only becoming aware of the nature of the sickness after inception of the policy, the common assumption had not failed.

As far as the alternative allegation was concerned, because a contract of insurance postulates that a sum of money will be paid upon the happening of a specified uncertain event, the risk insured against cannot have occurred prior to the entering into of the contract. In the present case, Kent was permanently disabled before the contract was entered into, so that the uncertain event did occur prior to the entering into of the contract. Accordingly, no valid contract of insurance was concluded.

Kent's claims were dismissed.

# CITY COUNCIL OF THE CITY OF DURBAN v RUMDEL CONSTRUCTION (PTY) LTD



A JUDGMENT BY BROOME DJP
DURBAN AND COAST LOCAL DIVISION
7 JANUARY 1997

[1997] 3 All SA 20 (D)

*Interpretation of provisions of a construction contract arising from a claim for indemnity by the contractor against the insurer. The contractor's 'maintenance period' obligations are not determined by the fact that arise during the maintenance period but by the fact that the construction contract imposes those obligations in that period.*

## THE FACTS

Rumdel Construction (Pty) Ltd undertook the second phase of a road bypass for the Natal Provincial Administration. Prior to commencement, it engaged its insurance broker, Mr Lewis, to obtain indemnity insurance in respect of the contract. Lewis negotiated the terms of an insurance agreement with Allianz Insurance Ltd, and concluded these negotiations with instructions to Allianz to issue its contract work/public liability policy for a period of twenty two months from 21 March 1988, and for a twelve month maintenance period.

When Allianz's representative signed the insurance contract, he considered he was acceding to the terms of the agreement as negotiated with Lewis. Rumdel signed the contract on that assumption as well. The contract however, recorded the period of insurance cover as being twenty two months from 21 March 1988 and did not include a twelve month maintenance period.

An endorsement to the contract recorded that during the period not exceeding twelve months from the time of take-over by the principal, the insurance would include liability of the contractor for loss or damage to the insured new property. Another provision, denoted as exception (e)(vii), recorded that Allianz would not be liable to indemnify in respect of damage to existing underground cables unless the exact position of such cables had been furnished to Rumdel prior to commencement of the insured works. General Exception 6 provided that the insurance policy did not cover loss occasioned by any operations during any maintenance period other than those carried out for the sole purpose of complying with Rumdel's obligations under the maintenance clause of the construction contract.

The construction contract did not incorporate a maintenance clause. It did however, provide, in clause 48, that the Engineer could issue a Certificate of Completion upon being satisfied that the works were complete for all practical purposes, and that the period of maintenance would begin in respect of those works which had been completed from the date of issue of the certificate. Clause 49 provided that during the period of maintenance, Rumdel would execute all such work of repair and making good of defects as might be required by the engineer.

During the maintenance period, it was discovered that a manhole had earlier been covered while raising the ground level for the road. Rumdel was required to raise the manhole, and in doing so, had to remove rubble which had been placed on top of it. While digging a hole in the ground to create a place for the disposal of the rubble, one of Rumdel's pay loaders caused damage to electric cables owned by the City Council of Durban. The cables had been installed after the insurance contract was entered into, and during Rumdel's execution of the contract works. The council claimed payment of the damage from Rumdel. Rumdel contended that the insurance contract was to be rectified by the inclusion of a provision for cover during the twelve month maintenance period, and claimed an indemnity from Allianz. Rumdel introduced Allianz as a third party in the action, the council deferring its claim to the conclusion of Rumdel's claim against Allianz. Allianz repudiated.

## THE DECISION

The common continuing intention of the parties was that Allianz would extend cover for the twelve month maintenance period. This being the test for allowing rectification of a written contract, rectification of the insurance contract had to be allowed.

It could not be said that rectification in this manner would create an inconsistency with the endorsement to the contract. The endorsement referred to a different subject matter, ie insured new property, and gave cover in respect of this property arising from causes occurring prior to the maintenance period or which were caused by Rumdel as a result of work done during the maintenance period. Rectification would therefore augment the insurance cover, but would not be inconsistent with it.

Allianz also alleged that it was entitled to repudiate on the grounds that exception (e)(vii) applied and that Rumdel had not complied with its terms. The exception however, referred to existing underground cables. This had to be a reference to cables existing at the time the contract was concluded. It would be impractical to require of Rumdel that it ascertain the existence or otherwise of cables installed at any time during the execution of the contract works. The cables actually damaged by Rumdel had not existed at the time the contract was concluded. The exception therefore did not assist Allianz.

Allianz also repudiated on the ground that General Exception 6 applied, and that the operation during which the cable was damaged was not carried out for the sole purpose of complying with Rumdel's obligations under the maintenance clause of the contract.

In determining whether General Exception 6 did apply, it was necessary to determine whether the work being done by Rumdel at the time the damage was caused was work referred to in the maintenance clause. There being no such clause in the construction contract, the reference to it in General Exception 6 had to be a reference to Rumdel's obligations as recorded in clause 48 or clause 49 of that contract. Of the two clauses, only clause 49 provided for obligations to be performed by Rumdel during the maintenance period. Clause 48 provided for the continuing obligations of Rumdel flowing from uncompleted work in respect of the main contract, but clause 49 provided for the obligations of Rumdel imposed on it during the maintenance period. The latter obligations were those referred to by General Exception 6.

The operations being carried out by Rumdel in which the cables were damaged, were not done in the performance of obligations imposed on it during the maintenance period: they were done to rectify a situation which had arisen by virtue of events that had taken place during the performance of the contract works. They did not fall under the description of Rumdel's obligations as set out in clause 49 and were therefore not done for the sole purpose of complying with Rumdel's obligations under the maintenance clause of the construction contract. General Exception 6 therefore applied.

Allianz was entitled to repudiate.

> *...the enquiry is not so much into the nature of the work being performed at the time or into the time when it was being performed, but into the obligation requiring its performance. The same applies to the argument that the work was being done in compliance with an undertaking by the contractor to finish the outstanding work during the maintenance period. That obligation is unrelated to any maintenance obligation or obligation under a maintenance clause.*

# COMMERCIAL UNION ASSURANCE COMPANY OF SA LTD v GOLDEN ERA PRINTERS AND STATIONERS (BOPHUTATSWANA) (PTY) LTD



A JUDGMENT BY
WADDINGTON AJP
BOPHUTATSWANA PROVINCIAL DIVISION
8 MAY 1997

[1997] 3 All SA 165 (B)

*An insurer may not bring an action for damages against a tenant, arising from the insurer having become obliged to reinstate the tenanted premises, based on the tenant's obligation to return the premises upon termination of the lease, where the lease continues and has not been terminated, because such an action if brought by the landlord would be premature. Where it is clear from a lease that the tenant contributes as part of the monthly rental towards an insurance premium payable by the landlord, the landlord may not bring an action for damages, alleging negligence by the tenant, arising from those events both parties have thereby insured against.*

## THE FACTS

Golden Era Printers and Stationers (Bophutatswana) (Pty) Ltd entered into a lease as tenant with the Bophutatswana National Development Corporation (BNDC) as landlord. Clause 6.2 of the lease provided that Golden Era was obliged at its own expense to maintain the leased premises in good condition, and upon termination of the lease, return the premises in the same condition of good repair as it was received from BNDC, excluding normal wear and tear. Clause 8.1 of the lease provided that in the event of Golden Era failing to maintain the premises in terms of clause 6.2, BNDC would, following notice, be entitled to fulfil Golden Era's obligation and recover from it all expenses incurred in connection therewith.

In terms of its obligations recorded in clause 5.2 of the lease, BNDC insured the premises against loss arising from fire, the insurer being Commercial Union Assurance Company of SA Ltd. Clause 4.3 provided that should the premiums increase beyond a certain amount, a portion of the premium then payable would be added to the monthly rental payable by Golden Era.

During the currency of the lease, a fire occurred at the premises and some of the buildings situated there were destroyed. BNDC made a claim against Commercial Union in terms of the insurance policy, and was compensated in full. Golden Era remained in occupation of the premises, and the lease continued.

Commercial Union alleged that the damage was caused by Golden Era's negligence, and took cession of BNDC's claim for damages arising from the fire. By subrogation, it brought an action against Golden Era for payment of those damages. It alleged that as a result of the fire, Golden Era was unable to return the premises to BNDC as it was required to do in terms of clause 6.2.

Golden Era defended the action inter alia on the grounds that the claim brought in contract had been brought prematurely, and on the grounds that the lease, properly construed, excluded any claim by BNDC on the grounds of Golden Era's negligent acts.

## THE DECISION

The condition precedent for Golden Era having to return the premises to BNDC in the same condition in which they were received was the termination of the lease. This was the intention and clear meaning of clause 6.2. The clause did not impose an obligation on Golden Era to return the premises to BNDC in that condition during the currency of the lease. A claim to return the premises, if brought by BNDC, could have been met with the response that the obligation to do so had not yet arisen. The same response could be given to its subrogated claim as brought by Commercial Union.

In any event, the obligation to return the premises in the same condition of good repair as that in which it was received did not include the obligation to replace a building completely destroyed by fire. The fact that the lease required BNDC to insure the premises indicated that clause 6.2 was not intended to include this obligation.

The claim by Commercial Union, not being sustainable by BNDC from whom it was subrogated, was therefore unsustainable by it.

The alternative contention put by Golden Era was that the lease itself excluded any claim by BNDC against it arising from its own negligence, ie for delictual damages. Commercial Union was

therefore similarly precluded from bringing a subrogated action on this ground.

In support of this, it had to be recognised that it was clear from clause 4.1, that Golden Era was obliged to contribute to the payment of the premium, and this contribution would be obtained by BNDC in its receipt of the monthly rental. It made commercial sense for BNDC to build into the rental it charged Golden Era, an amount attributable to the insurance premium. In the light of Golden Era's contribution to the insurance premium, it could be concluded that the insurance agreement itself was intended to protect the interests of both BNDC and Golden Era. Having both insured their interests in this manner, the implication was that both were protected against the possibility of loss. BNDC would therefore not entitled to bring an action for damages against Golden Era, and neither, by subrogation, Commercial Union.

The action was dismissed.

## *PARADISE LOST PROPERTIES (PTY) LTD v STANDARD BANK OF SOUTH AFRICA (PTY) LTD*

A JUDGMENT BY COMBRINCK J DURBAN AND COAST LOCAL DIVISION
27 SEPTEMBER 1996

1997 (2) SA 815 (D)


*A landlord is not entitled to assert a hypothec over property on the premises over which it has a lease where it has knowledge that a third party owns the property. Because a third party tacitly consents to the operation of the hypothec, the onus of showing that the landlord knew of its ownership of the property rests on the third party.*

### THE FACTS

Supergro Properties CC leased premises in Margate Sands Business Centre to Dynamic Shares CC. Dynamic ceded its right, title and interest in the lease to Mrs Hodgson with effect from 1 November 1993. Mr and Mrs Hodgson conducted a business at the premises, and then sold the business to Mr Woolley.

The sale recorded that the Hodgsons were indebted to the Standard Bank in the sum of approximately R100 000, and that the purchaser would assume responsibility for repayment of the loan. It provided further that ownership in the business and all its assets was reserved in favour of the sellers until such time as the full purchase price had been paid. The sale was subject to the suspensive condition that the purchaser conclude a lease with Supergro on terms not less favourable than the existing lease, and that satisfactory arrangements be made with the seller's creditors for the repayment of amounts due to them.

The date on which Woolley was to take over the business was 5 August 1994, but the agreement was not signed until November 1994. An unsigned copy of the agreement was however, sent to both the Standard Bank and Supergro in August 1994.

In September 1994, Supergro ceded its rights and obligations under the lease to Paradise Lost Properties (Pty) Ltd.

The Standard Bank brought proceedings against the Hodgsons for amounts owing to it. It took judgment against them, and attached the assets then at the premises. The assets were sold in execution. Paradise Lost Properties asserted that it held a hypothec which operated over the property, and that the proceeds of the sale in execution were to be distributed taking into consideration its prior right in terms of the hypothec. The Standard Bank contended that because Paradise had known that ownership in the assets vested in the Hodgsons, it did not have a hypothec over them.

## THE DECISION

To show that a hypothec operates over the property of a third party, a lessor must establish that (i) the property is on the premises with the knowledge and consent of the third party, (ii) the lessor was unaware of the fact that the property is owned by the third party, (iii) the property was brought onto the premises for the use of the lessee, and (iii) the property was intended to remain on the premises indefinitely.

All but issue (ii) had been established. The question was therefore whether or not Paradise knew that the Hodgsons were the owners of the property. If Supergro knew, then that knowledge would be imputed to Paradise. There being a presumption that the owner of goods brought onto leased premises tacitly consents to the operation of the hypothec, the onus of showing that no such consent has been given rests on the owner. It had to be shown therefore, that Supergro, or its successor, Paradise, knew that the Hodgsons were the owners of the property.

The evidence showed that Supergro had received an unsigned copy of the business sale agreement as early as August 1994. This informed the lessor that the goods on the premises were owned by a third party, ie by the Hodgsons. Alternatively, it led the lessor to believe that Woolley became the owner of the goods. On either alternative, the Hodgsons failed to rebut the presumption that they had tacitly agreed that the goods were subject to the lessor's hypothec.

Supergro having had knowledge that the Hodgsons or Woolley owned the goods, it was unable to assert its hypothec. The bank's contention was upheld and the proceeds of the sale distributed without regard to the hypothec.

# *RAND WATER BOARD v BOTHMA*

A JUDGMENT BY HATTINGH J ORANGE FREE STATE PROVINCIAL DIVISION
12 SEPTEMBER 1996

1997 (3) SA 120 (O)

***An owner of land whose property is encroached onto by his neighbour does not forfeit his right to require removal of the encroachment merely because the encroachment has existed for a year and a day. However, the right to require removal is subject to the discretion of the court, which may order the removal of the encroachment only upon the payment of compensatory damages, or may not order the removal of the encroachment but award compensatory damages to the owner encroached upon.***

## THE FACTS

Rand Water Board and Bothma were the owners of two pieces of land with a common border. In 1979, Bothma built certain structures which encroached on the Board's land. The Board did nothing in response to this, until 1989, when it demanded that he remove the structures. The Board applied for an order that Bothma had no rights in the structures and should remove them from the Board's land at his own cost. Bothma opposed the application. Three years and seven months after Bothma had filed his answering affidavit, the Board filed its replying affidavit. Some two years later, the Board placed the matter on the court roll for hearing.

Bothma opposed the application on the grounds that the encroachment had existed for longer than one year so that the Board lost its right to enforce removal of the structures. He argued that the year-and-a-day rule applied, ie that the owner of land which makes no objection to an encroachment of his land for a year and a day loses his right to enforce removal of the encroachment.

## THE DECISION

Historically, the year-and-a-day rule was an extraordinary rule and not necessarily generally applied in the Roman-Dutch law. The old authorities of Roman-Dutch law were unclear as to the consequences of the rule, when it was referred to, and justified its existence by reference to Roman law concepts which were never received into South African law.

The year-and-a-day rule was therefore never accepted as a

general rule of the Roman-Dutch common law, and not received into South African law. Bothma was not entitled to rely on the rule.

Notwithstanding the absence of the year-and-a-day rule, the courts had in the past, assumed they had a discretion to award compensatory damages, where the removal of the encroaching structure was ordered. This discretion would however, be exercised subject to reasonableness, so that a neighbour entitled to damages would be expected to share some of the prejudice occasioned by the encroachment.

In the present case, it was appropriate for the court to exercise its discretion in favour of Bothma. This was because the long time lapse between the date on which the encroachment had taken place and the date of first demand that the encroachment be removed, as well as the long time taken by the Board to respond to Bothma's answering affidavit, were both indications that the Board had not suffered any damage by the encroachment. Furthermore: the cost of removing the structures must have increased from the R30 000 considered applicable in September 1989; the Board had done nothing to protect itself when the structures were first constructed on its property; the removal of the structures would leave Bothma without a home on his own property.

The application was dismissed.

## *BODY CORPORATE OF THE SOLIDATUS SCHEME v DE WAAL*

A JUDGMENT BY LE ROUX J
TRANSVAAL PROVINCIAL DIVISION
15 MAY 1997

[1997] 3 All SA 91 (T)

*'Maintenance' work referred to in section 37(1)(b) of the Sectional Titles Act (no 95 of 1986) may include work done to remedy damage to a building caused by poor design and construction, and must therefore be paid for by the exclusive-use owners entitled to the rights in respect of the common areas in respect of which such work is done.*

### THE FACTS

After the completion of construction of a sectional title scheme building, the Solidatus building, rainwater penetration took place as a result of faulty workmanship and poor design and construction of the waterproofing. Experts advised that remedial work should be undertaken. The body corporate of the scheme called a meeting of all the sectional title unit holders, and a resolution authorising the trustees to levy a special contribution from the holders of rights to exclusive-use areas in respect of remedial work to the areas in which they held rights was passed by a majority of the owners.

The exclusive-use owners contended that they were not exclusively obliged to pay for the remedial work necessary for these areas and that all of the owners had to share the burden of these expenses. The body corporate contended that payment could be required of the exclusive-use owners alone as section 37(1)(b) of the Sectional Titles Act (no 95 of 1986) entitled it to require exclusive-use owners to make such additional contributions necessary to defray maintenance in respect of exclusive-use areas.

The exclusive-use owners contended that 'maintenance' as referred to in the section did not encompass the remedial work which had to be done on the building.

### THE DECISION

An exclusive-use area is defined in the Act as a part of the common property designated for the exclusive use by the owner of a section. The owner of such an area is exclusively entitled to use it and enjoys all the rights of ownership in respect of it, including the right to offer it as security for a bond.

Maintenance in respect of such an area could include the extensive repair work and replacement of materials which had become necessary in the circumstances pertaining to the Solidatus building. The purpose of the legislature

in enacting section 37(1)(b) was to place the burden of the maintenance of these areas on those entitled to the rights in respect of them, ie the exclusive-use owners. The fact that the work which had become necessary was caused by the builders and designers of the building should not detract from the imposition of this burden. It was therefore appropriate to consider the 'maintenance' referred to in this section as encompassing the repair work done to the exclusive-use areas.

The exclusive-use owners were therefore responsible for payment in respect of this work.

## *LEVIN v GUTKIN, FISHER & SCHNEIER N.N.O.*

A JUDGMENT BY ZULMAN J
WITWATERSRAND LOCAL DIVISION
6 SEPTEMBER 1995

1997 (3) SA 267 (W)


*If a trust deed is capable of the interpretation that a trustee has power to allocate the assets of the trust to specific beneficiaries, an arrangement entered into between the beneficiaries as to the allocation of such assets between them is enforceable against them and overrides any the apparent intention of the trust deed that such assets be treated as indivisible and allocated to all the beneficiaries equally.*

### THE FACTS

In 1945, the Schneier Trust was established. The four children of the late Samuel Schneier were the beneficiaries, his sons, Hanni and Felix, and his daughters, Minna and Selma.

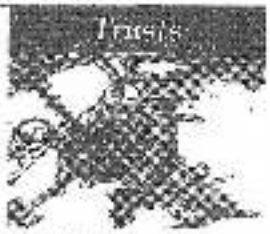
In terms of the deed of trust, one half of the assets of the trust were to be set aside to form a permanent fund. No portion of this fund was to be paid out to any child of the donor during the lifetime of that child. As regards the other half of the trust assets, the capital fund, the sons of the donor were entitled, upon the death of the donor, to be paid out their share of the remaining portion of the trust fund; the daughters of the donor were not so entitled during their lifetimes.

The income of the trust was to be paid to each beneficiary in the proportion that that beneficiary was entitled to participate in the trust fund, and upon the death of any beneficiary, was to devolve upon the issue of the beneficiary in the proportion in which such issue was entitled to participate in the trust fund.

Clause 3 of the deed of trust provided that if any doubts arose as to the true meaning, power and effect of powers intended in the deed to be granted to the trustees, a document signed by his duly appointed trustees, stating that they are satisfied that the trustees shall exercise certain powers in the manner specified in the document, shall be as fully effective as if the document had been inserted in the deed.

Hanni and Minna died. In 1960, Selma emigrated to the United Kingdom. As a non-resident, it was more advantageous to her that her interest in the trust consist in government or Escom (RSA) stock. In 1987, with the consent of her daughter, she requested the trustees to transfer her interest in the trust to RSA stock. The trustees did so. These investments yielded a much higher income than the remaining investments, with the result that Selma received a much higher income than the other surviving beneficiary, Felix. The remaining investments, however, principally in shares, yielded a higher capital growth.

In 1993, Selma died. In terms of the trust deed, her daughter and sole lawful descendant, Lynndy, became entitled to the remainder of the permanent fund and the entire remainder of the capital fund. She claimed an order declaring that she was entitled to two thirds of the total assets of the trust. The trustees opposed the claim on the grounds that because of the reallocation of assets in




1987, Lynndy was entitled to one half of the assets of the permanent fund and the entire assets of the capital fund. They also made a statement in terms of clause 3 that they were satisfied with the exercise of their powers in the 1987 reallocation of investments.

## THE DECISION

The question was whether or not the trustees had the power to appropriate assets of the trust, and distribute the capital by distributing the assets in kind. Were they entitled to give effect to a 'family arrangement' in this way, the applicant could not claim an entitlement to the trust assets as a whole, without regard to the prior distribution.

Unlike an executor in a deceased estate, a trustee may be directed to deal with the assets under his control in a particular manner, and may be so directed even when there are minor or unborn beneficiaries. In the latter case, even though the arrangement might not be enforceable at the time of conclusion, it may become enforceable later. In the present case, when the family arrangement was entered into in 1987, Lynndy was a contingent beneficiary: she might have died prior to the death of her mother, Selma. Furthermore, children of Felix might have pre-deceased him, and prior to Selma's death, Selma might have had further children. These uncertainties provided a basis for an argument by Lynndy that without the consent of all potential beneficiaries, the family arrangement was invalid in law. However, the trust deed did contemplate the division of the assets into two funds, and their subsequent allocation between the four named beneficiaries. The arrangement actually entered into was entered into with the consent of Selma and Lynndy. The essential question was therefore whether the trustees' positive response to the conclusion of this arrangement—the reallocation of some of the capital to RSA stock—accorded with their powers as given in the trust deed.

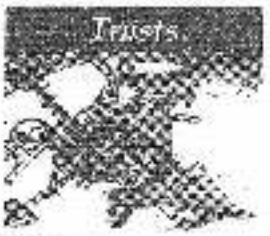
That the trustees did have such powers was clear from the fact that the trust envisaged the division of the assets into the two funds and their allocation between the four named beneficiaries. The fact that they did not expressly state that they were employing these powers when they made the asset reallocations in 1987 was irrelevant.

As far as clause 3 was concerned, the trustees could not rely on their statement issued in terms of this, because such a statement could only serve to clarify doubt as to the powers of the trustees and could not apply to any of their obligations.

The application was dismissed.

*... an executor is in a different position from a trustee. Beneficiaries have no power to direct an executor as to how to administer the estate of a deceased person. Such an executor is bound to administer the estate in terms of the testator's will subject to the provisions of the Administration of Estates Act (no 66 of 1965) and the supervision of the Master:*
*'A trustee is in a different position because the beneficiaries, if of full age and between them immediately entitled to the corpus of the trust property, can bring the trust to an end. Family arrangements being contracts for which the just cause is donation or compromise of claims by the curious beneficiaries, there seems no reason why a court should not in a proper case grant a declaration that a family arrangement like any other contract is valid ...'*

# *HOOSEN N.O. v DEEDAT*




A JUDGMENT BY MAGID J
DURBAN AND COAST LOCAL
DIVISION
7 MAY 1997

1997 CLR 403 (D)

***A trustee may delegate his authority to another person provided he was not appointed as trustee because of his special ability in some area, and provided he does not by delegating his authority, attempt to abdicate his responsibilities as trustee.***

## THE FACTS

The third respondent signed a Power of Attorney in favour of Deedat to represent him as trustee in a trust known as the Islamic Propagation Centre International. The third respondent, who was a founder and life trustee of the trust, had suffered a stroke which left him paralysed and unable to speak.

Hoosen and two other trustees applied for an order declaring that the Power of Attorney was null and void. The grounds for the application were that the trust deed did not allow for the delegation of a trustee's authority, that a trustee could not, in law, delegate his authority, and that the Power of Attorney did not constitute a valid delegation of the third respondent's authority.

## THE DECISION

There was nothing in the terms of the trust deed to indicate that a delegation of a trustee's authority was not allowed. There was also nothing in them to indicate that a trustee's very appointment demonstrated that he must have some skill or ability in order to be appointed as trustee.

The law does not prevent a trustee from delegating his authority, except where the trustee has been appointed because of some special quality or ability, and provided that when a delegation takes place, the trustee so delegating is not absolved of responsibility for the actions of the delegee. In the present case, the third respondent had not been appointed because of any special quality or ability. His appointment of Deedat as his representative could therefore not be attacked.

As far as the Power of Attorney was concerned, its terms did not confer excessive power on Deedat. It was meant simply to formalise the authority the third respondent wished to confer on her to attend meetings on his behalf and speak and vote at them on his behalf.

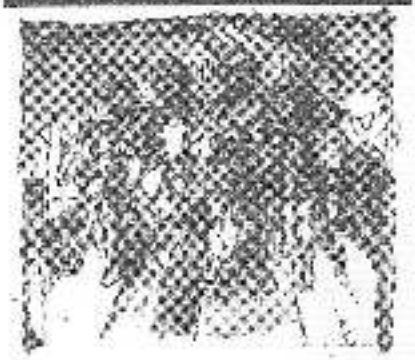
The application was dismissed.

# KELLOGG CO v BOKOMO CO-OPERATIVE LTD

A JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 OCTOBER 1996

1997 (2) SA 725 (C)

Competition



*In order to assess whether or not one has engaged in passing off, it is necessary to take into account all of the methods by which the product alleged to be passing off that of another is to be marketed. A person who competes, actuated by the motive of advancing his own economic interests does not compete unlawfully.*

## THE FACTS

Kellogg Co and its subsidiary, the second applicant, were competitors with Bokomo Co-operative Ltd in the manufacture and marketing of cereal products, including breakfast foods made from cereals.

In June 1996, Kellogg decided to introduce a new product in this market, a wheat biscuit cereal to be named Nutribrix. It conducted consumer research in order to determine the best package design for the product, and then presented the new product to various retail chains in South Africa with a view to selling the product in their stores in October 1996. The retail chains accepted Nutribrix as a product for sale in their stores, and arrangements were made for its delivery to the stores for sale.

In September 1996, Bokomo Co-operative Ltd introduced into the market, a toasted muesli wheat biscuit named Nu-Bix. 'Nu-Bix' had been registered as a trade mark in 1986. Bokomo had at that time, intended to introduce Nu-Bix as a line-extension of its Weet-bix product, but had not done so immediately because of technical production and other problems. In 1993, Bokomo continued its line-extension plans with the introduction of other products, and in 1996, it embarked on the construction of a manufacturing plant for the production of these products and the Nu-Bix product.

Upon hearing of Kellogg's plans to introduce the Nutribrix product, Bokomo accelerated the launch of the Nu-Bix product. In doing so, it purchased from Woolworths that company's equivalent of the muesli biscuit product which Bokomo was to sell as the Nu-Bix product, and made arrangements for its sale as Nu-Bix in various retail stores in the Western Cape.

Kellogg applied for an order interdicting Bokomo from passing off its goods as those of Kellogg and from competing unlawfully with Kellogg by using the trade mark Nu-Bix.

## THE DECISION

The names Nu-Bix and Nutribrix were confusingly similar. However, though relevant to infringement of trade mark, this in itself was not sufficient to prove that there had been a passing off. In assessing whether there had been a passing off, it was necessary to compare the total get-up of the one product with the other and thereby determine whether or not there was a reasonable likelihood of confusion.

Comparing the two products, it could not be said that any such likelihood existed. The appearance of the two products was as dissimilar as the dimensions of their packaging (25X19X5cm in the case of Nutribrix, and 21,5X9X9cm in the case of Nu Bix). The dominant colours on the Nutribrix package were shades of brown and yellow followed by white, red and blue. In the case of Nu-Bix the colours were dark green, followed by yellow, brown, white and red. Bearing in mind that the two products were in themselves similar, the respective get ups of each of them was surprisingly dissimilar.

The fact that there was an aural similarity between the sound of the two names, did not mean that there was a reasonable likelihood of confusion—the products were not going to be marketed by aural communication only, and the presentation of the two products in television advertising and in stores would mean that buyers would be given the dissimilar visual representations of each product.

Kellogg had not shown that Bokomo had engaged in passing off.

As far as the allegation of unlawful competition was concerned,

Kellogg based this on the submission that Bokomo's launch of the Nu-Bix product was not bona fide, and had been done merely to gain an advantage over Kellogg. However, this submission was inconsistent with the evidence that Bokomo introduced the Nu-Bix product as a line extension of its existing products and despite technical production problems, continued to bring about the introduction of this product by inter alia, embarking on the construction of a manufacturing plant. In having accelerated the launch date of the Nu-Bix product, Bokomo was actuated by the advancement of its own economic interests. For a competitor, this was a legitimate motive and not one which could found proof of unlawful competition.

The application was dismissed.


# STANDARD BANK OF SOUTH AFRICA LTD v ESSOP

A [JUDGMENT BY MESKIN J
DURBAN AND COAST LOCAL
DIVISION
15 MAY 1997

[1997] 3 All SA 117 (D)

Shortlisting

*An agreement between two parties that one party is entitled to bring an application for sequestration of the other party's estate without notice and by the consent of the person to be sequestrated is illegal as being contrary to public policy.*

## THE FACTS

Holding a judgment for R488 000 against Essop, the Standard Bank of SA Ltd brought an application for the sequestration of his estate. The application was postponed after a settlement agreement was entered into between the bank and Essop.

The agreement of settlement provided that Essop would make certain payments to the bank. In the event of Essop failing to make any of the payments, the bank was entitled to reinstate the application for his sequestration and for that purpose, use an affidavit signed by Essop in which he stated that he withdrew his opposition to the application for his sequestration and consented to a final order of sequestration being granted against him in the event of his failure to pay any amount due in terms of the settlement agreement.

Following default by Essop in making a payment, the bank applied for the sequestration of Essop's estate. Essop opposed the application on the grounds that the right of reinstatement of the application was illegal and accordingly null and void. It based its opposition on the contentions that the settlement agreement was an agreement to commit an offence because it contravened section 135(1) of the Insolvency Act (no 24 of 1936), alternatively was contrary to public policy.

## THE DECISION

Assuming that the settlement agreement did constitute a contravention of section 135(1), its resulting invalidity would not destroy the bank's statutory right to proceed with an application for the sequestration of Essop's estate. However, if the agreement was unlawful, the bank would not be entitled to reinstate the application. The question therefore was whether the agreement was unlawful.

The agreement not only recorded Essop's withdrawal of his opposition to the application for sequestration, but also his consent to the grant of an order of sequestration. In stipulating for these rights, the bank's conduct was unconscionable. By doing so, it had purported to empower itself to deprive Essop of his status as a solvent person, without any notice to him and without being able to defend himself. This conduct offended any reasonable person's sense of what was fair and just, and the agreement was inimical to the interests of the public. The agreement would enable the bank to proceed with the sequestration of Essop's estate upon an incorrect allegation of default, and would entitle it to the sequestration of his estate even if this was not to the advantage of creditors.

The agreement being illegal and contrary to public policy, it was null and void. As such it could provide no basis upon which the application for sequestration could be brought. The application was dismissed.

# *TER BEEK v UNITED RESOURCES CC*

A JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
13 DECEMBER 1995

1997 (3) SA 315 (C)


*While settlement negotiations are being undertaken between a close corporation against which a demand in terms of section 69(1)(a) of the Close Corporations Act (no 69 of 1984) has been issued and its creditor, no adverse conclusion can be drawn from the close corporation's failure to respond to the demand. A failure to raise a counterclaim alleged against the close corporation during such settlement negotiations will be indicative of an unsustainable defence to the creditor's claim, and an inference that the close corporation is unable to pay the debt claimed by the creditor may then be drawn giving grounds for an order winding up the close corporation.*

## THE FACTS

In January 1994, Ter Beek purchased a 25% interest in United Resources CC from the second respondent for R250 000. In terms of clause 17 of the agreement of sale, Ter Beek was entitled to withdraw from the close corporation after a period of six months from the effective date of sale. In the event of him exercising his right to do so, the close corporation would repurchase his member's interest for R250 000 plus interest, and payment of the repurchase would be made by the close corporation from its normal trading activities as and when funds became available.

In terms of clause 8, either party could cancel the sale upon the other party being in breach of any obligation provided for in the agreement and failing to rectify such breach within 14 days of notice to do so.

In June 1994, Ter Beek exercised his right to withdraw from the close corporation, and gave notice to the second respondent of his decision to do so. In the same month, he gave notice to the second respondent that he had failed to meet certain obligations provided for in terms of the agreement, and called for compliance within 14 days. On 31 August 1994, Ter Beek's attorneys cancelled the contract on the grounds that the second respondent had failed to comply with those obligations, and demanded repayment of the purchase price of R250 000. On the same date, Ter Beek's attorneys demanded of the close corporation payment of R25 000 in unpaid salary then due to Ter Beek. This demand was stated to be made in terms of section 69(1)(a) of the Close Corporations Act (no 69 of 1984). Ter Beek issued summons against the close corporation and the second respondent for payment of the R250 000 claim. United Resources and the second respondent defended the action.

The parties then entered into settlement negotiations. After these had failed, in March 1995, the attorneys for United Resources addressed Ter Beek's attorneys and denied that any salary payments were due from the close corporation to Ter Beek. Settlement negotiations resumed, and then, in April 1995, United Resources issued a summons against Ter Beek for payment of A$50 000 and R240 000. These claims arose from damages allegedly suffered from Ter Beek having breached his duties as member of the close corporation by failing to respond to an enquiry from a potential customer and failing to actively engage in marketing certain products in May and June 1994.

Ter Beek then applied for the winding up of United Resources, on the grounds that it was unable to pay its debts within the meaning thereof in section 69(1)(a) of the Close Corporations Act, and on the ground that it was just and equitable that the close corporation be wound up. Section 69(1)(a) provides that a close corporation will be deemed to be unable to pay its debts if the creditor to whom the close corporation is indebted has served on the close corporation a demand requiring payment of the sum then due and the close corporation has for 21 days thereafter failed to pay the sum or secure it to the reasonable satisfaction of the creditor. United Resources based its defence to the application on the contention that as a result of Ter Beek's alleged malperformance of his obligations in May and June 1994, he was not entitled to claim his salary, and upon the contention that arising out of the alleged malperformance, it had a counterclaim against him which was substantially in excess of Ter Beek's claim for unpaid salary.

THE DECISION

Ter Beek's claim against United Resources had to be confined to his claim for unpaid salary—his claim for repayment of the R250 000 had to be addressed to the second respondent alone since it was he alone who had contracted with Ter Beek.

It was clear from the correspondence that had passed between the parties and their attorneys, that this claim had not formed a part of the settlement negotiations entered into between the parties prior to the action for damages against Ter Beek instituted by United Resources. The fact that United Resources had not raised any objections to the claim for salary at that point showed that the failure to respond to the formal demand for payment of salary signified a lack of any bona fide or reasonable ground for non-payment of this claim, and that the present failure to pay was a result only of an inability to pay. In spite of this, the deeming provision of section 69(1)(a) of the Close Corporations Act could not be applied. This was because after demand had been made on the close corporation in terms of this section, the parties had entered into settlement negotiations. The conclusion of law—that the close corporation should be deemed to be unable to pay its debts—did not follow, because no adverse inference can be drawn from the failure to respond to a demand while settlement negotiations are being conducted.

It remained open to Ter Beek to show that United Resources was in fact unable to pay its debt to him. United Resources had responded to this claim by alleging malperformance by Ter Beek of his obligations as employee. The period to which this allegation related (May and June 1994) did not however, relate to the whole period in respect of which Ter Beek claimed his salary and was therefore an inappropriate defence to that claim. The second part of this defence—that United Resources had a counterclaim for damages arising out of the alleged malperformance—while in principle sustainable as a defence to an application for winding up, was unsustainable in the present circumstances, where United Resources had made no mention of the complaint during the settlement negotiations, had not prior thereto, recorded any alleged malperformance on the part of Ter Beek, and had not given sufficient particularity of the alleged malperformance and the manner in which the amounts claimed as damages were calculated.

Ter Beek had therefore shown that United Resources was unable to pay its debt in respect of arrear salary. Section 68(c) provides for this as a ground upon which a court may order the winding up of a close corporation. A winding-up order against United Resources was accordingly granted.

## *JOSEPH v AIR TANZANIA CORPORATION*

A JUDGMENT BY STREICHER J
WITWATERSRAND LOCAL DIVISION
25 MARCH 1996

1997 (3) SA 34 (W)

***An external company registered as such in South Africa is not resident in South Africa. Accordingly attachment of such a company's property to found or confirm the jurisdiction of the South African courts may be ordered.***

THE FACTS

Joseph alleged that Air Tanzania Corporation had defamed him and caused malicious prosecution proceedings to be brought against him involving his detention in a Tanzanian jail. The second applicant, Starwelt Airways (Pty) Ltd whose principle operating officer was Joseph, alleged that Air Tanzania's actions had also resulted in a loss of profits in the sum of R12 970 000.

In order to found or confirm jurisdiction of the court in an action to be brought by Joseph and Starwelt for payment of damages, they attached an aircraft belonging to Air Tanzania at Johannesburg International Airport. Air Tanzania is a public corporation of the United Republic of Tanzania and has its registered office or principal place of business in Tanzania. It is also an external company registered as such in South Africa and its local registered office is in Johannesburg.

Air Tanzania opposed confirmation of the attachment on the grounds that it was a 'person resident in the Republic' as it had a registered office in Johannesburg. It offered alternative security for the applicants' claims in the form of certain immoveable property situated in Edenvale, Johannesburg.

## THE DECISION

Section 28(1) of the Supreme Court Act (no 59 of 1959) provides that no attachment of a person or property to found jurisdiction shall be ordered by a court against a person who is resident in the Republic.

Section 170 of the Companies Act (no 61 of 1973) provides that an external company shall have in the Republic a postal address and a registered office to which all communications and notices may be addressed. This however, does not mean that such a registered office is to be regarded as the legal home and administrative centre of the external company. When compared to the significance of the registered office of a domestic company, the opposite inference could be drawn. Air Tanzania's Johannesburg registered office could therefore not be considered as giving it residence in South African within the meaning of section 28(1) of the Supreme Court Act.

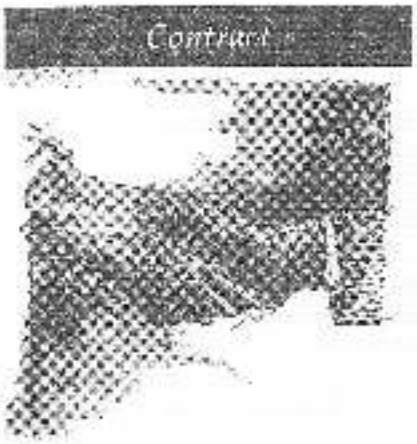
Considerations of commercial convenience and expediency militate against viewing the external company's local registered office as the residence of the company for the purposes of applying section 28(1) of the Supreme Court Act: if it were accepted as the residence of an external company, any foreigner could sue the external company in respect of a cause of action wherever arising.

The allegations made by Joseph, though not those made by Starwelt Airways (Pty) Ltd, established a prima facie cause of action against Air Tanzania. He was therefore entitled to an attachment of Air Tanzania's property which, in the light of that company's offer, was appropriately its fixed property in Johannesburg.

# ADMIN ESTATE AGENTS (PTY) LTD v BRENNAN

A JUDGMENT BY PICKERING J (JENNETT J concurring)
EASTERN CAPE DIVISION
17 OCTOBER 1996

1997 (2) SA 922 (E)




*A contract for the purchase of land will not be considered to be completely in writing, where one of the parties stipulates a term which amounts to a counter-offer and which is not signed by the other party.*

## THE FACTS

Mrs Herbst signed a deed of sale in respect of her property in Broadwood, Port Elizabeth. Her agent, Admin Estate Agents (Pty) Ltd, approached Mrs Brennan with a view to her counter-signing the deed of sale and purchasing the property. Brennan declined to do so, and her husband, acting on her behalf, drew up an addendum headed 'Subject to sale' reading 'This sale is subject to the following matters being cleared up to the satisfaction of ourselves: (1) the amount of arrears and settlement of such arrears ...' Mrs Herbst was then, and thereafter, unable to pay arrears on the bond over her property.

Mrs Herbst did not sign this addendum. However, after being assured that Mrs Herbst had signed the addendum, Mrs Brennan signed the deed of sale. In a letter sent later, Mrs Herbst's attorney confirmed that Mrs Herbst had agreed to the conditions of sale.

Admin deducted commission from a deposit paid by Brennan in terms of the deed of sale. The commission was payable in terms of a clause which provided that the commission would become payable upon signature of the agreement and would be borne by the seller.

Brennan contended that no sale agreement as provided for in section 2(1) of the Alienation of Land Act (no 68 of 1981) had been concluded, and that the full deposit had to be refunded. Admin contended that a sale agreement had been concluded and asserted its right to deduct its commission from the deposit.

## THE DECISION

Section 2(1) of the Alienation of Land Act provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or their agents acting on their written authority.

In determining whether or not there was compliance with this section, a contract for the sale of land was not required to be embodied in one document alone, but the signatures to such a contract were required to be intended to cover the whole contract. In the present case, the addendum contained a suspensive condition, and was in the nature of a counter-offer. It introduced a new term into the contract, and as such required that the seller, Mrs Herbst, to accept it. The situation was thus different to that where an agent has the authority to amend a contract on behalf of the seller.

Mrs Herbst had not accepted the new term. The letter from Mrs Herbst's attorney could not be construed as any such acceptance as he had no authority to accept the counter-offer.

The section had not been complied with. The full deposit was to be refunded.

# GOLDBERG v CARSTENS



A JUDGMENT BY DAVIS AJ (KING J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
22 NOVEMBER 1996

1997 (2) SA 851 (C)

*Where one party by his silence misleads another into thinking that a contract contains terms which he gave the other party to understand would be contained in the contract, the contract may be rendered null and void, notwithstanding the inclusion in that contract of a provision that no prior representations induced the contract.*

## THE FACTS

Prior to entering into an agreement to purchase shareblock 12/SB/PO9 together with a timeshare interest in a holiday resort, Carstens was shown a summary of the deed of sale and a calendar summary of time share modules indicating which weeks of the year were available for purchase. Next to the code PO9 appeared the number 14, and then the applicable dates for the 14th week of each year from 1991 to 2000. Carstens was also given a Purchase Summary, which recorded 'Unit No: 12; week No: 14; module No PO9—shareblock number 12/SB/PO9, 6/04 to 13/04'.

Carstens and Goldberg acting for a partnership, then entered into the agreement for the purchase and sale of the shareblock, which gave Carstens the right of occupation in a chalet. The sale agreement, which was recorded in a document, defined the time module which Carstens had bought as a time module for a period of seven days of each year commencing on a Saturday at 12 noon being the third week coinciding with the Cape Easter school holidays. The agreement contained a term that the agreement constituted the entire contract between the parties and there were no prior representations which induced the agreement. It also contained a term that the provisions of the agreement correctly reflected the intention of the parties and that neither party could apply for rectification of the agreement. In a separate document, Carstens also acknowledged that he understood the nature of the contents of the agreement.

Carstens contended that he was entitled to occupy the chalet during the 14th week of each year, and not during the period as defined in the agreement. He cancelled the agreement and brought an action for repayment of amounts paid in terms thereof.

## THE DECISION

Goldberg argued that in the face of the terms of the agreement, and in the absence of any evidence of fraud, it was not open to Carstens to contend that the agreement could be cancelled for the reasons he had given. However, those terms could not ensure the validity of the agreement, if one party by its silence had misled the other with the result that a justus error had occurred. The question was whether or not Carstens had entered into the agreement as a result of a justus error.

The documentation shown to Carstens prior to entering into the agreement gave him the impression that he was obtaining timeshare for the 14th week of each year. This misconception would have been cleared if Goldberg's agent had explained the contents of the agreement which Carstens did sign. No such explanation had been given, with the result that Carstens acted upon a misapprehension when he signed the sale agreement. The result was that the agreement was invalid.

The action was correctly upheld.

# *ADENIA EIENDOMME (EDMS) BPK v LPD ONDERNEMINGS BPK*



A JUDGMENT BY
HARTZENBERG J
TRANSVAAL PROVINCIAL
DIVISION
21 APRIL 1997

[1997] 3 All SA 85 (T)

***Parties to an agreement which confers rights on a third party may not vary the terms of that agreement so as to take away the rights so conferred.***

## THE FACTS

Adenia Eiendomme (Edms) Bpk sued LPD Ondernemings Bpk for payment of estate agent's commission provided for in a sale agreement entered into by LPD as purchaser and a certain Enslin as seller. It alleged that it was entitled to commission in terms of clause 6 of the sale agreement which provided that LPD was obliged to pay estate agent's commission of R125 000 to Adenia within two calendar months of date of registration of transfer of the property sold. Adenia had accepted the benefits of this provision.

LPD resisted an application for summary judgment on the grounds that the sale agreement had been superseded by a later agreement which incorrectly recorded that it was obliged to pay Adenia estate agent's commission. LPD alleged that the intention in respect of estate agent's commission was that it would be required to negotiate this with Adenia and it intended to apply for rectification of the agreement to reflect this.

Adenia persisted in its application for summary judgment.

## THE DECISION

Having varied the usual rule that the seller pays the estate agent's commission, it was clear that buyer and seller had discussed the question of liability for estate agent's commission prior to concluding the agreement. It therefore appeared that LPD had accepted this variation. Accepting that it had done so, the parties to the agreement could not thereafter unilaterally alter the terms of the agreement affecting the rights of a third party, Adenia. Rectification of the agreement would not be allowed where this would affect the rights of a third party.

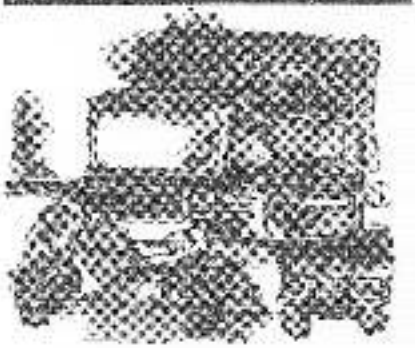
The defence raised by LPD was therefore without merit. Summary judgment was granted.

# STANDARD BANK OF SOUTH AFRICA LTD v TOWNSEND

A JUDGMENT BY HEHER J
W.L.WATERSRAND LOCAL DIVISION
7 JUNE 1996

1997 (3) SA 41 (W)

Credit transactions



*A creditor under an instalment sale transaction is not obliged to follow the procedures provided for in section 83(10) of the Insolvency Act (no 24 of 1936) for realising its claim, in order to succeed in an action against sureties of the credit receiver, provided that it retains the possibility of achieving its preferent claim by following the procedures provided for in that section.*

## THE FACTS

Standard Credit Corporation Ltd (Stannic) concluded ten instalment sale transactions with Townsend Plant Hire CC in terms of which it supplied goods on credit to the close corporation. Townsend Plant Hire CC was placed in liquidation, and Stannic, with the consent of the liquidator, repossessed the goods and sold them. Stannic calculated its damages in the sum of R679 925,04, and brought an action against three sureties for the close corporation, Townsend and the other two defendants.

The deeds of suretyship which the defendants had signed provided that in the event of liquidation of the close corporation, Stannic would be entitled to decide whether and to what extent, to prove a claim against the debtor in liquidation. The failure to prove a claim against the debtor to the full extent thereof or at all, would not detract from Stannic's right to recover from the surety the full amount to which they were bound under the suretyship.

After the sales of the goods by Stannic, Stannic did not pay the proceeds thereof to the liquidator. When Stannic later submitted its claims against the insolvent estate, they were rejected and the liquidator called for payment of R277 033,32 being the amount at which Stannic had valued its security. The liquidator, however, did nothing to enforce the call for payment. Another creditor, Barlows Tractor Co (Pty) Ltd, had a claim for R7m against the insolvent estate, and if made against the insolvent estate and proved, would leave other proved creditors with very little with which to satisfy their claims.

The sureties defended the action brought against them on the grounds that Stannic had not proved its claim as required by section 83(10) of the Insolvency Act (no 24 of 1936) and was therefore unable to give them cession of Stannic's preferred claim for the purpose of an action by them against the principal debtor, Townsend Plant Hire CC. The sureties contended that they were prejudiced by this inability, and therefore excused from having to honour their obligations as sureties toward Stannic. They also defended the action on the grounds that the prices realised by Stannic upon sale of the goods were, contrary to an implied term of the deeds of suretyship, below the true value of the goods, alternatively were not fair and reasonable. The goods had been sold at prices higher than valuations of them which had been effected by a sworn appraiser. They were sold either by public auction or, after price negotiations, by private treaty.

Section 83(10) provides that whenever a creditor has realised its security, it shall forthwith pay the net proceeds of the realisation to the liquidator, and thereafter the creditor shall be entitled to payment, out of such proceeds, of its preferent claim if such claim was proved and admitted.

## THE DECISION

There had not been compliance with section 83(10). The liquidator did not have a discretion to condone non-compliance. Accordingly, Stannic had not acquired a preferred claim against the insolvent estate. The liquidator remained, however, entitled and obliged to recover the proceeds of Stannic's realisation of its security. Were he to do so, Stannic would be entitled to payment of its claim out of the net proceeds and thereby achieve its preference. Since the possibility of Stannic acquiring a preference did exist, it could not be said that it was absolutely unable to give cession of its claim to the sureties.

The fact that Stannic might be left without anything against which to satisfy its claim, were it not to achieve the position of preferred creditor—in view of the large claim which Barlows might bring against the insolvent estate—also did not mean that Stannic was precluded from proceeding against the sureties. Whether able to prove its claim or not, Stannic was, in terms of the provisions of the deeds of suretyship, expressly not obliged to prove its claim against the close corporation in liquidation. The sureties could therefore not complain if, by failing to comply with section 83(10), Stannic put it beyond its power to enforce its claim against the principal debtor.

As far as the alleged implied term was concerned, there was no evidence of the circumstances under which the deeds of suretyship were concluded, and therefore no basis upon which it could be said that, contrary to any duty not to do so, Stannic sold the goods at prices below the true values of the goods.

The goods were sold at prices which were fair and reasonable, and the sureties had no grounds for complaint that they were sold at prices any lower than this.

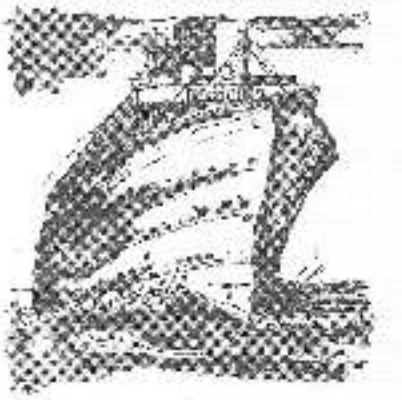
The action succeeded.

## *MV LERESTI: AFRIS SHIPPING INTERNATIONAL CORP v MV LERESTI (DMD MARITIME INTERVENING)*

A JUDGMENT BY SQUIRES J
DURBAN AND COAST LOCAL DIVISION
23 NOVEMBER 1992

1997 (2) SA 681 (D)

Shipping



*The conditions under which a court will order the furnishing of security are that the applicant has a genuine and reasonable need for the security and that there is a prima facie case which if accepted will establish a claim*

### THE FACTS

Afris Shipping International Corp chartered the *Leresti* from DMD Maritime Ltd. Complaining that the vessel had been withdrawn from the charter, at which stage there was an improvement in the level of bunkers to its credit of US$12 534, and that it had two speed claims, Afris arrested the *Leresti* when it came into Durban harbour. Afris intended to bring arbitration proceedings in London against DMD for payment of US$44 333,75.

DMD applied for the release of the vessel. This application was granted, security not being necessary for the release after Afris accepted that DMD was not the owner of the *Leresti*, but the bare boat charterer.

DMD then applied for an order that Afris provide security for a counter-claim it intended bringing in the arbitration proceedings in London for the determination of Afris' claims. DMD's counter-claim was in respect of unpaid hire charges, wrongful deductions, wrongful arrest of the vessel and damages arising from delayed sailing due to an action by Afris' agent for payment of its claim.

### THE DECISION

In terms of section 5(2)(b) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983), a court may order that a person pay security for costs or for any claim, and in terms of section 5(2)(c) such an order may be made as a condition for an arrest or attachment. There was nothing in the Act to indicate that such an order was restricted to apply to claims only brought in a South African court.

The conditions under which a court will order the furnishing of security are that firstly, the applicant has a genuine and reasonable need for the security and secondly, there is a prima facie case which if accepted will establish a claim.

On the claims, as presented by DMD, there did not appear to be a prima facie case in its favour. The

claim arising from the action by Afris' agent arose from a party other than Afris, and the claim for wrongful arrest depended on the allegation that Afris had no reasonable or probable cause to arrest the *Leresti*. The latter allegation was not readily sustainable, given that there was some basis for believing that DMD was the owner of the vessel.

The fact that DMD had still not decided to institute a claim for wrongful arrest against Afris was a further factor in deciding that DMD should not be entitled to security for its claim. Should it decide to bring this claim, it could apply for security in the court in which it brought that claim.

The application was dismissed.

## *THE MV* SNOW DELTA
## *DISCOUNT TONNAGE LTD v SERVA SHIP LTD*

A JUDGMENT BY FOXCROFT J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
17 SEPTEMBER 1996

1997 (2) SA 719 (C)

*An incorporeal right is situated where the person exercising the right is situated and not necessarily where the property in respect of which that right is exercised is situated. Thus, a sub-charterer of a time-chartered ship exercises its rights where the sub-charterer is situated, and not where the ship is situated.*

### THE FACTS

Serva Ship Ltd time chartered the *Snow Delta* from the owners of the vessel, and on-chartered the vessel to Universal Reefers at a slightly higher amount, resulting in a profit to Serva. Discount Tonnage Ltd attached Serva's right, title and interest in *Snow Delta* when it was lying alongside at Cape Town, and sought confirmation of the attachment. It and Serva were peregrini of the court, and the contract under which they had earlier concluded their arrangements was concluded outside of South Africa.

Serva opposed confirmation on the grounds that the right sought to be attached was not situated within the jurisdiction of the court.

### THE DECISION

In attaching Serva's right, title and interest in *Snow Delta*, Discount Tonnage was seeking to attach an incorporeal right. An incorporeal right exists at the same place where the person who exercises that right is. In order to locate that place, one must therefore identify the place where that person exercises the right.

The fact that the *Snow Delta* was situated in Cape Town did not mean that if a person exercised a right in regard to the vessel, the right was being exercised there. In accordance with the aforesaid rule, the right would be exercised in the place where the person exercising the right was. Serva was not within the jurisdiction of the court when it exercised its right as sub-charterer to Universal Reefers. There was therefore no right situated in Cape Town which Discount Tonnage could attach.

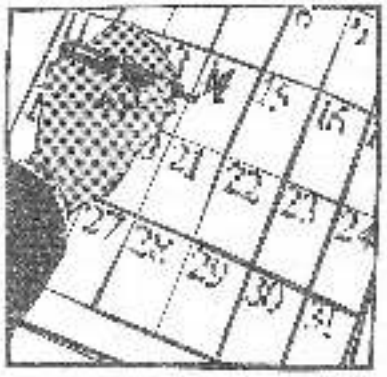
Confirmation of the attachment was refused, and the rule nisi discharged.

# HOBAN v ABSA BANK LTD

A JUDGMENT BY TL CHITEN AJ
WITWATERSRAND LOCAL
DIVISION
30 MAY 1997

1997 CILR 390 (W)

*Time computation*



*A judgment debtor may not set aside a sale in execution on the grounds that some slight formality, such as that the advertisements of the sale were circulated on the incorrect day, has not been properly adhered to.*

## THE FACTS

Hoban and the fourth respondent owned fixed property, and bonded the property to Absa Bank Ltd as security for a loan of R250 000. As a result of default in repaying the loan, Absa took judgment against Hoban and the fourth respondent and the property was declared specially executable.

On 15 April 1994, advertisements of the sale in execution of the property were given in two newspapers circulating in the district in which the property was situated. The sale of the property took place on 22 April 1994.

Hoban applied for an order declaring the sale in execution to be invalid and setting it aside. His ground for doing so was that the advertisements had appeared on a day not provided for in Rule 46(7)(c) of the Rules of Court. That Rule provides that the advertisements are to be published not less than three days and not more than five days before the date appointed for the sale. In terms of this rule, the advertisements should have appeared between 16 and 18 April 1994.

## THE DECISION

Because the rule also referred to a 'month' and 'two weeks' this was an indication that references in the rule to time periods were references to calendar periods and not court periods. The references to 'days' in the Rule were therefore references to calendar days, not court days. Hoban was correct in contending that the advertisements should have appeared between 16 and 18 April 1994.

This however, did not necessarily mean that the sale in execution was invalid. Proceedings for the sale in execution of property are undoubtedly inroads upon the rights and property of an individual, but non-compliance with a slight formality in those proceedings would not entitle a judgment debtor to have the sale set aside. It must at least be shown that there is a reasonable possibility that non-compliance will cause him prejudice. Hoban had not shown that he had suffered any prejudice. On that ground, he was not entitled to have the sale in execution set aside.

The application was dismissed.

# *ADCOCK INGRAM CONSUMER PRODUCTS LTD v DHANSOOKLAL JEENABHAI MODY*

A JUDGMENT BY DANIELS J
(DU PLESSIS J and DE VILLIERS J
concurring)
TRANSVAAL PROVINCIAL
DIVISION
22 APRIL 1997

[1997] 3 All SA 125 (T)


*A trade mark holder may amend the mark registered in its name provided the amendment does not substantially affect the identity of the mark.*

## THE FACTS

Adcock Ingram Consumer Products Ltd held two trade marks registered in its name. The representation of the trade mark, as given in Adcock Ingram's application for registration was given as a single two-dimensional photograph of a cylindrical container.

Adcock Ingram wished to depict the trade mark with more clarity, and therefore applied for an amendment of its mark in terms of section 34 of the Trade Marks Act (no 62 of 1963). The amendment consisted in depictions of the container in four diagrams showing different views of the same container.

Mody opposed the application on the grounds that the proposed amendment substantially affected the identity of Adcock Ingram's trade mark and therefore contravened the provisions of section 34. That section allows the amendment of a trade mark not substantially affecting the identity of the mark.

## THE DECISION

Photographs of a cylinder showing its back, front and side views would all be the same. An improved representation of a cylinder could therefore be better achieved by showing various aspects of it diagrammatically. Provided that when this is done, the mark thus depicted is not substantially affected, there would be nothing wrong in amending the representation of the mark in this manner.

Comparing the photograph with the diagrams, there could be no room for the suggestion that the diagrams constituted an amendment of the initial mark. Given that the object depicted on the photograph was cylindrical, the diagrams had no other effect than to depict this feature in various forms.

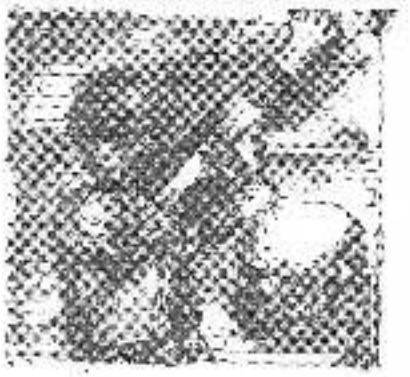
The amendment of the mark not substantially affecting the identity of the mark, the amendment had to be allowed.

# *HUBBY'S INVESTMENTS (PTY) LTD v LIFETIME PROPERTIES (PTY) LTD*

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL
DIVISION
14 APRIL 1997

[1997] 3 All SA 202 (W)

*Enrichment*



*A contractor's action against the owner of property based on an allegation of enrichment need not state whether the claim arises from a contract entered into between the contractor and the employer by way of a sub-contract or not.*

## THE FACTS

Hubby's Investments (Pty) Ltd entered into a written contract with Sentinel Building Supplies (Pty) Ltd, and undertook to build sectional title factories on property owned by Lifetime Properties (Pty) Ltd. Hubby's built the factories, but Sentinel did not pay for the construction. It claimed payment, basing its claim on an allegation of unjust enrichment, from Lifetime Properties, and sought an order liquidating the company.

Lifetime raised the preliminary objection to the application that Hubby's had no claim against Lifetime, it lacked locus standi to bring the application.

## THE DECISION

There was no evidence of the existence or otherwise of a contract between Sentinel and Lifetime. It was therefore impossible to say whether the claim for enrichment was competent or not. No claim for enrichment would be competent if Sentinel had entered into a contract with Lifetime for the construction of the factories and had thereafter sub-contracted the work to Hubby's.

However, because there is no real distinction between a contractor's right of retention and his right of action, an action by a contractor which fails to state whether or not there was a contract between the employer and the owner of the property where construction work is effected, may properly found an action against the owner of the property concerned.

The preliminary objection was dismissed.

# Current Commercial Cases

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# *LAMBONS (EDMS) BPK v BMW (SA) (EDMS) BPK*

A JUDGMENT BY EM GROSSKOPF JA
(FH GROSSKOPF JA, HOWIE JA, HARMS JA and SCOTT JA concurring)
SUPREME COURT OF APPEAL
27 MAY 1997

[1997] 3 All SA 327 (A)

***Contract***

***Negotiations between two parties intended to lead to a contract between them do not result in a contract until such time as there is agreement between them regarding the essential terms of the contract. An offer made in the course of such negotiations cannot, if accepted, bring about a binding contract where the terms of the intended contract remain undetermined.***

## THE FACTS

On 7 January 1993, Lambons (Edms) Bpk approached a Mr Willis, the trade development manager of BMW (SA) (Edms) Bpk, with the request that BMW consider appointing Lambons as a BMW motor car dealer in Bloemfontein. Willis indicated that BMW was considering cancelling an existing dealership it had awarded to another party, and that it would consider appointing Lambons as its dealer in its place.

On 19 January 1993, Willis and BMW's service manager visited Lambons' place of business, and were satisfied with what they saw. They and a Mr Bodenstein, Lambons' managing director, discussed generally such matters as the sale of new and used vehicles, and the supply of vehicle parts and service. Bodenstein was not at that stage given a copy of BMW's standard terms of contract, a 129-page document, nor was he asked to complete a New Dealer Evaluation and Status File, a 71-page document. Both of these documents contained portions for completion, such as the insertion of the area within which the dealership was to operate, and a suretyship agreement by Bodenstein. At this stage, Bodenstein had, operated in the motor car dealership industry for some years.

On 27 January 1993, Willis telephoned Bodenstein and said to him 'The Board has approved you as a BMW dealer'. He asked Bodenstein for his balance sheet and made arrangements for Bodenstein to meet BMW's top management in Midrand. Upon receiving Bodenstein's balance sheet, Willis said to Bodenstein 'Congratulations, you have been appointed a BMW dealer. See you on Wednesday.' BMW later wrote to the party controlling the other dealership in Bloemfontein and stated that it planned to appoint a further BMW dealer in that city.

BMW later took the view that no binding contract had been concluded between it and Lambons. Lambons differed, and brought an action for damages for breach of contract, claiming R14 161 774 from BMW.

## THE DECISION

The question was whether BMW had intended its offer to have resulted in a binding contract, upon acceptance of the offer. It clearly did not. It was highly unlikely that a large organisation such as BMW would have concluded such an important and involved contract over the telephone. It had its standard-form contract, and Willis' words on the telephone could not have given Bodenstein the impression that without this, a final and binding contract would be concluded upon acceptance of his 'offer'. Bodenstein's own evidence suggested that he could not have thought this.

Even if it could be said that the parties' intention was that they were concluding a binding contract, further details of which would be added later (a proposition not warranted by the facts) it could still not be said that any final contract was later concluded.

The intention of the parties, as evident from their discussions, was that a contract would be concluded, but in the future. Both believed that this would take place. In writing to the other BMW dealer in Bloemfontein, BMW had shown that as far as it was concerned, the contract was not yet in existence, but something that would take place in the future.

Bodenstein had, in any event, accepted that BMW would be entitled to cancel the contract if

after the telephonic confirmation by Willis, it became apparent that the parties disagreed about the terms of the contract. Bodenstein had never been aware of what the terms of BMW's standard contract were. These terms included the remuneration to be paid to BMW, and the area of operation of the dealership. Without details such as these, no final contract could have been concluded between the parties.

The action was dismissed.

## *FIRST NATIONAL BANK OF SA LTD v SAAYMAN N.O.*

JUDGMENT BY STREICHER JA (HEFER JA, VIVIER JA, OLIVIER JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
30 MAY 1997

[1997] 3 All SA 391 (A)

***A contract entered into by a person who lacks the mental capacity to contract cannot be enforced against that person.***

### THE FACTS

In 1989, Mrs Malherbe signed a deed of suretyship in favour of First National Bank of SA Ltd, in respect of the debts of Dalsig Mynbou Bpk. She also signed a cession agreement in which she ceded to the bank all shares owned by her which might be delivered to the bank. She signed these security documents after being told what they contained, but without reading them. Mrs Malherbe depended on dividend income from the shares for her personal income.

Mrs Malherbe was eighty five years old when she signed the security documents. Some 14 years previously, she had had a stroke and was diagnosed as having Ménière syndrome. From 1980, she experienced attacks of dizziness, a knocking in her head and disorders in her ears and eyes. In 1988, she was subjected to an assault, and was thereafter unwilling to emerge from her home. Her daughter then attended to such chores as the purchase of household necessaries. In September 1991, Malherbe's daughter, Saayman, was appointed a curator bonis of Malherbe's affairs, the court to which application for such appointment having been made holding that Malherbe was unable to manage her own affairs. Mrs Malherbe was examined by two psychiatrists and a clinical psychologist. They concluded that Mrs Malherbe suffered from dementia or psuedo-dementia, and that her cognitive functions had become impaired.

Some years before signing the security documents, Mrs Malherbe had signed a deed of suretyship in respect of the debts of another company, Dalsig Minerale Bpk, a public company in which she had no interest. She had also signed blank pledges in favour of creditors and gave her shares as security for other loans to Dalsig from the bank, in return for an undertaking that they would be returned within 30 days of notice being given for their return.

Dalsig was put into liquidation, and the bank called upon Mrs Malherbe to honour her obligations in terms of the deed of suretyship. Saayman defended the action for enforcement on the grounds that when Mrs Malherbe signed the security documents she had lacked the mental capacity to contract.

THE DECISION

It was probable that when Mrs Malherbe signed the security documents, she did not have the capacity to understand what she was doing nor what the consequences of her action were. This was evident because following the assault on her, she had not entered into even the simplest transactions, such as the purchase of household necessaries. Her behaviour in earlier undertaking suretyship obligations in favour of Dalsig Minerale, in exchange for no benefit to herself, was not indicative of a person who lived economically and dependent on income from dividends. In signing pledges in blank, her behaviour was absolutely inexplicable. The same could be said of her behaviour in giving the security of her share portfolio as security for Dalsig's loan from the bank.

The fact that Mrs Malherbe did not call for return of her shares within 30 days also indicated that she did not understand what she was doing. It was clear that when she signed the security documents in 1989, she had forgotten that she had already parted with some of her shares and that she did not realise that the effect of having completed the security documents was to enable the sale of the rest in order to liquidate the principal debt.

On a balance of probabilities, Mrs Malherbe did not have the mental capacity to sign the security documents, and did not realise the consequences of her action. The bank was not entitled to enforce payment in terms of them.

## *MENSKY v ABSA BANK LTD*

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
18 JULY 1997

UNREPORTED

***Where parties to a contract agree that one of them shall insure against the possibility of some risk associated with the contract, this will be an indication that the risk of loss falls on the person obliged to insure, and that person will therefore not be entitled to direct a claim for damages arising from such loss against the other party.***

THE FACTS

Mensky rented a that in the course of a relocation of the branch from Hillbrow to Braamfontein, the bank mislaid the contents of her locker and failed to return them to her. She claimed the value of the jewellery and foreign currency alleged to have been in the locker. The bank defended the action inter alia on the grounds that it was protected by the exemption provision of their agreement. Mensky contended that the exemption provision did not apply while the bank was relocating its premises because during that period, the locker was placed in the custody of a party employed to attend to the move of the bank's premises.

THE DECISION

In determining the meaning and scope of the exemption provision, it was critical that Mensky was responsible to insure the contents of the locker. The fee paid to the bank for the safe-keeping of the locker was not sufficient to compensate the bank for the task of safely managing and maintaining the locker. It was not commensurate with the responsibility of having to do so, and therefore indicative of the fact that the bank had not undertaken this responsibility.

Knowing the value of the items placed in the locker, Mensky—as opposed to the bank—could properly insure the items against loss. This was also indicative of who had accepted responsibility for their loss. It amounted to an allocation to Mensky of the risk of loss. Having failed to insure the items, Mensky could not later direct a complaint about the loss at the bank.

The action was dismissed.

# *GOODMAN BROTHERS (PTY) LTD v RENNIES GROUP LTD*

*Contract*

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION
21 JUNE 1996

UNREPORTED

***A contractual provision exempting a party from any liability whatsoever for loss or damage, unless special arrangements are made in the performance of the contract, protects the party in whose favour the provision is inserted in the contract, even if the party's employee's intentionally caused loss or damage to the other party to the contract in the performance of the contract.***

## THE FACTS

Goodman Brothers (Pty) Ltd engaged Rennies Group Ltd to clear through Customs a consignment of goods and carry the goods from Rennies' warehouse at Jan Smuts Airport to Goodman's premises. The contract incorporated Rennies' standard trading conditions, clause 9 of which provided that Rennies would not accept liability for the handling of, inter alia, any valuables. The clause further provided that if a customer delivered any such goods to Rennies without making special arrangements, Rennies would bear no liability whatsoever for any loss or damage to the goods.

Clause 28 provided that Rennies would not be liable for any loss or damage to goods held within its custody and control, whether on the grounds of breach of contract or negligence, unless it was proved that the loss or damage was caused by the gross negligence of Rennies.

Among the goods conveyed by Rennies for Goodman were certain watches owned by Goodman. Rennies employees stole the watches while conveying them to Goodman's premises.

Goodman brought an action against Rennies for damages arising from the theft. Rennies defended the action on the grounds that clause 9 of the standard trading conditions absolved it of liability toward Goodman.

## THE DECISION

The meaning of clause 9 was clear: it exempted Rennies from liability for loss or damage, even when caused by its own deliberate wrongdoing or negligent conduct or when caused by its servants acting within the scope and course of their employment. This interpretation was reinforced by clause 28 which imposed liability in the specific circumstances therein referred to, and only when Rennies had been grossly negligent. When read with this clause, the requirement of clause 9 that 'special arrangements' be made had the effect of exempting Rennies from all liability where such special arrangements had not been made.

The effect of interpreting clause 9 in this manner was not to allow an exemption of liability where the party to the contract had been guilty of fraudulent misconduct. The effect was to allow and exemption of liability where the employee of the party to the contract had been guilty of fraudulent misconduct. If such an exemption was not contrary to public policy, the exemption of liability where special arrangements were not made, as provided for in clause 9, was equally unobjectionable.

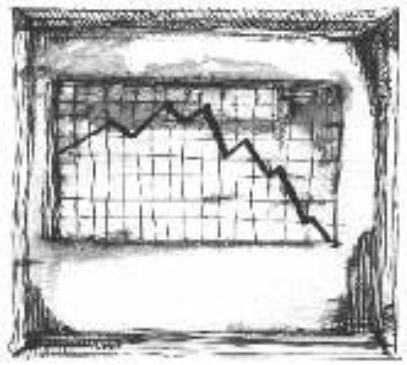
The action was dismissed.

# *EASTERN FREE STATE CAPE CO-OPERATIVE LTD v THE MASTER*

A JUDGMENT BY KROON J
EASTERN CAPE DIVISION
19 DECEMBER 1996

1997 (3) SA 899 (E)

***Insolvency***



***A creditor's statement when it proves its claim, that it depends on its security for payment of its claim, is the affirmation of a right which it held in terms of section 83(12) of the Insolvency Act (no 24 of 1936), but it does not restrict the creditor to receiving only the proceeds of the realisation of that security for the satisfaction of its claim. Such a creditor may claim the balance of its claim as a concurrent creditor against the insolvent estate.***

## THE FACTS

The Eastern Free State Cape Co-operative Ltd submitted a claim against the estate of Viljoen which was the subject of a compromise proposal in terms of the Agricultural Credit Act (no 28 of 1966). Viljoen's indebtedness of R471 499,21 toward it was secured by a pledge. The co-operative's claim recorded that its claim was secured by the pledge and that it depended on that security for payment of its claim.

Viljoen's estate was then subject to an administration in terms of the Act, following the rejection of the compromise. The administration was, in terms of the Act, to be done as if it was an insolvent estate.

The trustees filed a first liquidation and distribution account in the insolvent estate, reflecting the co-operative's claim of R471 499,21 and noting that the co-operative depended solely on its security. The preferent and secured portion of the claim was reflected as R44 185,40, this being the proceeds of the realisation of the co-operative's security. No portion of the balance of the co-operative's claim was reflected under concurrent claims.

The co-operative stated that when it submitted its claim, it had not meant to convey that it was relying solely on the proceeds of the secured property for the satisfaction of its claim, but had merely referred to its security and indicated that it was invoking that security for the satisfaction of its claim without prejudice to its right to claim any excess as a concurrent claim. The Master took the view that the co-operative was not entitled to change its mind after having elected to depend only on the proceeds of its security for the satisfaction of its claim.

The co-operative then applied for an order to set aside the Master's decision and to amend the liquidation and distribution account so as to reflect the balance of its claim as an unsecured creditor.

## THE DECISION

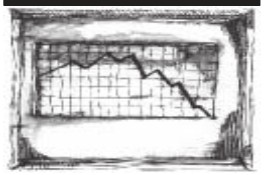
The statement made by the co-operative when it proved its claim, that it depended on its security for payment of its claim, was the affirmation of a right which it held in terms of section 83(12) of the Insolvency Act (no 24 of 1936). It did not confine the co-operative to receiving only the proceeds of the realisation of that security for the satisfaction of its claim. That might have been the case had the co-operative stated that it depended solely on its security for the payment of its claim, but the co-operative had not stated this and so had not confined itself to the proceeds of the realisation of its property for the satisfaction of its claim.

In making a statement that the proceeds of its security are solely depended upon for satisfaction of its claim in these circumstances, a creditor makes an election to depend on its security in this manner. Where such an election is made, the creditor cannot later change its mind, nor can it amend its claim in terms of the proviso contained in section 44(4) of the Insolvency Act so as to change that election. In the present case however, the co-operative did not wish to change its election, and so was not subject to these constraints. It never had elected to depend solely on its security for the satisfaction of its claim.

The application was granted.

# *ABSA BANK LTD v MASTER OF THE SUPREME COURT*

*Insolvency*



A JUDGMENT BY ALEXANDER J
DURBAND AND COAST LOCAL DIVISION
28 JUNE 1996

1997 (3) SA 636 (D)

***A secured creditor which states in its proof of claim that it claims against an insolvent estate and relies for its claim solely on the proceeds of the property which constitutes its security, thereby elects to prove its claim on that ground alone, and may not thereafter amend its statement so as to rely on the proceeds of other property which becomes available to concurrent creditors.***

## THE FACTS

Absa Bank lent money to DPF Properties (Pty) Ltd, the loan being secured by a mortgage bond. In March 1992, Absa applied for the provisional liquidation of the company, and a final order winding up the company was made the following month.

Absa submitted a claim for R2 645 000 with interest at 20% per annum from the date of provisional liquidation. The claim was made under an affidavit in terms of section 44(4) of the Insolvency Act (no 24 of 1936), and contained an averment to the effect that the bank had not received any security for the debt save and except for the mortgage bond, on which security the bank relied solely for the satisfaction of its claim against the insolvent estate.

At the time the bank submitted its claim, the only possible asset which might have become available to concurrent creditors was a claim by the liquidator against another insolvent company. Certain of the concurrent creditors decided to pursue this claim at their expense. As a result, funds became available for an unexpected dividend to be paid to concurrent creditors.

The bank sought to correct the claim it had submitted by omitting the averment that it relied solely on its security for the satisfaction of its claim. After the Master had refused to allow the correction, the bank applied for an order allowing it.

## THE DECISION

The averment included in the bank's affidavit was intended to reflect the provisions of section 89(2) of the Insolvency Act. This section provides that if a secured creditor (other than a secured creditor upon whose petition the estate in question was sequestrated) states in its affidavit submitted in support of its claim, that it relies for the satisfaction of its claim solely on the proceeds of the property which constitutes its security, it shall not be liable for the costs of sequestration aside from certain costs specified elsewhere in the Act.

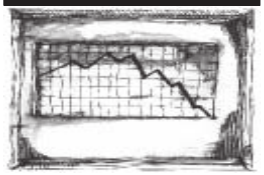
The averment in the bank's affidavit was incorrect because it was the secured creditor upon whose petition the estate in question was sequestrated. It was however, the bank's intention to preserve itself from being called upon to make a contribution to the costs of the winding up. The question was whether, despite this intention, the averment made in its affidavit had the effect that the bank waived its right to participate in any future dividend.

The bank contended that because it had not been competent for it to invoke the protection of section 89, it could not have depended solely on its security for the satisfaction of its claim. However, in spite of the mistake, it was not incompetent for the bank to have depended solely on its security for the satisfaction of its claim. It was within the bank's power to do so, and it had not been part of the stated intention of the bank to do so in order to avoid a liability to contribute. By submitting the claim as it had, the bank had made an election to claim on the basis of its security only and had thereby abandoned any other basis for a claim against the insolvent estate.

The application was dismissed.

# *DE FRANCA v EXHAUST PRO CC*





A JUDGMENT BY NEPGEN J
SOUTH EASTERN CAPE LOCAL DIVISION
13 NOVEMBER 1996

1997 (3) SA 878 (SEC)

***Section 50 of the Close Corporations Act (no 69 of 1984) authorises the institution of proceedings where liability arises on account of the breach of a fiduciary duty but does not authorise the institution of proceedings to defend an application for the liquidation of the close corporation. Where an application in terms of section 36 or 49 of that Act is made for the acquisition of a member's interest, sufficient evidence of a fair price and of the ability of the proposed purchaser to acquire the member's interest must be furnished.***

## THE FACTS

De Franca and his son each held a 50% interest in Exhaust Pro CC. As a result of a breakdown in personal relations between them, it became impossible to properly continue the business of the close corporation and De Franca brought an application for its provisional winding up. The application was brought on two grounds, that Exhaust Pro was unable to pay its debts as envisaged by section 68(c) of the Close Corporations Act (no 69 of 1984) and that in terms of section 68(d) of the Act, it was just and equitable that the close corporation be wound up. De Franca alleged that Exhaust Pro had failed to repay the balance of his loan account and had failed to pay certain rental due to him in terms of a lease.

De Franca's son opposed the application on behalf of Exhaust Pro. He brought a counter-application for an order that his father's membership of the close corporation cease forthwith and that he or Exhaust Pro acquire his father's interest in the close corporation at a fair price. He also sought leave to intervene in the application as a creditor and oppose the application.

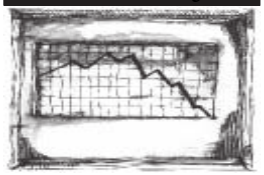
De Franca contested his son's right to represent Exhaust Pro in opposing the application. De Franca's son argued that although Exhaust Pro CC had not passed a resolution authorising him to act for it, section 50(1)(b)(i) of the Close Corporations Act applied. That section provides that where a member of a corporation is liable to the corporation on account of the breach of a duty arising from his fiduciary relationship to the corporation, any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation.

## THE DECISION

Section 50 of the Close Corporations Act authorises the institution of proceedings in respect of the liability referred to therein, ie liability on account of the breach of a fiduciary duty. It does not extend to authorising the institution of proceedings in respect of anything beyond that, such as defending an application for the liquidation of the close corporation. De Franca's son was therefore not entitled to rely on this section as authority for opposing the application for winding up of Exhaust Pro. He lacked the locus standi to do so.

The evidence showed that a breakdown in the relationship between father and son had taken place. This breakdown was so complete, that it was inevitable the close corporation should be wound up, unless De Franca's son's counter-application was to succeed. The counter-application was based on sections 36 and 49 of the Act. Section 36 provides that a court may order that a member of a close corporation cease to be a member on the grounds that the member has been guilty of conduct likely to have a prejudicial effect on the carrying on of the business of the corporation, or that the member conducts himself in such a manner that it is not reasonably practicable for other members of the corporation to carry on business with him. Section 49 provides that any member of a close corporation who alleges that any particular act of the corporation or of one of its members is unfairly prejudicial or unjust to him may apply to court for the court to make an order as it thinks fit.

As far as the ground based on section 49 was concerned, assuming that De Franca had engaged in unfairly prejudicial or unjust conduct, the court could not make



an order that his son or Exhaust Pro purchase his interest at a fair price, because there was no indication of what a fair price would be. It was also not clear whether De Franca's son had the financial resources to pay any price for the interest, nor was it clear whether Exhaust Pro could do so within the requirements provided for in section 39 of the Act. There was also uncertainty as to the financial condition of the close corporation. In these circumstances, the court could not make an order that De Franca's interest in Exhaust Pro be purchased by either De Franca's son or the close corporation.

As far as the ground based on section 36 was concerned, this section was clearly enacted for the kind of situation pertaining the facts of this case, ie where a deadlock exists between the members of a close corporation. However, the insufficiency of the evidence in regard to the application based on section 49 applied equally in the case of the application based on section 36. Without any indication of the value of the interest held by De Franca in Exhaust Pro, no order could be made.

The counter-application was dismissed, and a provisional order winding up Exhaust Pro granted.

## *MONDI LTD v RHODES*

A JUDGMENT BY MESKIN J
DURBAN AND COAST LOCAL DIVISION
29 APRIL 1997

1997 CLR 419 (D)

***The respondent in sequestration proceedings is not entitled to an order interdicting the provisional trustees from exercising their powers since a court does not have the power to make such an order.***

### THE FACTS

Mondi Ltd obtained an order provisionally sequestrating Rhodes' estate. Rhodes then applied for an order interdicting the provisional trustees of his estate from exercising their powers or performing their duties pending the confirmation or discharge of the provisional order.

Mondi contested the application.

### THE DECISION

In terms of section 18(2) and 18(3) of the Insolvency Act (no 24 of 1936) the Master alone has the power to give directions to the provisional trustee. Any provision empowering the court to prevent the provisional trustee from exercising his powers would be in conflict with these provisions, and would prevent the Master from effectively exercising his power to give directions to the provisional trustees.

The court has the common law power to remove a provisional trustee from office, where he is guilty of conduct inconsistent with his fiduciary position. Having this power in circumstances appropriate for its use, there was no reason to confer on the court a similar power in other circumstances in order to prevent the provisional trustee from exercising his powers.

Section 149(2) of the Act, which provides that a court may rescind or vary any order made by it under the provisions of the Act, gives the court no such power. A mere variation of an order cannot affect the provisional trustee's exercise of his powers. The section does not entitle a court to grant any interdict whatsoever, nor does it entitle a court to suspend the operation of a provisional order. A suspension would effectively nullify the concursus creditorum brought about by the provisional order, thereby destroying the very legal relationships—and thereby the very purpose of the order initially created by the applying creditor.

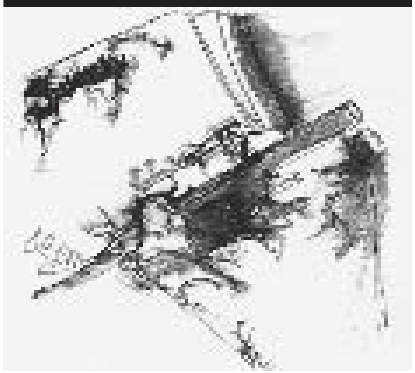
The application was dismissed.

# *METEQUITY LTD N.O. v HEEL*

A JUDGMENT BY CILLIERS AJ
WITWATERSRAND LOCAL DIVISION
12 DECEMBER 1996

1997 (3) SA 432 (W)

***Suretyship***



***A judgment debt does not create a new obligation independent of the debt from which it originally arose. A judgment creditor is therefore not entitled to enforce a judgment debt arising from a debt which itself is unenforceable.***

## THE FACTS

W de Jong Property Developments (Pty) Ltd passed a mortgage bond over its property in favour of Metequity Ltd in its capacity as trustee of the De Jong Development Bond Trust. The bond incorporated an acknowledgement of debt in the sum of R410 000, interest and costs.

Metequity brought an action against the company for payment in terms of the bond, and obtained a judgment against it. Some time later, Heel signed a deed of suretyship in favour of Metequity for payment of all sums of money which the company then and thereafter might owe to Metequity for whatsoever cause arising. Metequity brought an action against Heel for payment of the sum then due from the company.

Heel defended the action on the grounds that the principal debt was void in that it arose from a transaction which contravened section 38 of the Companies Act (no 61 of 1973) which prohibits a company from giving financial assistance for the purchase of its own shares. Heel alleged that the mortgage bond had been passed by the company as security for the payment of the purchase price of its shares following the sale of its shares by Metequity.

Metequity contended that in view of the fact that it held a judgment against the principal debtor, the voidness or otherwise of the principal debt could not assist Heel, the judgment having created a new and independent debt which was covered by the suretyship. It applied for summary judgment.

## THE DECISION

The first question was whether the terms of the deed of suretyship covered a judgment debt. The words 'all sums of money which the company might owe Metequity' could be understood to include a judgment debt. A judgment debt reinforces or confirms a pre-existing debt, transforming the remedy of the person holding the debt from a right of action to a right of execution. Through the operation of res judicata, it also precludes the judgment debtor from disputing that the debt is owing. Upon this understanding of a judgment debt, the suretyship could be interpreted as covering such a debt. The question then was whether or not that debt was independent of the debt from which it came.

Following the judgment handed down in the matter of *Swadif (Pty) Ltd v Dyke N.O.* 1978 (1) SA 928 (A), a judgment debt cannot be said to create a new obligation—it depends on the original principal debt and the creditor is obliged to rely on the validity of the original debt when enforcing payment under the judgment debt. Metequity had therefore to deal with the allegations concerning the contravention of section 38 in order to enforce its rights against he surety.

Metequity's application for summary judgment failed.

# *DRYBULK SA v MV YU LONG SHAN*

A JUDGMENT BY NILES-DUNÉR AJ
DURBAN AND COAST LOCAL DIVISION
6 JUNE 1996

1997 (3) SA 629 (D)

*Shipping*

***An arbitration award resulting from a maritime claim does not create a new cause of action.***

## THE FACTS

On 17 May 1991, Drybulk SA concluded a chartered the MV *Fei Xia Shan* from Guangzhou Zhen Hua Shipping Co. It was agreed that any dispute arising between the parties would be resolved by arbitration in London. Later in 1991, a dispute did arise between the parties, an arbitrator was appointed, and on 10 June 1994, the arbitrator issued a final award of US$335 400 in favour of Drybulk.

Relying on the arbitration award, Drybulk then instituted an action in rem against the MV *Yu Long Shan*, alleging that this vessel was an associated vessel by virtue of both it and the MV *Fei Xia Shan,* being ultimately owned by the State of China. In terms of section 3 (6) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983), an action in rem may be brought by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose.

The *Yu Long Shan* excepted to the claim on the grounds that it was not an associated ship, as the only provision upon which Drybulk could allege it was an associated ship—section 3(7)(c) of the Act—referred only to a charter by demise. Drybulk had not alleged that the charter of the MV *Fei Xia* was a charter by demise. Section 3(7)(c) of the Act, as it was when the dispute between the parties arose in 1991, provided that if a charterer or subcharterer of a ship by demise is alleged to be liable in respect of a maritime claim, the charterer or subcharterer shall, for the purposes of section 3(6), be deemed to be the owner of the ship.

## THE DECISION

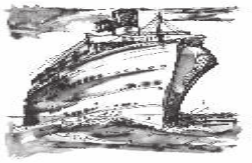
Section 3(7)(c) of the Act was amended in 1992 so as to omit the qualification that the charter is required to be one by demise and provides that any charterer shall be deemed to be the owner of the ship for the purposes of section 3(6). Drybulk therefore had to show that it was entitled to rely on the amended section 3(7)(c). If it could not, the exception had to succeed.

The maritime claim upon which Drybulk alleged it was bringing the present action was the arbitrator's award of 1994. While this event did take place after the amendment to the Act, it did not create the maritime claim upon which Drybulk brought its present action. That claim had arisen in 1991. Had Drybulk at that stage attempted to bring an action against the *Yu Long Shan*, it could have been met with the provisions of the unamended section 3(7)(c). To allow it now to rely on the amended section 3(7)(c) would be to give the section retrospective effect.

Because Drybulk did not allege that its charter of the MV *Fei Xia Shan* was a charter by demise, it could not prove that the MV *Yu Long Shan* was an associated ship. The exception was upheld.

# *K J INTERNATIONAL v THE MV* OSCAR JUPITER





A JUDGMENT BY ALEXANDER J
DURBAN AND COAST LOCAL DIVISION
8 JULY 1997

[1997] 3 All SA 475 (D)

***A foreign state which transfers control of a commercial enterprise to a separate entity which then enters into commercial transactions is immune from the claims of those who have transacted with that separate entity, but it is not so immune from the admiralty jurisdiction of a South African court if at the time when the cause of action arose, the ship was in use or intended for use for commercial purpose.***

## THE FACTS

The Romanian government established three new commercial entities for the purpose of exercising operational control of its fleet of ships. Each had economic autonomy and enjoyed legal status, but the beneficial ownership of the ships was to remain with the Romanian government. One of the new commercial entities was Compania de Navigatie Maritima 'Romline' SA (Romline), and a ship allocated to it was the MV *Oscar Jupiter*.

In terms of a protocol agreement between the governments of Romania and Maldova, the *Oscar Jupiter* was made available to the State Navigation Company of Maldova. The protocol agreement was entered into as part of a policy to strengthen the economic and cultural ties between Romania and Maldova. A bareboat charter was entered into with the Maldova Shipping Company, a concern wholly owned by the Maldovian Republic. The ship was to continue to be run by the officers and crew of Romline. As a result of change in the ownership of the Maldova Shipping Company, the bareboat charter was later taken over by the Firma De Navigate Neptun, in which the Maldovian Republic held 89,2% of the equity. Neptun concluded a partnership agreement with the Pontus Shipping Company of Constanta in terms of which Pontus was to undertake the entire management of the ship.

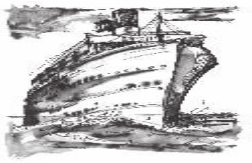
The owners of a cargo of rice on board the *Oscar Jupiter* claimed damages arising from the delivery of the rice in a damaged state, alternatively short landed. They obtained the arrest of the ship, and a rule nisi calling upon interested persons to show cause why the ship should not be sold. Thirteen crew members and the ship's master intervened, and claimed that the ship should be sold to satisfy their lien in respect of unpaid wages. Romline intervened as a respondent, and claimed that it was protected from the crew members' claim by the Foreign States Immunities Act (no 87 of 1981).

## THE DECISION

The Foreign States Immunities Act affords immunity to a foreign state from the jurisdiction of South African courts, but provides for certain exceptions to this immunity. One of these exceptions, provided for in section 2 of the Act, is that the immunity does not extend to a separate entity, ie an entity which is distinct from the executive organs of government of the foreign state and capable of suing and being sued, where that entity has not acted in the exercise of sovereign authority. Another exception is provided for in section 4, where in the case of a 'commercial transaction' entered into by a foreign state, the foreign state does not enjoy immunity.

These exceptions did not apply in the present case. The Romanian government and the charterer had not entered into any commercial transaction. The Romanian government had withdrawn from the operational control of its fleet of ships long before the bareboat charter was entered into with the Maldova Shipping Company. That control had passed from Romline to the Maldova Shipping Company, and then to Neptun. Neptun could not be considered the alter ego of the Romanian government when it entered into the bareboat charter. It could therefore not be said that the Romanian government entered into a commercial transaction at that point.

Section 11 of the Act however, did apply. That section provides that a foreign state shall not be



immune from the admiralty jurisdiction of a South African court in certain actions, if at the time when the cause of action arose, the ship was in use or intended for use for commercial purpose.

The *Oscar Jupiter* was engaged on a 'commercial purpose' with the direct approval and participation of the Romanian government when the bareboat charter was entered into and performed. The ship had remained the property of the Romanian government, and used with its permission for a commercial purpose. This meant that section 11 of the Act applied and rendered Romline susceptible to the crew members' claim.

The rule nisi was confirmed at the instance of the crew members.

*First as to the contention that the facts reveal a "commercial transaction" between the Romanian Government and the charterer. I would be hard pressed to sustain the argument. So far as the Romanian Government was concerned it had long departed the scene. It had passed the Respondent ship into the hands of Romline which in turn passed it to the Navigation Company of Maldova which in turn became Neptun and eventually a partner of Pontus. Neptun as the bareboat charterer in arranging the carriage of the rice in question, or in engaging the crew, can, in my opinion, hardly be considered the* alter ego *of the Romanian Government in concluding either "commercial transaction". Were these the only facts I would have no difficulty in absolving the Romanian Government from any liability.*

*The case for the applicants, however, invites a different approach. It is based on the proposition that the Respondent ship was engaged on a "commercial purpose". And such a purpose was with the direct approval and participation of the Romanian Government. The argument centres on what was the evident policy behind its decision to pass the ship from Romline to the State Navigation Company of Maldova. The inter-ministerial protocol reveals a far-reaching package of economic aid being conferred by the one Government on the other; including the gift of the ship, as it were, so as to enable Maldova to operate it for its own profit. The nominal charter hire is indicative of the generosity of the Romanian Government to its less affluent neighbour. If I may summarise the argument it is simply this: The ship remains ours but you can use it on the high seas, and whatever you earn by way of commercial enterprises, subject only to the modest charter fee, is yours.*

# *ABSA INSURANCE BROKERS (PTY) LTD v LUTTIG N.O.*

A JUDGMENT BY ZULMAN JA (MAHOMED CJ, SMALBERGER JA, VIVIER JA and STREICHER AJA concurring)
SUPREME COURT OF APPEAL
30 MAY 1997

[1997] 3 All SA 267 (A)

***Insurance***

***An agreement containing provisions at variance with section 20bis of the Insurance Act (no 27 of 1943) is null and void.***

## THE FACTS

Absa Insurance Brokers (Pty) Ltd conducted the business of an insurance broker. In terms of an agreement entered into with IGI Insurance Co Ltd, it would receive payment of insurance premiums from customers, and be entitled to set off commission due to it from IGI in respect of the insurance then placed with IGI. Absa would also be entitled to repay premiums which became refundable as a consequence of the fact that insurance had been cancelled, and could deduct the amount of such premiums from the total amount of premiums due to IGI.

In September 1993, Absa received some R3m in respect of premiums. During that month, some individuals cancelled their insurance with IGI and a total of some R1m became repayable to them as a result. This sum was credited to them. Absa then set off this amount against the total amount of R3m and paid IGI the lesser amount.

On 30 September 1993, IGI was placed under curatorship. Its curators contended that Absa had not been entitled to set off the R1m and claimed payment of this sum. It contended that the agreement in terms of which Absa purported to set off the R1m was prohibited by section 20bis of the Insurance Act (no 27 of 1943). The section provides that no registered insurer shall authorize or permit an agent or broker to retain or deal with any moneys in respect of premiums received other than by accounting to the insurer for the premiums received, and setting off only commission against payments then due.

## THE DECISION

The language of the section is clear and unambiguous: it permits only the deduction of commissions due to the agent or broker. The agreement clearly fell within the terms of prohibition of the section, as it constituted an authorisation to Absa to deal in premiums other than as authorised in the section. The amount deducted by Absa was not an amount in respect of commission: it could therefore not be set off against the premiums due to IGI.

In determining whether the effect of the contravention of section 20bis rendered the agreement a nullity, it was significant that the Act in which the section was enacted was designed to regulate the insurance industry. The section was there to protect the interests of the insurer as well as the public at large. In the light of the purpose of the section, it was clear that the mere imposition of a fine or a penalty for a violation of the provisions of section 20bis would not be sufficient. To allow the enforceability of an agreement entered into in violation of the section would undermine the very purpose of the Act. Such an agreement was a nullity.

The curators were entitled to payment of the R1m deducted by Absa.

# *SANTAM LTD v POTGIETER*



A JUDGMENT BY HANCKE J
ORANGE FREE STATE PROVINCIAL DIVISION
7 MARCH 1996

1997 (3) SA 415 (O)

***An insurance policy which provides that the insured forfeits all rights under the policy if he obstructs the insurer in the exercise of its rights may be enforced against the insured where the insured fails to inform the insurer of the whereabouts of the insured property after the occurrence of the loss of that property.***

## THE FACTS

Santam Ltd insured Potgieter's property against theft and damage. In terms of the insurance policy, Potgieter would forfeit all benefits under the policy if he obstructed Santam in the exercise of any of its rights thereunder.

Potgieter claimed indemnity under the policy, alleging that his motor vehicle and other items had been stolen and damaged. Santam accordingly paid Potgieter R61 275,83. It later appeared that Potgieter had taken the vehicle to a panelbeater and had requested that it be repainted so that it could not be recognised that it had been so repainted. He had also requested that its wheel rims and rear be widened. When questioned by the police as to how he had come into possession of the vehicle, Potgieter replied that someone had offered the vehicle to him for sale, and thereafter he had retaken possession of the vehicle. He was unable to recall the location of the house at which he alleged he had done so. Other items in respect of which Potgieter had made his claim against Santam were found at his house.

Santam brought an action against Potgieter for repayment of the R61 275,83, claiming that payment of that sum had never been due, alternatively that it was entitled to cancel the insurance policy, alternatively that Potgieter had committed fraud as described in the policy, alternatively that Potgieter had obstructed it in the exercise of its rights under the policy.

## THE DECISION

Assuming in favour of Potgieter that he had not committed fraud, the question was whether Potgieter had obstructed Santam in the exercise of its rights.

In view of Potgieter's obligation to take all possible steps to find the guilty party and retrieve lost property, and in view of the fact that the insurance contract was one of the utmost good faith, Potgieter ought to have informed Santam as soon as he had learnt of the whereabouts of the stolen vehicle. Because he had not done so, he had obstructed Santam in the exercise of its rights under the policy, thereby entitling Santam to assert that he had forfeited all his rights thereunder. The same could be said of Potgieter's failure to report the whereabouts of the other stolen items.

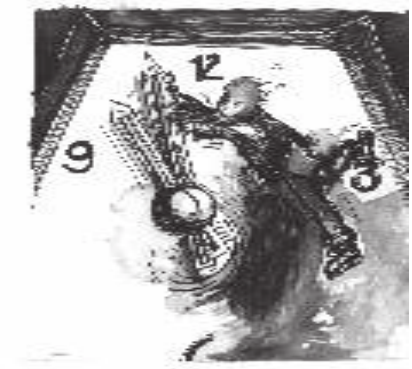
Potgieter had therefore forfeited all his rights in terms of the policy. Santam was entitled to repayment of R61 275,83.

# *ABSA BANK BPK v LOUW*

A JUDGMENT BY CONRADIE J and LOUW J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
7 FEBRUARY 1997

1997 (3) SA 1085 (C)

***Prescription***



***An agreement that the period of prescription provided for in the Prescription Act (no 68 of 1969) be extended is unenforceable.***

## THE FACTS

Louw entered into a credit agreement with Absa Bank Bpk, in terms of which the bank became Louw's creditor in respect of the purchase price of a BMW motor car. The second and third respondents signed deeds of suretyship in favour of the bank for the due performance of Louw's obligations. The deeds of suretyship incorporated a provision that the surety renounced the benefits conferred in terms of the Prescription Act (no 68 of 1969) both in respect of prescription running in respect of the principal debt and in respect of the surety's obligations.

Louw defaulted in making payments to the bank in terms of the credit agreement. The bank's claim against him prescribed. The bank persisted in its claim against the sureties. The sureties argued that the waiver of the protection extended by the Prescription Act was ineffective.

## THE DECISION

There was an objection in principle to a prior waiver of the protection of prescription. Allowing parties to agree to longer periods for the running of prescription than those provided for in the Prescription Act would nullify the purpose of prescription, which was to encourage creditors to collect their debts expeditiously and bring certainty as to when a debt would be extinguished. Parties were entitled to vary the period of prescription, but not beyond the limits provided for in the Prescription Act.

An agreement to extend the period of prescription was equally unacceptable as this too was against the public interest.

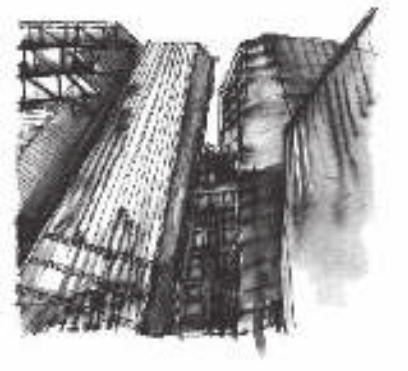
The provision of the deeds of suretyship being contrary to the public interest, it could not be enforced.

# *SHERIFF FOR THE DISTRICT OF WYNBERG v JAKOET*

A JUDGMENT BY BRAND J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 MARCH 1996

1997 (3) SA 425 (C)

***Property***



***A provision in a sale agreement which removes the seller's obligation to give vacant occupation of the property sold entitles the seller to enforce the sale despite the continued unlawful occupation of the property by a third party.***

## THE FACTS

The Assfan Trust passed a mortgage bond over its fixed property in favour of Nedcor Bank Ltd. Some years later, the Assfan Trust leased the property to a certain Mr Hamdulay. This lease continued to exist when Nedcor took a judgment against the Trust in terms of the bond, and when a consequent sale in execution of the fixed property took place.

At the sale in execution, the property was auctioned subject to the lease. The highest bid was less than Nedcor's claim. The property was then auctioned free of the lease, and sold to the highest bidder, Jakoet. A term of the sale as recorded in clause 4 was that possession of the property would be given and taken on the date of sale. Clause 8 recorded that notwithstanding the provisions of clause 4, there would be no obligation on the sheriff or any other person to give vacant occupation to the purchaser.

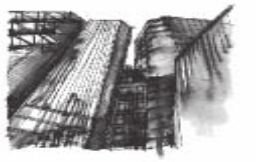
Hamdulay refused to vacate the property. Jakoet attempted to eject him, then abandoned the attempt. The sheriff tendered transfer of the property, but Jakoet refused to take transfer and purported to cancel the sale on the grounds that possession of the property had not been given.

The sheriff brought an action to enforce the sale.

## THE DECISION

The effect of the incorporation of clause 8 into the agreement of sale was to entitle the sheriff to enforce the sale without being obliged to give vacant occupation of the property. The sheriff had to give as much physical control as possible without necessarily giving vacant occupation. Jakoet was therefore not entitled to resist enforcement of the sale on the grounds of the sheriff's failure to give vacant occupation.

Having complied with all his obligations in terms of the sale, Jakoet had no grounds for cancellation. The sheriff was entitled to enforce the sale.



# *COMMERCIA AREA INDUSTRIAL FORUM v NORTH EAST RAND TRANSITIONAL METROPOLITAN COUNCIL*

A JUDGMENT BY VAN DIJKHORST J
TRANSVAAL PROVINCIAL DIVISION
26 SEPTEMBER 1996

1997 (3) SA 1075 (T)

***In determining whether a party has properly complied with the requirements of the Town-planning and Townships Ordinance no 15 of 1986 (T) it is necessary to determine whether or not that party is an authorised local authority, and has complied with the regulations for the establishment of townships as provided for in that Ordinance.***

## THE FACTS

The North East Rand Transitional Metropolitan Council lodged an application for the establishment of a township on its land. It lodged the application with the Edenvale/ Modderfontein Metropolitan Substructure (EMS) as an authorised local authority in terms of the Town-planning and Townships Ordinance no 15 of 1986 (T). The EMS published a notice of the application in newspapers in terms of section 108(1)(a) of the Ordinance.

The EMS then engaged a contractor to install reticulation works for water and sewerage, and work began on this. The Commercia Area Industrial Forum and the second applicant, representing owners of adjacent land, applied for an interdict to prevent the council and the EMS from proceeding with the establishment of the township and to secure the land against residential settlement.

## THE DECISION

The Ordinance regulates the establishment of townships by owners of land and by local authorities, the former being dealt with under Chapter III and the latter under Chapter IV. Section 108 forms part of Chapter IV. The party which acted in terms of this section, the EMS, was however, not the party establishing the township. The council was establishing the township. It was not clear whether or not that party was a local authority as defined in the ordinance, and therefore uncertain whether, even if the EMS could be said to have been acting as the council's agent, the procedure of publishing a notice of the application in terms of section 108 was properly done.

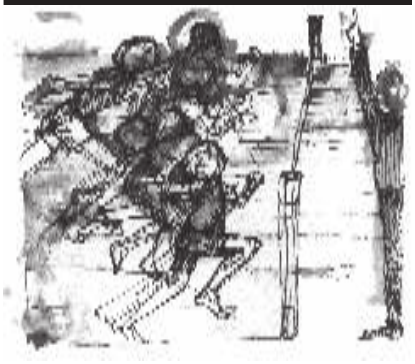
Because the proper procedures had not been followed, the council and the EMS had acted ultra vires the Ordinance in proceeding with the establishment of the township. An interdict to prevent them from so proceeding was granted.

# *HUSHON SA (PTY) LTD v PICTECH (PTY) LTD*

A JUDGMENT BY NIENABER JA (ZULMAN JA concurring) and SCHUTZ JA (HEFER JA and STREICHER AJA concurring)
SUPREME COURT OF APPEAL
9 MAY 1997

[1997] 2 All SA 672 (A)

***Competition***



***In assessing damages from loss of profits, a court may take into account the difficulties of proving the quantum of such damages, and when it is clear that a plaintiff has suffered such damages, may apply a rough and ready method of calculation of the quantum of such damages.***

## THE FACTS

From 1986, Hushon SA (Pty) Ltd imported air-conditioning equipment from Kyung Won Machinery Company, a Korean company known as 'Century', and distributed the equipment in South Africa. In the same period, Pictech (Pty) Ltd imported similar equipment from Japan, where it was manufactured under the name 'Hitachi', Pictech's supplier being the Taiyo Busan Company. The Hitachi product was very similar to Century's product. It was not as modern as Century's product, but it was cheaper.

Century promised Hushon that it would grant it the exclusive right to import Century equipment into South Africa, if its orders reached a value of US$200 000 within a given period. Hushon failed to reach that target.

In a letter written by a certain Huysemeyer, the managing director of KIC Ltd, Century equipment was described as a serious threat to Pictech, and plans were set out to take the Century distributorship away from Hushon. These included taking two key sales staff from Hushon.

One of these, a Mr B Danney, made contact with Century while he was still in Hushon's employ, and told it that Hushon was experiencing financial difficulties, and that as a result, its sales were being hampered. He further informed Century that he and another Hushon employee Mr D Woodman, had made contact with CAC (Pty) Ltd which had enough financial backing to ensure that Century products would eventually become market leaders in South Africa. CAC was formed by Pictech as a wholly-owned subsidiary in order to conduct the Pictech group's trade in Century equipment.

After Hushon became aware of the steps being taken by Pictech to take away the Century distributorship, he made contact with Century to assure if of Hushon's continuing ability to execute the distributorship. Danney was dismissed from Hushon's employ. He then took up employment with CAC. Using a visa to enter Korea obtained while he was employed by Hushon, he visited Century and obtained its agreement to supply CAC with air-conditioning equipment. Thereafter, Hushon's relationship with Century deteriorated rapidly. Hushon was unable to obtain rapid responses from Century, as it had in the past, to enable it to submit quotations to potential purchasers. Hushon lost credibility in the market place and experienced increasing difficulty in doing business in Century equipment.

Hushon alleged that Pictech's actions were actionable on the grounds that they amounted to unlawful competition. It claimed damages in the sum of R1 181 034 alleged to be the total lost profits for the period 1987 to 1991 and calculated as the difference between projected sales and actual sales.

In proving its claim for damages, Hushon led evidence of CAC's turnover of sales of Century equipment for the period 1987 to 1991. It applied an average gross margin to these figures, and a projection of profits, to arrive at the profits allegedly lost by Hushon over this period. Hushon claimed payment of R1 181 034.

## THE DECISION

(per Nienaber JA)

Pictech had clearly engaged in unlawful competition. The question was whether or not the evidence presented by Hushon showed that it had suffered the damages it alleged. The question was whether Hushon would have sold all the items of Century

equipment which CAC had sold, had CAC not entered the market.

Unlike the case of an action against an agent for payment of profits unlawfully made, or the case of an action for damages for infringement of a registered design, the profit made (in the former case) or the sales achieved (in the latter case) were not the measure by which Hushon could prove its damages. Hushon was required to demonstrate the actual profits it had lost as a result of the intervention of CAC.

The evidence showed that Hushon had never held the sole distributorship of the Century products in South Africa, Century never having granted it such rights. Accordingly, it was always possible for CAC to have entered the market and obtain its supplies from Century. At least part of the profits CAC had made might have been legitimately made. Hushon's evidence of the profits CAC actually made therefore failed to prove its damages.

It remained clear that Hushon did suffer loss as a result of Pictech's conduct. Given the difficulties of proving its damages, the court was entitled to resort to a rough and ready method of assessment of the damages, having regard to the probabilities of the case. In doing so, the CAC sales statistics were significant since they served as an indication of the potential of trade during the relevant period.

Using these figures as a point of departure, downward adjustments had to be made to take into account factors which would probably have affected Hushon's trade. These included the fact that CAC was part of a large conglomerate of companies which had taken a policy decision to enter the market for Century equipment, the fact that Hushon was comparatively small and without the financial resources possessed by CAC, and the fact that Hushon was in a precarious financial position. It was also not clear that Hushon would have been able to handle the additional capacity of CAC's trade. Taking these factors into account, Hushon would not have been able to achieve sales of more than R1½m. Applying Hushon's own ratio of profit to sales, a loss of profits of R175 000 was apparent. Hushon was entitled to payment of this amount.

(per Schutz JA)

Less weight should be attached to the impact on Hushon's sales of CAC's lawful competition in the market for Century equipment. It was open to serious doubt whether CAC would have entered the market on this basis without employing unlawful means. Less weight should also be attached to Hushon's financial position—it being by no means clear that Hushon could not have achieved financial backing for the continuation of its business.

The loss of profits was more accurately assessed at R250 000.

# *VENTER v BOPHUTATSWANA TRANSPORT HOLDINGS (EDMS) BPK*

A JUDGMENT BY OLIVIER JA (HEFER JA, FH GROSSKOPF JA, NIENABER JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
18 MARCH 1997

1997 (3) SA 374 (A)

***An inference may be drawn from ownership of a vehicle that a person driving the vehicle does so within the scope and course of his duties as employee.***

## THE FACTS

On 8 June 1988, a motor collision took place between a bus owned by Bophutatswana Transport Holdings (Edms) Bpk (BTH) and a lorry owned by Venter. Venter's lorry was being driven at the time by one of his employees, and the collision was caused solely by the negligence of that employee. BTH sued Venter for payment of R58 400 being damages sustained in the collision. In an appeal against judgment having been granted against him, Venter contended that his employee had not been acting within the scope and course of his duties as employee at the time of the collision, and that BTH had failed to prove the amount of its damages.

The motor collision took place at 7.30 pm. This was two and a half hours after Venter's lorries normally—though not always—returned following a day delivering sand to building contractors. Two other employees of Venter were on the lorry at the time of the collision. They were mechanics who did not normally accompany the lorries but worked at Venter's place of business. On occasions, mechanics were required to go to lorries which had broken down in order to repair them.

The two mechanics died following the collision, and the driver disappeared.

In proving its damages, BTH led the evidence of an assessor who had inspected its bus after the collision. He stated that his assessment of the reasonable costs of repair was R58 400 after inspecting a quotation for repair given by a panelbeater. In cross-examination, he confirmed that the cost of three items listed on the quotation was reasonable.

## THE DECISION

Ownership of a vehicle justifies the inference that the driver of the vehicle is employed by the owner and drives the vehicle within the scope and course of his duties as employee. This inference does not mean that the normal onus of proof is altered: to establish an employer's vicarious liability, a plaintiff must still show, having regard to all relevant factors, that the driver of the defendant's vehicle drove the vehicle within the scope and course of his duties as employee.

In the present case, the fact that the two mechanics were present at the time of the collision at 7.30 pm created a reasonable possibility that they had been taken to the lorry to repair it after the lorry had broken down on the way back from a delivery of sand. Against this possibility, the contrary one, that the lorry driver had taken the lorry on an unauthorised trip together with the two mechanics, was more improbable.

Taking these factors into account, together with the inference that could be drawn from Venter's ownership of the vehicle, Venter could be considered vicariously liable for the action of the driver.

As far as the proof of damages was concerned, it was true that the assessor had not given reasons for assessing the reasonable costs of repair at R58 400. However, his assessment was clearly given as a result of his experience as an expert. Venter's representative had been able to test the assessor's assessment of the reasonable costs of repair, and in doing so, it had been clear that the assessor did not have a complete inability to justify the cost of each item repaired. There was therefore enough material before the court to properly assess BTH's damages.

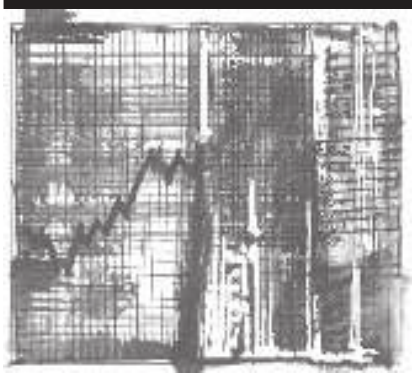
The appeal was dismissed.

# *HASLAM v SEFALANA EMPLOYEE BENEFITS ORGANISATION*

A JUDGMENT BY CAMERON J
WITWATERSRAND LOCAL DIVISION
5 AUGUST 1997

1997 CLR 536 (W)

***Securities***



***A party which concludes an agreement for the purchase of shares in a company acquires the shares in that company, for the purposes of the application of the Securities Regulation Code on Takeovers and Mergers, whether or not the sale is finally performed.***

## THE FACTS

In July 1993, Sefalana Employee Benefits Organisation agreed to purchase from Concor Holdings (Pty) Ltd nearly three and a half million shares in Time Life Insurance Ltd, constituting an effective controlling shareholding in that company. Later in the year, Sefalana repudiated the agreement and Concor then cancelled the agreement.

Haslam and the other plaintiffs were minority shareholders in Time Life. They contended that Seflana was obliged to offer to purchase their shares at the price agreed with Concor, and brought an action for damages arising from its failure to make that offer. Seflana contended that it was not obliged to make the offer in circumstances where the shares had not actually been transferred to it.

The parties approached the court for a determination of whether Sefalana incurred an obligation to offer to purchase the shares of the minority shareholders at the price agreed with Concor.

## THE DECISION

Section 440L of the Companies Act (no 61 of 1973) provides that no person shall enter into or propose an affected transaction except in accordance with the Securities Regulation Code on Takeovers and Mergers. An affected transaction is defined to mean any transaction or scheme which has the effect of vesting control of any company in any person in whom control did not vest before the transaction or scheme. An 'acquisition' in relation to securities of a company is defined as the acquisition of securities in the company by any means whatsoever, including purchase or subscription. In terms of Rule 8.1 of the Code, when a person holding less than a specified percentage of the shares in a company acquires securities carrying more than a specified percentage of the voting rights in the company, such person is obliged to extend offers to the holders of other holders of any class of capital to acquire all their securities, or such portion of their securities as the Panel may determine.

The sale of the shares by Concor to Sefalana exceeded the percentages referred to in the Rule. Accordingly, the transaction was an affected transaction as defined in the Act. The crucial question was whether that transaction constituted an 'acquisition' of the shares in Time Life.

From the definition of this term in the Code, an acquisition of shares includes not only obtaining the ownership of the shares themselves, but also obtaining any rights or interest in them. The term is therefore widely defined. Applying this definition literally, there was little doubt that Seflana acquired rights and interests in the controlling shareholding of Time Life. Seflana might not, as a result, have taken control of the company, but the overall rationale and purpose of the Code being to extend equal treatment to minority shareholders, Seflana was obliged to make the same offer to Time Life's minority shareholders as it had made to Concor.

Seflana therefore did incur an obligation to offer to purchase the shares in Time Life held by the minority shareholders and its failure to do so constituted a contravention of that obligation.

# *SOUTHERN WITWATERSRAND EXPLORATION CO LTD v BISICHI MINING PLC*

A JUDGMENT BY CAMERON J
WITWATERSRAND LOCAL DIVISION
30 JUNE 1997

1997 CLR 520 (W)

***Companies***

***The doctrine of unanimous assent may be applied where shareholders consent generally to a method of passing a company resolution different from that provided for in the Articles of Association. Where the Articles provide for the 'round robin' method of passing a director's resolution, it is sufficient if each director signs and identical copy of the resolution even if the signatures do not all appear on the same document. A person may waive a right without communicating the waiver to the other party to the agreement if by waiving, that person does not seek to enforce a right but to renounce one.***

## THE FACTS

In June 1994, the shareholders in Black Wattle Colliery (Pty) Ltd concluded an agreement which provided that a resolution signed by the majority of the company's directors would be as effective as if it had been passed at a meeting of the majority of its directors. It further provided that if there were any conflict between the agreement and the Memorandum or Articles of Association of the company, then the provisions of the agreement would take precedence. Article 76 of the Articles of Association provided that a resolution in writing signed by all the directors would be as valid and effectual as if it had been passed at a meeting of directors duly convened and held.

In February 1995, Southern Witwatersrand Exploration Co Ltd entered into an agreement with Bisichi Mining PLC and Black Wattle, in terms of which Bisichi acquired from Southwits and Magnama (Pty) Ltd 50% of the shares in Black Wattle. The agreement was made subject to the suspensive conditions that the South African Reserve Bank give its approval to the agreement, and that Southwits' rights and obligations in terms of a mineral lease it had concluded with the Middelburg Town Council be ceded to Black Wattle. The agreement provided that the second suspensive condition was inserted solely for the benefit of Black Wattle and could be waived by it in writing at any time prior to the date of fulfilment.

The first suspensive condition was fulfilled by the extended date of fulfilment of 31 July 1995, but the second was not. Prior to 31 July 1995, three of Black Wattle's directors had signed a resolution waiving the second suspensive condition. The fourth had received a separate faxed copy of the resolution and had signed it, but had not returned it to the director who had initiated the resolution. The two directors of Southwits who signed the agreement for that company also represented Magnama, and they were also directors of Black Wattle.

Southwits brought an application for an order declaring that the agreement of February 1995 had lapsed, and that the agreement of June 1994 had not been cancelled.

## THE DECISION

The agreement of June 1994 went further than an agreement authorising a specific appointment or transaction—it purported to render effective any resolution signed by a majority of Black Wattle's directors. Despite its generality, the doctrine of unanimous assent—that the unanimous assent of all members of a company is an alternative method of passing a valid company resolution—remained applicable. That doctrine could be applied by employing the 1994 shareholders' agreement, which enabled Black Wattle to waive the second suspensive condition by a resolution signed by a majority of its directors.

In any event, the facts showed that article 76 had been complied with. That article provided for the 'round robin' method of passing resolutions. The fact that the fourth director did not sign the same document as the one signed by the other directors did not detract from the fact that the 'round robin' method had been effectively employed in terms of article 76.

Southwits also contended that even if the resolution was valid, the waiver contained in it had not been communicated to the other parties to the agreement. However, while communication of a

waiver is normally essential for the effectiveness of the waiver, in the present case, the party relying on the waiver, Black Wattle, did not seek to enforce a right but sought to renounce any reliance on it. Communication of the waiver was therefore not essential for the waiver to be effective.

In any event, the facts showed that there had been a communication of the waiver. The two directors of Southwits who signed the agreement for that company also represented Magnama, and they were also directors of Black Wattle. In these circumstances, no formal communication of the waiver was necessary other than the faxed communications provided for in the agreement.

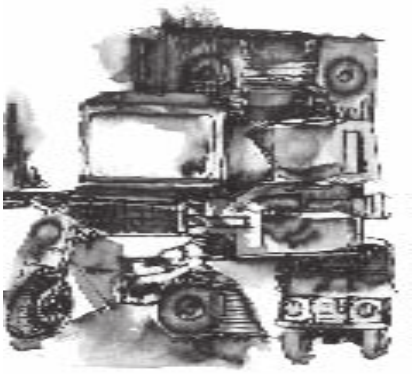
The application was dismissed.

## *EX PARTE SIEMENS TELECOMMUNICATIONS (PTY) LTD*

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
4 APRIL 1997

1997 CLR 448 (W)

*Credit Transactions*



***A lease agreement in respect of goods which purports to lease the goods for a rental without imposing any finance charge in respect of the transaction falls within the definition of a leasing transaction as provided for in the Usury Act (no 73 of 1968) and remains a transaction for which principal debt and finance charges may be ascertained.***

### THE FACTS

Siemens Telecommunications (Pty) Ltd leased telephone and switchboard systems to various customers. It did so by giving the customer the use of a system for a period of about sixty months, in return for which the customer paid a monthly rental and maintenance charge. Siemens would retain ownership of the system which would have to be returned to it after expiry of the lease. Siemens was entitled to vary the rental from time to time by a percentage equal to the percentage change in the Prime Overdraft Rate applicable at the date of commencement of the lease.

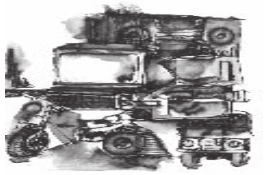
Following default by certain customers in paying their rentals in terms of the leases, Siemens would request default judgment for payment thereof in a magistrates' court having jurisdiction in respect of the particular lease. On various occasions, default judgment was refused on the grounds that the lease agreement fell within the provisions of the Usury Act (no 73 of 1968) as being a 'leasing transaction', and that details of, inter alia, the principal debt and finance charges had not been set out as was required by that Act.

Siemens applied for an order declaring that a lease agreement in respect of which no finance charges is payable is not a 'leasing transaction', and that a lease agreement which is not also a money lending transaction as referred to in the Act is not a 'leasing transaction'.

### THE DECISION

The Usury Act defines a leasing transaction as any transaction by which a lessor leases moveable property to a lessee and the amount then owing is payable after the date of conclusion of the transaction. The leases entered into by Siemens with its customers clearly fell within the terms of this definition; they were therefore governed by the Act. The question was whether or not the leases were affected by the Act—specifically in the requirement that they disclose the information referred to by the magistrates—because they carried no principal debt and no finance charges.

The Act defines the principal debt in the case of a leasing



transaction as the difference between the cash price at which the property leased is normally sold and the sum of the cash amount paid on date of transaction to the lessor by the lessee, the reasonable value agreed upon of property delivered to the lessor by the lessee for application in reduction of the cash price and the present value of the book value of the property, plus stamp duties and insurance premiums. Applying this definition, it was clear that in the case of Siemens' leases, there was a principal debt. The telephone and switchboard systems had a market value—as was also evident from the fact that the lease agreement provided for their insurance—and Siemens had presented no evidence to show that they did not have a market value. It was therefore possible to attach a cash price at which these systems would normally be sold, and from this subtract the sums referred to in the definition.

Were Siemens' proposition that its leases contained no principal debt, and equally, no finance charges, to be accepted, it would follow that it would be entitled to charge a monthly rental of any amount without contravening the Act. The application was dismissed.

# Current Commercial Cases

Volume 6 Part 6 December 1997

## In this issue ...



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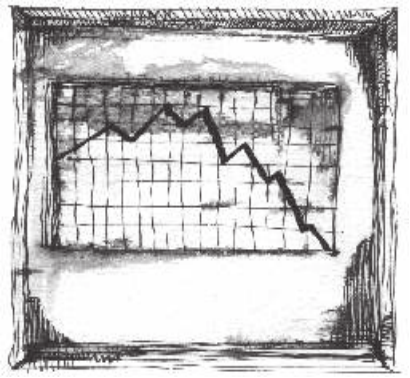
# *DOUGLAS GREEN BELLINGHAM v MALCOLM GREEN*

A JUDGMENT BY VAN COLLER AJA
(MAHOMED, CJ, EKSTEEN J, MARAIS J and ZULMAN J concurring)
SUPREME COURT OF APPEAL
22 SEPTEMBER 1997

UNREPORTED

***Insolvency***



***When a trustee pays a dividend to an unsecured creditor, he appropriates payment to each claim proved by the unsecured creditor, whether or not the creditor has submitted a single claim arising from more than one debt. Where the creditor has so submitted a single claim, the trustee assesses each debt comprising the claim, and any dividend then paid is directed to the partial satisfaction of each debt proved against the sequestrated estate. The creditor is then not entitled to appropriate the whole payment received from the trustee to any one debt.***

## THE FACTS

Kotze, a buyer for Douglas Green Bellingham, requested Malcolm Green to invoice Douglas Green Bellingham for the purchase of used bottles. In response, Malcolm Green issued invoices, which indicated delivery to Douglas Green's warehouse, but he did not deliver the bottles. He received payment from Douglas Green.

Kotze had indicated to Malcolm Green a source where the bottles could be obtained and then received cheques made out in his favour from Malcolm Green for the bottles. Kotze had arranged a similar scheme with another party, Worcester Bottle Exchange.

When Douglas Green discovered Kotze's scheme, it claimed from his sequestrated estate payment of R2 642 960,89 comprising the debt incurred through Malcolm Green and that incurred through Worcester Bottle Exchange. Douglas Green received a dividend. It claimed it was entitled to appropriate this to the oldest debt, ie that arising from the Worcester Bottle Exchange scheme, and was therefore entitled to recover the balance of its claim from Malcolm Green. The effect of the appropriation was to increase Douglas Green's claim against Malcolm Green as joint wrongdoer with Kotze.

Malcolm Green objected to the appropriation on the grounds that section 103(1)(a) of the Insolvency Act (no 24 of 1936) applied. The section provides that any balance of the free residue of a sequestrated estate shall be applied in the payment of unsecured claims in proportion to the amount of each such claim.

## THE DECISION

The trustee who paid the dividend was bound to pay the dividend in terms of the section. Having done so in terms of section 103(1)(a), he made an appropriation of the dividend according to the provisions of the section, ie to the total claim of each proved creditor. It was thereafter impossible for any creditor to effect an appropriation on its own.

The dividend was paid in response to a claim in respect of two categories of debt, that arising from the Worcester Bottle Exchange Scheme and that arising from the Malcolm Green scheme. These were separate claims, each of which the trustee had to decide whether to accept or reject. When payment was made by the trustee, it was therefore made pro rata in respect of each claim individually, and no appropriation could be effected thereafter.

Malcolm Green's objections were upheld. Accordingly, Douglas Green's claim against him was to be reduced by the dividend received in respect of its claim arising from the scheme in which he had been involved.

# *BANK OF LISBON INTERNATIONAL LTD v WESTERN PROVINCE CELLARS LTD*

*Insolvency*

A JUDGMENT BY GOLDSTEIN J (GOLDBLATT JA and FEVRIER J concurring)
WITWATERSRAND LOCAL DIVISION
15 OCTOBER 1997

UNREPORTED

***The object of section 34(1) of the Insolvency Act (no 24 of 1936) is to prevent a trader from avoiding payment of business debts by disposing of the business to a person who is not liable for such debts. A 'trader' for purposes of the application of section 34(1), includes a person who has traded and who might have ceased trading as at the date of transfer of the business referred to in the section, but who has engaged in those activities referred to in the definition of a 'trader' which constitute a person a trader.***

## THE FACTS

The Bank of Lisbon International Ltd lent money to J C de Araujo, and held as security a notarial bond over assets of his business, a liquor store. The bank enforced the notarial bond by taking possession of the business. Western Province Cellars Ltd then purchased the business from de Araujo, and paid the purchase price to the bank.

Western Province took transfer of the business, but no publication of the intention to transfer the business was made in terms of section 34(1) of the Insolvency Act (no 24 of 1936). Section 34(1) provides that if a trader transfers any business belonging to him, except in the ordinary course of that business or for securing the payment of a debt, and the trader has not published notices of the intended transfer within stipulated periods before the date of transfer, the transfer will be void as against his creditors for a period of six months after the transfer, and will be void against the trustee of his estate, if his estate is sequestrated at any time within that period.

de Araujo was sequestrated within the stipulated period, and his trustee applied for the sale to be set aside on the grounds that the provisions of section 34(1) had not been complied with. The Bank of Lisbon opposed the application on the grounds that because de Araujo had ceased trading in the business for a period of four weeks before the sale, he was not a 'trader' as referred to in section 34(1). An alternative ground was that the transfer fell within the exception 'for securing the payment of a debt' as provided for in the section.

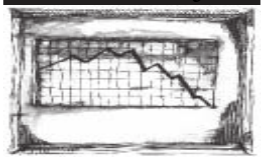
## THE DECISION

The Act defines a trader as any person who carries on any trade, business, industry or undertaking in which various stipulated activities are undertaken, including the sale of property. The bank argued that the carrying on of trade as referred to in the definition, being stated in the present tense, was an activity intended to be taking place at the time when the transfer of the business takes place. However, the purpose of the definition was to set out those activities which would constitute the person a trader. This meant that if a person fell within the terms of the definition, he would not cease to be so simply because he ceased operating it.

The object of section 34(1) is to prevent a trader from avoiding his debts by selling and transferring his business to a person who would not be liable for such debts. If it were to be held that a person is not a trader merely because he has not traded for a period of a few weeks before selling and transferring his business, this object would not be achieved. de Araujo might have ceased trading, but he remained a trader.

As far as the bank's alternative ground was concerned, the transfer of the business did not take place for securing payment of a debt, but in order to pay a debt. The exception referred to in section 34(1) refers to a transfer effected in order to secure a debt, such as a pledge or in the perfection of a notarial bond.

The trustee's application was granted.



## *GOTTSCHALK v GOUGH*

A JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 JUNE 1996

1997 (4) SA 562 (C)

***The dismissal of an application for provisional sequestration may not be appealed.***

THE FACTS

Gottschalk applied for the provisional sequestration of Gough's estate. The application was dismissed because Gottschalk had been unable to prove that there was reason to believe the sequestration would be to the advantage of creditors. Gottschalk applied for leave to appeal the dismissal of the application.

Gough opposed the appeal on the grounds that the dismissal of an application for a provisional order or sequestration is not appealable. His opposition was based on section 150 of the Insolvency Act (no 24 of 1936).

Section 150(1) provides that any person aggrieved by a final order of sequestration or by an order setting aside an order of provisional sequestration may appeal against such order. Section 150(5) provides that there shall be no appeal against any order made by the court in terms of the Act, except as provided in section 150.

THE DECISION

Amendments to section 150 bringing it to its present wording showed a clear legislative intention to limit, rather than broaden appeals against orders made in sequestration proceedings. The section did not expressly provide for a right of appeal against an order dismissing an application for a provisional order of sequestration. Such an order would therefore be appealable only if not encompassed by the provisions of section 150(5). The question therefore was: was the order against which Gottschalk appealed, an order referred to by section 150(5), ie one made in terms of the Act?

The order which had been made was an order made following an application made in terms of the Act, and following an inquiry as to whether the order sought was appropriate. It was one made in terms of the Act. This was so even though section 150 did not expressly refer to an order dismissing a provisional order of sequestration.

The application for leave to appeal was dismissed.

## *EX PARTE ELLIOT*

A JUDGMENT BY FLEMMING DJP
WITWATERSRAND LOCAL DIVISION
26 JUNE 1997

1997 (4) SA 292 (W)

***An applicant in a rehabilitation application may not cure the defect of not having furnished security for the application three weeks before bringing the application by obtaining a postponement of the application to a date more than three weeks after the commencement of the application.***

THE FACTS

Elliot applied for his rehabilitation. On the date on which the application was to be heard in court, he had not lodged security for the application three weeks previously, as required by section 125 of the Insolvency Act (no 24 of 1936). He asked for the postponement of the hearing of the application to a date more than three weeks after the date on which he lodged security.

The court raised the question whether this could be done.

THE DECISION

Section 125 requires the furnishing of security three weeks before the application for rehabilitation is brought, not three weeks before the order sought by such an application is granted. The purpose of the requirement is to assure any opponent of the application that his costs of opposition will be recoverable, should be decide to oppose the application after perusing the application papers and assessing its merits. Such an opponent's interests will not be assured were it to be possible for a court to condone the lateness in furnishing security and allow a postponement to afford the applicant further time to bring the application. Allowing the possibility of a postponement would mean that the opponent would never know when the order sought by the applicant was to be finally sought.

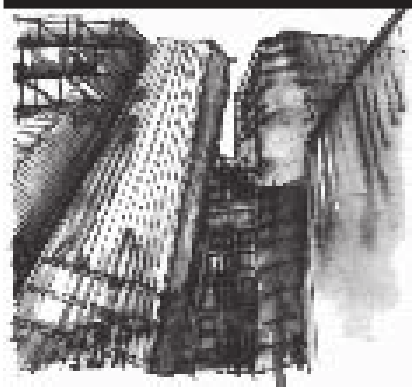
A postponement was therefore not possible. Application dismissed.

# *RANDBURG TOWN COUNCIL v KERKSAY INVESTMENTS (PTY) LTD*

A JUDGMENT BY SCOTT JA (SMALBERGER JA, SCHUTZ JA, PLEWMAN JA and VAN COLLER AJA concurring)
9 SEPTEMBER 1997

UNREPORTED

*Property*



***In determining the amount of compensation payable following an expropriation of property in terms of the Expropriation Act (no 63 of 1975) any depreciation in the value of the property brought about by the imposition of an earlier enforced encumbrance over the property is, in terms of section 12(5)(f) of the Act, not to be taken into account.***

## THE FACTS

In December 1976, the Randburg town-planning scheme was introduced . It applied to erf 843, Ferndale, situated in Randburg. The property had been zoned 'special' two years earlier, and this permitted its development for use as offices, subject to an obligation on the owner to register servitudes for road widening purposes and for public parking. The property was not so developed, and the servitudes were never registered.

The town-planning scheme of 1976 provided that certain buildings were not permitted on the property unless a right-of-way for general street purposes was registered against the property. In April 1990, the Randburg Town Council expropriated a road widening servitude over the property, the owner had not taken any steps to develop the property.

The town council expropriated part of the property in terms of Expropriation Act (no 63 of 1975). Section 12(1)(b) of that Act provides that the compensation to which a claimant is entitled following an expropriation, is an amount to make good any actual financial loss caused by the expropriation. The owner, Kerksay Investments (Pty) Ltd, claimed that it was entitled to R40 000 in terms of this section. The town council offered R1 401, contending that in calculating the compensation payable, it was entitled to take into account the diminution in value of the property which occurred as a result of the introduction of the 1976 town-planning scheme. It contended that the imposition of the obligation to register servitudes for road widening purposes and public parking in 1976 constituted a depreciation of the value of the property in terms of section 12(5)(f) of the Act.

Section 12(5)(f) of the Act provides that in determining the amount of compensation payable, any enhancement or depreciation in the value of the property due to the purpose for which or in connection with which the property is being expropriated, shall not be taken into account.

## THE DECISION

The sole question in issue was whether the depreciation in the value of the property caused by the 1976 scheme was to be disregarded in calculating the compensation payable to Kerksay. On a literal interpretation of section 12(5)(f) of the Act, the depreciation in the value of the property caused by this scheme was to be disregarded—the section specifically referring to depreciation due to the purpose for which (or in connection with which) the property is being expropriated. The purpose of the expropriation was the same as the purpose of the 1976 scheme, ie road widening, so that any depreciation brought about by the 1976 scheme was, on this interpretation, depreciation referred to in section 12(5)(f).

The section could not be interpreted as being inapplicable to depreciation resulting from an enforced encumbrance over the property in question, such as that brought about by the 1976 town-planning scheme. In interpreting the section, there was no reason to apply any distinction between depreciation arising from that cause and depreciation arising from any other cause.

The fact that an owner might have been compensated by depreciation brought about by the introduction of the town-planning scheme, and therefore stood to be compensated twice, did not justify a departure from the literal interpretation of the section.

Though it appeared that the intention of the Act was not to allow an owner double compensation, the fact that this potential existed was no reason to deviate from the first rule of interpretation that the proper meaning of a statute is to be found in the ordinary and literal meaning of its words. Applying this rule, the section meant that in determining the amount of compensation payable to Kerksay, any depreciation in the value of its property brought about by the 1976 town-planning scheme was irrelevant.

The town council's contentions were rejected. It was obliged to pay R40 000 in compensation.

## *M & J MORGAN INVESTMENTS (PTY) LTD v PINETOWN MUNICIPALITY*

A JUDGMENT BY OLIVIER JA (VAN HEERDEN JA, HOWIE JA, SCOTT JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
30 MAY 1997

1997 (4) SA 427 (A)

***A resolution by a local authority that authority be granted to an appointed official to expropriate property amounts to a decision to expropriate in terms of section 190(2) of the Local Authorities Ordinance no 25 of 1974 (N) because it expresses an intention to expropriate, even if it incorporates an added directive that the authorised person is to take the necessary administrative steps, as required by section 190(3). If a local authority amends the plan relating to the proposed expropriation by reducing the extent of the expropriation it need not pass a further resolution merely to accommodate the change.***

### THE FACTS

In December 1993, the town council of the Pinetown Municipality resolved that authority be granted to the Executive Director: Corporate Services to expropriate various properties situated within its area of jurisdiction, including a portion of a property owned by M & J Morgan Investments (Pty) Ltd. The expropriations were intended to facilitate the upgrading of roads in Pinetown.

The Town Clerk then wrote to Morgan Investments and gave notice that it was the council's intention to expropriate approximately 1 550 m² of its land as depicted on an attached plan. Objections to the proposed expropriation were invited within 30 days of the notice. Morgan Investments raised preliminary objections to the expropriation, and then more substantive objections on a number of grounds, including a report by its own engineer proposing an alternative method of street development.

In May 1994, the Executive Director responded to Morgan Investments' objections in a report to a management committee of the town council. In this report, it was pointed out that the area of land to be expropriated could be reduced to approximately 1 000m². Morgan Investments was allowed to address the committee on the matter, which also considered the town council's response to its objections. The management committee recommended to the town council that it adopt the report made by the Executive Director.

The town council then resolved that the Executive Director's report be adopted. It transmitted to the Minister of Housing and Local Government its resolutions, all objections to the proposal and the comments of its consultants and those of Morgan Investments. The plan submitted to the Administrator was an amended plan, drawn up in accordance with the report indicating the smaller area of expropriation of Morgan Investments' property.

Morgan Investments applied for an order interdicting the municipality from submitting its decision to expropriate its property, interdicting the Minister from considering or approving the decision to expropriate, and for an order reviewing and setting aside this decision. Morgan Investments failed to obtain the order. It appealed.

## THE DECISION

The municipality passed its resolution in December 1993 in terms of section 190(2) of the Local Authorities Ordinance no 25 of 1974 (N). The sub-section provides that a decision in terms of sub-section 1 to expropriate, shall not be valid except under the authority of a resolution passed by a majority of councillors. Section 190(3) provides that when the council has taken a decision in accordance with sub-section 2, it shall serve a notice on the owner of the property concerned informing it of the intention to expropriate and inviting objections.

Morgan Investments contended that the resolution that authority be granted to the Executive Director: Corporate Services to expropriate its property was not a decision to expropriate and did not express an intention to expropriate. However, the resolution was intended to be a resolution in terms of section 190(2) and the authority given to the Executive Director in it was an added directive that that person was to take the necessary administrative steps, as required by section 190(3), to give effect to the resolution. Morgan Investments itself understood the resolution to have been made in terms of section 190(2), as was evident from its reaction to the resolution. The fact that the resolution contained a delegation of authority was itself an indication that the town council had decided to do that for which the authority was conferred.

Morgan Investments also contended that the resolution to expropriate related to the unamended plan and that a further resolution would be required in order to expropriate the area depicted on the amended plan. This contention was however, over-technical and lacking in common sense. The alteration in the area to be expropriated was not so substantial to render the resolution already taken ineffectual. It involved the expropriation of a smaller area than had originally been intended, and the reduction had come about as a result of Morgan Investments' own objections. A separate resolution was not required.

Morgan Investments also contended that the municipality had violated the audi alteram partem rule in that it had not been given a hearing on the decision to expropriate the area depicted on the amended plan. However, it had been given a fair opportunity to address the management committee in respect of substantially the same proposed expropriation as that finally submitted to the Minister.

Morgan Investments' final contention was that the municipality had failed to undertake an environmental impact study relating to the proposed expropriation. To require such a study in these circumstances was however, unreasonable, given that the affected area was in an urban area and was intended to do no more than facilitate the flow of traffic. The Minister himself could consider this objection and call for such a study if necessary.

The appeal failed.

# *DESPATCH MUNICIPALITY v SUNRIDGE ESTATE AND DEVELOPMENT CORPORATION (PTY) LTD*



A JUDGMENT BY VAN RENSBURG J
SOUTH EASTERN CAPE LOCAL DIVISION
24 MARCH 1997

1997 (4) SA 596 (SECLD)

***A local authority may prevent the owner of land which permits the illegal occupation of its land and the erection of illegal structures thereon from allowing the continuation of such activities, despite the local authority's own right to prevent such activities.***

## THE FACTS

Sunridge Estate and Development Corporation (Pty) Ltd owned property on which squatters illegally established a settlement. During 1996, further squatters joined existing squatters on the property and commenced erecting illegal structures. Sunridge took steps to compel the squatters to vacate the property, and then entered into negotiations with them to sell the land to them. Further squatters settled on the land and erected illegal structures thereon.

The Despatch Municipality addressed Sunridge with its concern at the continued settlement of squatters on its land. The settlement and structures thereon began to cause a nuisance to nearby residents, its situation nearby a national road brought about a danger for road users, and a health hazard arose. Despite the representations made by the municipality, squatters continued to occupy the land.

The municipality demanded that Sunridge prevent the further influx of squatters onto the land, and then brought an application for an interdict to prevent Sunridge from permitting the further erection of buildings by squatters on its property. Sunridge contended that the municipality should have proceeded by enforcing the provisions of the National Building Regulations and Building Standards Act (no 103 of 1977). The municipality contended that Sunridge should have prevented the unlawful influx onto its property by employing the provisions of section 3A of the Prevention of Illegal Squatting Act (no 52 of 1951).

## THE DECISION

Section 3A of the Prevention of Illegal Squatting Act provides that an owner of land shall not permit the erection on his land of any building or structure intended for occupation by persons, if a plan of the building is to be approved by a local authority, and such approval has not been given. Section 3 provides that where a person has been convicted of entering upon another person's land without the permission of the owner, a building or structure with respect to which the person has been convicted shall be demolished and removed from the land.

Section 10(1) of the National Building Regulations and Building Standards Act empowers a local authority to prohibit the erection of a building which is unsightly or objectionable, and section 4(1) of the Act prohibits the erection of any building without the prior approval of a local authority.

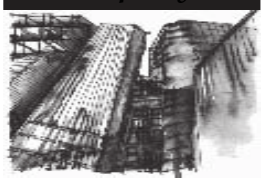
Sunridge had permitted the continued occupation of its land by squatters and had taken no active legal measures to prevent the further erection of illegal structures on its property. Its passivity could be expected to continue in the future. The municipality was therefore justified in contending that the problem for which it sought a remedy would continue into the future so that an interdict to prevent this threat was appropriate.

Sections 10(1) and 4(1) of the National Building Regulations and Building Standards Act certainly gave the municipality a basis upon which to remedy the situation brought about by the unlawful influx of squatters. However, the alternative remedy provided Sunridge by the Prevention of Illegal Squatting Act was a much more effective remedy. An enforcement of its provisions was the more appropriate course to be adopted in the present case.

The interdict was granted.

# *EXECUTIVE SUITE (PTY) LTD v PIETERMARITZBURG-MSUNDUZI TRANSITIONAL LOCAL COUNCIL*





A JUDGMENT BY BOOYSEN J
NATAL PROVINCIAL DIVISION
13 MARCH 1996

1997 (4) SA 695 (N)

***A local authority which fails to prevent the illegal occupation of its land may be seen to be permitting the continuation of conduct prohibited by Prevention of Illegal Squatting Act (no 52 of 1951) and may be interdicted to prevent the continuation of such illegal occupation.***

## THE FACTS

Squatters illegally took occupation of land owned by the Pietermaritzburg-Msunduzi Transitional Local Council, which was situated in the neighbourhood of property owned by Executive Suite (Pty) Ltd and the other applicants. The squatters began building structures on the land.

Executive Suite then brought an application for an interdict against the local council, directing it to remove the structures, and partially erected structures, and ensure that no unauthorised persons trespass on its land and that no further structures be erected on its land. It based its application on the Prevention of Illegal Squatting Act (no 52 of 1951). Section 3A of the Act provides that an owner of land shall not permit the erection on his land of any building or structure intended for occupation by persons, if a plan of the building is to be approved by a local authority, and such approval has not been given. Section 3 provides that where a person has been convicted of entering upon another person's land without the permission of the owner, a building or structure with respect to which the person has been convicted shall be demolished and removed from the land.

Executive Suite alleged that a land invasion policy adopted by the local council designed to prevent illegal land occupation was not being implemented and that the local council had failed to respond to demands that the illegal land occupation be brought to an end. The local council responded by alleging that as a result of lack of resources, it was unable to deal properly with the problem. It opposed the application on the grounds that it had not permitted the illegal land invasion nor the erection of structures thereon.

## THE DECISION

The question was not simply whether the local council had permitted illegal occupation of its land in the past. It was also whether there was a real danger of this continuing in the future.

The local council had known about the illegal land occupation, but had done nothing about it. There was therefore reason to believe that it would allow the continuation of this situation in the future. The problem was a matter of grave concern to neighbouring residents, and it was incumbent on the local council to take steps to deal with the problem. Executive Suite was entitled to an interdict ordering the local council to take steps to prevent the further erection of structures on its land and the illegal occupation of its land.

# *ABSA BANK BPK v DU TOIT*

A JUDGMENT BY TRAVERSO J
30 JULY 1997
CAPE OF GOOD HOPE PROVINCIAL DIVISION

[1997] 4 All SA 1 (C)

***Banking***

***Where a bank consolidates a number of cheque accounts into one, and transfers the balance outstanding to a loan account without the knowledge of its customer, the amount outstanding remains a debit balance in a cheque account. In respect thereof, the bank is entitled to charge interest even where no instrument of debt has been executed by bank and customer.***

## THE FACTS

In terms of an agreement between Absa Bank Bpk and Du Toit, Du Toit held three current accounts with the bank. In respect of each of them, Du Toit enjoyed an overdraft facility and the bank was entitled to charge interest on the outstanding balance on them and debit the accounts accordingly.

On 11 February 1988, by agreement between the parties, the bank consolidated the three accounts into one. On 18 November 1988, the bank wrote to Du Toit setting out a repayment proposal, and transferred the balance outstanding to a personal loan account, to which it attributed a new account number. The bank charged interest to the account and Du Toit then made certain payments to the bank in terms of a revised repayment proposal which was agreed to on 9 May 1989.

The parties approached the court with three questions of law: (i) whether the execution of an instrument of debt was a requirement for the charging of interest, (ii) whether the bank was entitled to charge interest and debit it to the account after 18 November 1988 and/or 9 May 1989, and (iii) whether the bank was entitled to charge mora interest on the outstanding balance of the account.

## THE DECISION

Section 2(9) of the Usury Act (no 73 of 1968) provides that save in respect of a debit balance in a cheque account with a banking institution, no person shall in respect of a money lending transaction or credit transaction or leasing transaction stipulate for or demand or receive finance charges not disclosed in an instrument of debt. The bank contended that in the present case, the saving provision applied. Du Toit contended that when the bank created a new account with new terms of repayment, the overdraft arrangements terminated and the amount outstanding could no longer be described as debit balance in a cheque account.

Du Toit's argument failed to take into account the fact that the parties never agreed that Du Toit's account would be transformed into a personal loan account. He was always under the impression that the former account continued to exist. There could therefore be no question of a later agreement having superseded the former by novation. The amount outstanding was still a debit balance in a cheque account and the saving provision of section 2(9) of the Act applied. It was therefore not a requirement for the bank charging interest that an instrument of debt complying with the provisions of the Usury Act should have been executed by the parties.

Even if this conclusion was wrong, there was no reason to conclude that section 2(9) required the execution of an instrument of debt for the imposition of finance charges. The section was also open to the interpretation that where an instrument of debt was executed, no-one was entitled to receive finance charges not provided for therein. Section 3 of the Act requires that a money lender furnish to a borrower certain information, including the finance charges imposed in the money lending transaction, either upon demand being made for the information or in an instrument of debt executed by the parties. It does not provide that a money lender must always have an instrument of debt executed when lending money. This section therefore provided no indication that in circumstances other than in the case of a debit balance in a cheque account, an instrument of

debt was required before the money lender was entitled to impose finance charges. The legislature had not expressly provided that to entitle a money lender to impose such charges an instrument of debt was required: in the absence of such an express provision, or one provided by necessary implication, there was no reason to accept that the legislature had so provided. By providing for the exception of a debit balance in a cheque account, section 2(9) had not, by implication, so provided.

The bank had been entitled to charge interest on the loan account. The questions of law were answered in favour of the bank.

## *POWELL v ABSA BANK LTD*

A JUDGMENT BY MELUNSKY J
SOUTH EASTERN CAPE LOCAL DIVISION
25 AUGUST 1997

[1997] 4 All SA 231 (SEC)

***A bank which opens an account for an existing customer, whom it knows, in the name of a trading entity for that customer, is not obliged to ascertain that the customer is the sole proprietor of the trading entity. In collecting cheques paid into such an account, the bank is not negligent in failing to make further inquiries regarding the person opening the account and his business venture—whether or not the payee of the cheque includes the address of a party different from the named payee, and whether or not the bank official allows the customer to draw on the account to which the cheques have been deposited before the cheques have been cleared.***

### THE FACTS

Powell made four payments to Gerber as the purchase price of four used vehicles sold to him by Gerber. Gerber was an employee of Volkswagen of South Africa (Pty) Ltd, and had told Powell that he could deliver the vehicles from his employer as they had become available upon termination of certain of its employees' employment. The four payments were effected by delivering to Gerber four cheques drawn by Nedbank Ltd, Powell's bank, on itself in favour of Volkswagen Used Vehicle Sales. Underneath the name of the payee was Volkswagen's address.

Gerber deposited the cheques into a savings account opened with Absa Bank Ltd in the same month in which he obtained the cheques. He had opened the account upon making an application that he was carrying on business under the trade name Volkswagen Used Vehicle Sales. The bank manager who attended to his application had known Gerber for some three years as a holder of another account in his personal capacity, and had a customer profile on him which showed that he earned between R24 000 and R48 000 per annum. At the time Gerber opened the second account, he carried out a credit check to determine whether or not any judgments had been taken against him, and perused the telephone directory to see whether or not there was an entry for Volkswagen Used Vehicle Sales. There was no such entry.

When Gerber deposited the cheques into the savings account, he told the bank manager that they had come from a customer with whom he had done business. The bank manager accepted this and, believing that Gerber was entitled to the cheques, collected the cheques for him. The bank allowed Gerber to draw on the savings account immediately the cheques were deposited

Powell brought an action against Absa, alleging that as collecting bank, it owed him a duty of care to avoid causing him loss, that it received payment of the cheques on behalf of someone not entitled thereto, and in receiving payment, acted negligently and unlawfully. He alleged that as a result of the bank's conduct, he had suffered loss and was entitled to damages in the sum of the cheques, less amounts since received from Gerber. Nedbank joined Powell in his action as co-plaintiff, its claim being conditional upon it being held that Powell was not the true owner of the cheques.

## THE DECISION

Powell contracted with Gerber, not Volkswagen, but this did not entitle Gerber to use the cheques for his own benefit. Irrespective of whether or not this contract incorporated a provision that the purchase price was to be paid to Volkswagen, the question was whether in dealing with the cheques as it did, the bank became liable to Powell. This depended on whether or not the bank had been negligent in doing so.

In determining whether a bank is negligent in circumstances such as these, the standard to be applied is the general level of skill and diligence exercised by members of the banking profession. Such skill and diligence would require a reasonable banker to satisfy itself of the identity of a new client. In the present case, the bank had been satisfied of the identity of Gerber—it had known him for some years before he opened the second savings account. The bank was not under a duty to make further inquiries to satisfy itself that he was also the sole proprietor of a business known as Volkswagen Used Vehicle Sales. Having observed his conduct of his first account, and knowing that he had dealt in motor vehicles for some time, the bank was entitled to accept Gerber's honesty in the conduct of the second account. In the absence of evidence of any contrary current banking practice, there was no reason to impose a duty on the bank to do any more than it did in relation to the opening and conduct of the second account. The fact that it appeared that Gerber was conducting this business from his home and with a savings account, as opposed to a cheque account, did not change this conclusion.

The fact that Volkskwagen's address appeared underneath the name of the payee should have aroused the bank manager's suspicions, but he was not negligent in failing to pay attention to the address. The address was not part of the payment instruction, and in the absence of evidence to the contrary, a reasonably prudent banker is not under a duty to have regard to it.

The fact that the bank manager allowed the cheques to be credited to the account in contravention of the bank's internal rule, and the fact that he allowed the account to be drawn on immediately before the cheques had been cleared was not proof of negligence.

The bank was therefore not negligent and not liable to Powell. The action was dismissed.

# *TOTAL SOUTH AFRICA (PTY) LTD v NEDCOR BANK LTD*

*Banking*

A JUDGMENT BY EPSTEIN AJ
WITWATERSRAND LOCAL DIVISION
20 JUNE 1997

[1997] 3 All SA 562 (W)

***A party to a contract is not entitled to disregard the running of a period of notice which would validly bring the contract to an end, merely because the other party has purported to cancel the contract prematurely. A claimant under a letter of guarantee must show that the claim it makes in terms of the guarantee, even if made after the expiry of the guarantee, relates to claims arising during the currency of the guarantee, which claims may arise during the running of a period of notice given by the issuer of the guarantee.***

## THE FACTS

On 9 September 1996, Nedcor Bank Ltd issued a letter of guarantee to Total South Africa (Pty) Ltd advising that it held at Total's disposal R150 000 for the purchase of petroleum products to Transport Brokers CC. This amount was to be paid upon receipt of a written demand stating that the sum was due and payable. Nedcor reserved the right to withdraw from the undertaking by giving thirty days notice in writing of its intention to do so.

On 21 November 1996, Nedcor wrote to Total giving it notice of its intention to withdraw from the guarantee. Total received the notice on 12 December 1996. On 23 December, Nedcor wrote to Total advising it that the guarantee had expired in terms of its earlier letter of withdrawal. On 27 December, it telephonically advised Total that the guarantee had been withdrawn.

Total took the view that the notifications of 23 and 27 December constituted a repudiation of its agreement with Nedcor, and on 13 February, it claimed R150 000 in terms of the guarantee. It contended that because of the repudiation, it was not obliged to submit a claim according to the terms of the guarantee prior to the expiry date of 11 January 1997 (ie 30 days after 12 December 1996).

Nedcor denied that it was liable under the guarantee after 11 January 1997.

## THE DECISION

The rule that a party to an agreement is not obliged to counter-perform after the other party has repudiated its own obligations did not apply to the present case. Here, even if it were assumed that Nedcor had repudiated its obligations by prematurely cancelling the guarantee on 23 and 27 December, Total had not been under any obligation to counter-perform, either before or after that date. It was therefore incorrect to say that as a result of the premature cancellation by Nedcor, Total gained the right to enforce the guarantee until a further and proper cancellation took place.

The premature cancellation did not interrupt the notice period which had begun with the valid notification given by Nedcor on 21 November 1996. Any claims arising by Total during that period remained enforceable under the guarantee, and would remain enforceable so long as they arose during that period and demand was made for them, even if later than 11 January 1997, in terms of the guarantee. The demand which was made failed to specify when Total's claims against Transport Brokers arose. Total had therefore not shown that its claim fell within the terms of the letter of guarantee. Its claim was dismissed.

# *ALDEIA v COUTINHO*

A JUDGMENT BY OLIVIER AJ
(MALHERBE J concurring)
ORANGE FREE STATE PROVINCIAL DIVISION
22 MAY 1997

1997 (4) SA 295 (O)

***Contract***

***A misrepresentation may be made by stating an opinion in regard to a future state of affairs, where the opinion so stated does not reflect the person's true opinion regarding the state of affairs.***

## THE FACTS

On 25 September 1990, Coutinho sold a business known as 'Bridge Café' to Aldeia. On the date of sale, Coutinho gave Aldeia options to purchase two other business known as 'Kiss Kiss Café' and 'Ramosas'. The options were to subsist for a period of 60 days from termination of Coutinho's lease agreements which had been entered into with the landlord of the premises at which the businesses were conducted. In respect of the Ramosas business, it was expressly stated that a parking area situated at the business premises would be included with the business.

As at the date of sale, the premises at which the businesses were conducted were leased to two other parties—that relating to the Ramosas business terminating on 31 December 1992, and that relating to the Kiss Kiss business terminating in October 1993. In April 1990, Coutinho had purchased the property on which these businesses were operating, and in terms of the purchase agreement, possession and undisturbed occupation of the property was given to Coutinho from 1 May 1990. The agreement was made subject to obtaining consent from the provincial authorities for the subdivision of the property, and this consent was obtained in June 1991. Thereafter, Coutinho was obliged to obtain bank guarantees for the payment of the purchase price of the property. Coutinho however, never took transfer of the property.

As at the date of sale, an agreement to purchase the parking area relating to the Ramosas business concluded by Coutinho had been cancelled. Coutinho however, enjoyed a lease in respect of the parking area, and intended to develop it. In April 1991, Aldeia became aware of Coutinho's inability to provide the parking area, but continued to conduct the Bridge Café business until July 1993 when he refused to make rental payments then due to Coutinho. In August 1994, Aldeia cancelled the sale.

Coutinho brought an action against Aldeia for payment of an outstanding amount of R150 000. Aldeia defended the action on the grounds that Coutinho had fraudulently misrepresented to him that he would be the owner of the two businesses referred to in the options as well as of the parking area, and that he had a valid lease with the landlord of the premises at which these businesses were conducted. Aldeia contended that as a result of these misrepresentation, he was entitled to cancel the sale of the Bridge Café business.

## THE DECISION

A misrepresentation is normally made about an existing or factual situation. However, it is possible for a person to make a misrepresentation about his opinion regarding a future state of affairs. If it is shown that he does not truly hold the stated opinion regarding the future state of affairs, this would be a misrepresentation. The question was whether the representations contained in the two options given by Coutinho were misrepresentations in this sense.

Coutinho's reference to his lease agreements which had been entered into with the landlord of the premises at which the businesses were conducted was explicable and tenable, given the terms upon which he had purchased the property on which the businesses were being conducted. He could have held the opinion, honestly and with justification, that he would become the owner of the property and thereby become the landlord in respect of the two existing tenants. At the

time of conclusion of the sale, Coutinho was under no obligation to furnish bank guarantees in terms of the purchase of the property, indicating that the probabilities of being able to obtain such guarantees could not have influenced his representations regarding the future availability of the other two businesses.

Aldeia's delay in reacting to the alleged misrepresentations was in any event, indicative of the fact that he had not asserted the right to cancel within a reasonable time after obtaining knowledge of Coutinho's failure to take transfer of the property. Not having done so, and having purported to do so more than 26 months after knowing that he would not obtain possession of the property, Aldeia lost the right to cancel.

The action succeeded.

## *SMITH v DANIELS*

A JUDGMENT BY MELUNSKY J
SOUTH EASTERN CAPE LOCAL DIVISION
25 FEBRUARY 1997

1997 (4) SA 711 (SECLD)

***A creditor cannot compel payment of an alleged debt out of specific funds pending finalisation of an action for payment without proving that debtor and creditor agreed that the funds were agreed to be those from which the creditor was entitled to obtain satisfaction of the debt.***

### THE FACTS

In terms of a consent agreement following divorce proceedings, Daniels became entitled to payment of R150 000 from her former husband. At a time when R70 000 of this sum was still owing, Smith alleged that he was entitled to payment of R53 127,85 from Daniels, the debt arising from loans he had made to her.

Smith sought an interdict to compel payment of the alleged debt from the sum due to Daniels in terms of the consent agreement, pending finalisation of an action for payment of the debt.

### THE DECISION

There was no agreement in terms of which Daniels was to hold the money due to her as money to be held in trust or on behalf of Smith. She never considered the money due to her as money specially identified as the money with which she would make payment to Smith. Smith could therefore claim no right to that particular money, even if he could claim payment of a debt due to him by Smith.

Smith was not entitled to compel payment out of the proceeds of the debt due to Daniels.

# *KATE'S HOPE GAME FARM (PTY) LTD v TERBLANCHEHOEK GAME FARM (PTY) LTD*

*Contract*

A JUDGMENT BY OLIVIER JA (MAHOMED CJ, VIVIER JA, SCOTT JA and STREICHER AJA concurring)
SUPREME COURT OF APPEAL
10 SEPTEMBER 1997

UNREPORTED

***A provision in an agreement which gives a party the choice to exercise a right in certain circumstances does not constitute an enforceable agreement between the parties until the right has been exercised. Until the right has been exercised, or any other condition fulfilled giving the other party the right to enforce the terms of the agreement, the provision is not enforceable between the parties.***

## THE FACTS

Kate's Hope Game Farm (Pty) Ltd and Terblanchehoek Game Farm (Pty) Ltd assented to the terms of a constitution of a voluntary association formed for the purpose of pooling their farms to form a game farm.

In terms of clause 5.10 of the constitution, all members agreed that for the purpose of fencing out of the reserve the property of any person whose membership terminated, the association 'may erect on their property ... a game fence' and all members further agreed to pay their pro rata share of such fence. In terms of clause 9.7, no member or former member could erect fences within or around his land enclosing more than 5% thereof, without the consent of the association.

Kate's Hope was withdrawn from the pool. Terblanche then proposed the construction of a fence along a river dividing their two farms, part of it to be constructed on its farm, and part on Kate's Hope's farm, with it crossing the river in two places. It invoked the procedures provided for in section 16 of the Fencing Act (no 31 of 1963). The section provides that where a dividing line between two holdings is formed by a river, the owners may agree on a fair give-and-take line as a dividing line to be fenced, and in default of agreement, any such owner may claim that the matter shall be determined as a dispute in accordance with further provisions of the Act.

Terblanche applied for an order declaring that the constitution had been cancelled and was of no further force and effect, and that section 16 of the Fencing Act applied to the two farms and its provisions implemented for the determination of the dispute.

## THE DECISION

Assuming that the parties, being juristic persons (and as such arguably not eligible for membership of the association), were to be treated as being bound by the provisions of the constitution, the question was whether clause 5.10 of the constitution could be relied on as an agreement as referred to in section 16. If so, there was no ground for the operation of the determination of a dispute 'in default of agreement'.

Clause 5.10 included the operative word 'may'. This indicated that there was no obligation on remaining members of the association to erect the fence and that they had a choice in the matter. There was therefore no agreement between the parties as referred to in section 16 of the Act, and Kate's Hope had no enforceable right as against the other members of the association.

As far as clause 9.7 was concerned, this too could not be considered an unconditional agreement. The prohibition contained in it did not operate if the association gave its consent. There was no evidence whether the association had given its consent or not. It was therefore not possible to determine whether the agreement was enforceable, thereby preventing the operation of section 16.

The provisions of the section could therefore be implemented for the determination of their dispute.

# *ROTHMAN v CURR VIVIER INC*



A JUDGMENT BY VAN REENEN AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
22 SEPTEMBER 1995

1997 (4) SA 540 (C)

***An agreement for the sale of a sectional title unit which is intended to replace an agreement for the sale of share block rights and which provides for the transfer of the share block shares as an immediate prior condition to the transfer of the sectional title unit does not involve a share sale transaction as contemplated in the Share Blocks Control Act (no 59 of 1980) and is therefore not subject to the provisions of section 8A of that Act.***

## THE FACTS

The Place on the Bay Partnership was a share block developer holding over 50% of the shares in The Place on the Bay Shareblock Ltd. It sold share block rights to Rothman by selling to him shares in the company and rights in a use and occupation agreement. Rothman alleged that the sale did not reflect his true intention, which had been to purchase outright the apartment which was the subject of the use and occupation agreement.

The parties then entered into a variation agreement in terms of which the apartment would be transferred to him as a sectional title unit upon payment of the purchase price. The partnership undertook to bring about the conversion of the share block scheme to a sectional title scheme within six months of the date of the agreement. Rothman authorised the partnership to vote on his behalf for a conversion of the scheme at a general meeting of the shareblock company, and a deposit of R68 000 already paid by Rothman would be released to the partnership upon transfer of his section and exclusive use area. The shares originally purchased by Rothman would be transferred to him after a sectional title register had been opened, and immediately thereafter, the section and exclusive use area would be transferred to him.

Rothman claimed repayment of the R68 000, basing his claim on section 8A of the Share Blocks Control Act (no 59 of 1980). The section provides that if an undertaking has been given to effect the opening of a sectional title register and a contract for the acquisition of a share is entered into, the share block developer shall within 14 days of the signing of the contract, furnish a guarantee by a bank undertaking to pay the total expenditure necessary to open the sectional title register. If this is not complied with, a purchaser or seller who has partially performed, is entitled to reclaim from the other party what he has performed. The guarantee had not been furnished as contemplated in this section.

## THE DECISION

The first agreement entered into between the parties was clearly an agreement referred to in section 8A. By the second agreement, the parties intended to replace the first with an agreement originally intended by Rothman. It therefore represented an attempt to conclude a sale of a sectional title unit, as opposed to a contract for the acquisition of a share.

The fact that in terms of the second agreement, Rothman was given the right to vote and was to obtain the shares prior to transfer of the section and exclusive use area into his name, did not render the second agreement an agreement for the acquisition of share block rights. The transfer of the shares to Rothman was merely a prior condition for the transfer of the property into his name. It attracted no quid pro quo from the partnership and could not be said to constitute the transaction a share sale transaction.

The agreement was therefore not one which fell within the provisions of the Share Blocks Control Act, and the partnership had not been obliged to give the undertaking provided for in section 8A of that Act. Rothman's claim was dismissed.

# *KITSHOFF N.O. v BRINK*

A JUDGMENT BY
HARTZENBERG J
TRANSVAAL PROVINCIAL
DIVISION
5 DECEMBER 1996

1997 (4) SA 117 (T)

***Insurance***

***Section 44(2) of the Insurance Act (no 27 of 1943) does not operate automatically. A cession of a life policy effected by a man referred to in that section is effective until such time as it is challenged.***

## THE FACTS

On 30 October 1989, Brink obtained life insurance cover from Liberty Life Association Ltd. On 2 May 1990, he ceded the policy to his wife, to whom he was married out of community of property. On 9 April 1994, he died. As at that date, his estate excluding the value of the policy, was insolvent. Including the value of the policy, Brink's estate would have been solvent.

Kitshoff, the executor of Brink's estate brought an application based on section 44(1) of the Insurance Act (no 27 of 1943) for an order that he was entitled to payment of the proceeds of the policy for inclusion in the deceased estate. After the application had been brought, the Constitutional Court ordered that subsections 44(1)&2 of the Act were invalid, but that the invalidity would not affect the payment before the date of the order, of any money or delivery of any asset made to any creditor of the man or beneficiary of his estate, which were deemed to form part of the estate of the man referred to in the sub-sections.

Sub-section 44(1) provides that if the estate of a man who has ceded a life policy to his wife has been sequestrated, the policy or any money due thereunder shall be deemed to belong to that estate, except where the cession was effected in terms of an antenuptial contract. Sub-section 44(2) provides that if the estate of a man who has ceded a life policy to his wife has not been sequestrated, the policy or any money due thereunder shall be deemed to belong to that man.*

After the Constitutional Court made its order, Kitshoff applied to amend the application so as to base it on section 44(2), and sought an order that the proceeds of the policy formed part of Brink's deceased estate.

Brink's widow opposed the application for amendment.

## THE DECISION

Section 44(2) does not operate automatically: a policy ceded by the man referred to in the sub-section was ceded effectively, notwithstanding the deeming provision, and did effect the transfer of the asset as intended and desired by the man. Were the section to operate automatically, this would mean that notwithstanding the cession, creditors of the man could lay claim to the policy even if he were insolvent and in a position to pay his creditors. The fact that the sub-section deemed the property to be that of man showed that the property was not in fact that of the man. The section did not operate unless some claim to the proceeds of the policy had been made.

It could therefore not be said that the sub-section operated before the Constitutional Court made its order invalidating the operation of the sub-section. Kitshoff was not entitled to amend so as to base his application on the sub-section.

* Complex provisions forming part of these sections have been omitted for the sake of clarity.

# *BOLAND BANK LTD v MOUTON*

A JUDGMENT BY ROSE-INNES J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
11 JULY 1997

[1997] 4 All SA 67 (C)

***Corporations***

***The personal liability imposed on members of a close corporation in terms of section 26(5) of the Close Corporations Act (no 69 of 1984) continues in respect of the debts referred to in that sub-section, even after re-registration of the close corporation in terms of section 26(7).***

## THE FACTS

Boland Bank Ltd lent money to JNT Vloerdienste CC. The close corporation failed to repay the money, and was deregistered. The deregistration of the close corporation took place in terms of section 26 of the Close Corporations Act (no 69 of 1984).

Five months after JNT's deregistration, Boland brought an action against Mouton, a member of JNT, based on section 26(5) of the Act. The sub-section provides that if a corporation is deregistered while having outstanding liabilities, the members of the close corporation at the time of deregistration shall be jointly and severally liable for such liabilities. After the close of pleadings in the action, Mouton applied for the re-registration of the close corporation, and JNT was re-registered with effect from 7 April 1995.

Mouton defended the action on the grounds that any liability he may have incurred in terms of section 26(5) was extinguished upon the re-registration of JNT in terms of section 26(7). Section 26(7) provides that as from the date of the Registrar of Companies' notice of restoration of a close corporation, the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.

## THE DECISION

The mere deregistration of a close corporation does not bring about the extinguishment of the close corporation's debts. Debts due by the close corporation become unenforceable against it, but they are not discharged. Section 26(5) specifically provides that the close corporation's debts are not extinguished, but transmitted to members of the close corporation at the time of its deregistration. It was therefore incorrect to contend that if the debt has become unenforceable in this manner, it cannot be enforced later.

In contrast to the liquidation of a close corporation, upon deregistration, the members become personally liable for the debts of the close corporation, having, in terms of section 26(1), been given an opportunity to avoid this result by responding to any notice given by the Registrar that the close corporation is not carrying on business or is not in operation. This result is in keeping with the policy of the Act to impose civil liability, as opposed to criminal liability, as a means, inter alia, to protect creditors of a close corporation. It implies that although the close corporation's assets are not sold, and their proceeds distributed to creditors, the interests of creditors are nevertheless protected by extending liability for the payment of close corporation debts to the members themselves.

Section 26(5) provides for no restriction, whether in respect of amount or in respect of time, on this extension of liability. Nothing in the section suggests that this liability is to be later extinguished, whether by re-registration or in any other manner. Section 26(7) also provided for no such restriction. That fact that the sub-section provided for the continuation of the existence close corporation was no indication that the extension of liability provided for in section 26(5) was no longer to apply. The deeming provision—that the close corporation would be deemed to have continued in existence as from the date of deregistration—meant no more than that debts incurred by the close corporation prior to its deregistration would again become enforceable as against the close corporation. It could not be said that upon any interpretation of sub-sections 26(5)&(7) the personal liability imposed upon deregistration would fall away upon re-registration of the close corporation.

The defence failed.

# *OOS VRYSTAAT KAAP KOÖPERASIE BPK v VILNA BK*



A JUDGMENT BY LOMBARD J
ORANGE FREE STATE PROVINCIAL DIVISION
15 AUGUST 1997

[1997] 4 All SA 42 (O)

***A certificate of incorporation of a company is prima facie evidence that the company has been properly incorporated. When all the members of a close corporation act in order to execute some purpose for the close corporation, the action is validly done notwithstanding the fact that no resolution has been passed authorising the action.***

## THE FACTS

The chief manager of Oos Vrystaat Kaap Koöperasie Bpk gave evidence of the incorporation of this company, handing in to court a certified copy of a certificate of amalgamation and incorporation of the company. The certificate was signed by the Registrar of Co-operatives who had issued the certificate only after being satisfied that the statutory requirements for amalgamation had been complied with.

The assistant chief manager of Oos Vrystaat gave evidence of an application by the members of Vilna BK for membership of the co-operative, and confirmed that the directors of the co-operative had approved the application. The application was made by all four members of Vilna.

The parties approached the court for a determination of two questions: (i) whether Oos Vrystaat was a registered co-operative in terms of the Co-operatives Act (no 91 of 1981) and (ii) whether Vilna was a member of the co-operative.

## THE DECISION

Section 166 of the Co-operatives Act provides that if the Registrar of Co-operatives is presented with an application for incorporation, and is satisfied that the requirements of the Act have been complied with, and that the founding documents and incorporation of an amalgamated co-operative are not inconsistent with the Act, he must approve the application. Section 167 provides that the result of any such incorporation is that the amalgamated co-operative becomes a legal persona.

The uncontradicted evidence presented by Oos Vrystaat was that it had been incorporated according to the requirements of section 166. The certificate of amalgamation and incorporation was an official document and could therefore be proved by the handing in of a certified copy. Oos Vrystaat was a registered co-operative in terms of the Act.

As far as the second question was concerned, the uncontradicted evidence presented by Oos Vrystaat pointed to the fact that Vilna had become a member of the co-operative. The fact that no resolution was passed by Vilna for the application, and that no certificate of membership had been issued, was irrelevant. Vilna was a member of Oos Vrystaat.

# *BOHLOKONG BLACK TAXI ASSOCIATION v INTERSTATE BUS LINES (EDMS) BPK*

*Corporations*

A JUDGMENT BY GIHWALA AJ
(CILLIÉ concurring)
ORANGE FREE STATE
PROVINICIAL DIVISION
8 MAY 1997

1997 (4) SA 635 (O)

***An unincorporated association must show that it is such to entitle it to bring an action in its own name.***

## THE FACTS

Interstate Bus Lines (Edms) Bpk applied to a local roads board for the amendment of two road transport permits. The Bohlokong Black Taxi Association opposed the application, which was later rejected by the board. Interstate appealed to the National Transport Commission against the board's decision. The appeal succeeded, notwithstanding Bohlokong's objections.

Bohlokong brought an application for a review of the National Transport Commission's decision. It described itself as an association of taxi owners with legal personality in terms of its constitution. It alleged that it was an interested person with regard to the amendment, but it did not disclose the terms of its constitution. It alleged that each of its members had a personal interest in the matter and that Bohlokong represented them for that purpose.

Interstate contended that Bohlokong did not have the right (locus standi) to review the Commission's decision.

## THE DECISION

In terms of the Road Transportation Act (no 74 of 1977) an objector in an application made in terms of the Act has to state particulars of its services or interest in the matter. Bohlokong had however, not shown that it was such an 'interested person'. The question remained whether it could bring the application for review, seeing that its constituent members were interested persons.

Bohlokong contended that its interest was identical to that of its members. However, its interest was not of such a direct and substantial nature that entitled it to bring the application for review. Bohlokong had also not shown that it was an unincorporated association, thus showing that it was entitled to sue in its own name.

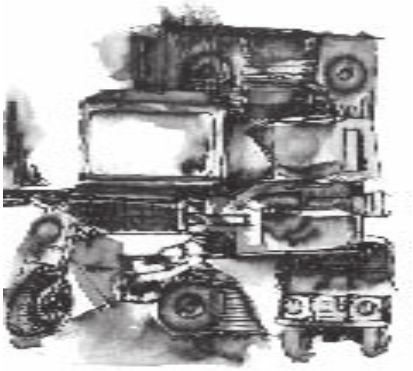
Bohlokong therefore had no right to bring the application. The application was dismissed.

# *TRUST BANK OF AFRICA LTD v PIENAAR*

A JUDGMENT BY COMRIE J
(HLOPHE J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
29 MAY 1997

1997 (4) SA 127 (C)

*Credit Transactions*



***A judgment creditor may not secure the attendance of its debtor at an inquiry instituted in terms of section 65 of the Magistrates' Courts Act (no 32 of 1944) by employing the procedures for attendance of witnesses in civil actions provided for in section 51 of that Act.***

## THE FACTS

Trust Bank of Africa Ltd obtained a judgment by default against Pienaar. It instituted proceedings against him in terms of section 65A-M of the Magistrates' Courts Act (no 32 of 1944) requiring his attendance at court to be examined on his financial position. A sanction of imprisonment forming part of these sections of the Act was declared invalid by the Constitutional Court.

The bank issued a notice on Pienaar in terms of section 65 calling upon him to attend court for an order for payment of the judgment by instalments, and it also issued a witness subpoena in terms of section 51 requiring his attendance as a witness at the enquiry. Both processes warned of the potential of committal to prison upon non-compliance.

Pienaar objected to the use of a subpoena in order to ensure his attendance at court, contending that it amounted to a circumvention of the Constitutional Court's ruling on the validity of the imprisonment provisions of the section.

## THE DECISION

Section 51 provides for procuring the attendance of a witness in a civil action in a manner provided for in the Rules of Court. It provides for a sanction of imprisonment upon failure to comply with a subpoena. While the section had a wide and general ambit, it had to be compared with the provisions contained in section 65A-M—provisions which also included measures for procuring the attendance of a debtor for the investigation of his financial position.

In comparing the two sections, it appeared unlikely that both were intended to achieve the same object, ie the attendance of the same person at court. Section 65A-M omitted any reference to the Rules of Court, and this was an indication that the judgment debtor did not fall within the ambit of section 51. It was therefore not possible for a judgment to employ the procedures of section 51 to secure the attendance of the judgment debtor at an inquiry held in terms of section 65.

Pienaar's objection was upheld.

# *PROTEA TECHNOLOGY LTD v WAINER*

A JUDGMENT BY HEHER J
WITWATERSRAND LOCAL DIVISION
25 JUNE 1997

[1997] 3 All SA 594 (W)

*Competition*

***An employer is entitled to lead evidence obtained by monitoring its employee's telephone conversations by telephone tapping and electronic surveillance where such evidence concerns the business of the company. Whereas the employer's behaviour in securing evidence in this manner might involve a violation of the employee's constitutional rights of privacy, this in itself does not render the evidence inadmissible. An employee in whom an employer reposes a special trust arising from his special abilities in a particular area holds fiduciary duties toward his employer like those of a director of the employer.***

## THE FACTS

Protea Technology Ltd employed Wainer, as a product manager from 1985, and as a divisional manager from 1994. In terms of his employment, he agreed to be bound by a number of restraints, including a restraint on soliciting or conducting negotiations with any principal in relation to products in respect of which Protea and its associated companies enjoyed exclusive distribution rights. Wainer was an acknowledged expert in the field in which he worked for Protea and because of this, Protea entrusted him with receiving and pursuing business opportunities which came to it in the course of business operations. In October 1996, Wainer resigned his employment with Protea and the following month took up employment with Broadcast Visions (Pty) Ltd, a competitor.

In the last month of Wainer's employment with Protea, Protea monitored certain of his telephone calls by telephone tapping and electronic surveillance. It appeared from these sources that at this time, Wainer (inter alia) procured that an Australian company would not finalise a contract with the second applicant, but would hold over the opportunity for the benefit of Broadcast Visions; he deliberately maligned Protea to a prospective applicant for his post, persuading him to cancel an interview which had been arranged with Protea, and he arranged with Tektronix plc, one of Protea's suppliers, that current orders for equipment would be delayed and placed with Broadcast Visions.

After Wainer began his employment with Broadcast Visions, Wainer continued plans to secure distribution rights for various products sourced by Protea from overseas companies with which Wainer had had contact while employed by Protea. Protea then brought an application for a final interdict restraining him from competing unlawfully with it. It depended on, inter alia, the evidence obtained from the telephone tapping and electronic surveillance. Wainer objected the introduction of this evidence on the grounds that it had been obtained in contravention of the Interception and Monitoring Prohibition Act (no 127 of 1992) and in violation of Wainer's right of privacy embodied in section 14(d) of the Constitution of the Republic of South Africa Act (no 108 of 1996).

## THE DECISION

Section 2(1) of the Interception and Monitoring Prohibition Act provides that no person shall intercept a communication transmitted over a telephone line or in any other manner over a telecommunications line, or monitor a conversation by means of a monitoring device so as to gather confidential information concerning any person. The question was whether or not evidence obtained in contravention of this section rendered the evidence inadmissible in civil proceedings.

Section 2(1) carried with it substantial penalties for contravention. The Act did not allow any exception to the prohibition except upon application to a judge, who could not allow an exception where the applicant wished to pursue only a civil interest. From this however, it did not necessarily follow that evidence obtained in contravention of the section would be inadmissible. Not to allow the admission of such evidence might result in an injustice. There was no compelling reason to give the section an interpretation which might lead to injustice. It was therefore appropriate to interpret the section as

not disallowing the evidence obtained by Protea by telephone tapping and electronic surveillance.

As far as Wainer's constitutional rights were concerned, Protea as his employer was entitled to know what he had been saying in conversations which concerned Protea. As long as it confined itself to what Wainer had been saying in these conversations, it was entitled to know what he had been saying, even if it obtained the information by telephone tapping and electronic surveillance. Had it overstepped this mark, and obtained private information pertaining to Wainer, Wainer would have had his remedies against Protea, including those based on an assertion of his constitutional rights. Protea was entitled to use the information obtained in this manner in the application for an interdict against Wainer.

Even if the court had had to exercise its discretion in deciding whether or not to admit illegally obtained evidence, the court would have taken into account the fact that Wainer had been involved in promoting his own business interests and undermining the business interests of Protea, had so acted while employed by Protea and in a position of trust and had in any event been aware that Protea might take steps to monitor his telephone. Protea had not had other means at its disposal to combat the threat presented by Wainer's plans. The information, once obtained, had met with an unsatisfactory response from Wainer, and could appropriately be admitted in evidence against him in spite of the fact that is had been illegally obtained.

As far as the substantive relief sought by Protea was concerned, it was clear that Wainer had violated secrecy clauses contained in his employment agreement, and had attempted to obtain distributorships for Broadcast Visions which properly belonged to Protea. Having been employed in a position of trust within Protea, he bore fiduciary duties toward it, as if he had been a director of it, and had engaged in unlawful competition against it. Protea was entitled to an interdict against Wainer and Broadcast Visions preventing them from engaging the services of any person employed by Protea after Wainer's departure from that company and from contracting for distributorships with companies with which Protea had secured distributorships, and an interdict against Wainer preventing him from disclosing the business affairs of Protea.

## *MANOUSAKIS v RENPAL ENTERTAINMENT CC*

A JUDGMENT BY FRIEDMAN JP (SELIKOWITZ J and BRAND J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
26 APRIL 1996

1997 (4) SA 552 (C)

***A person who was engaged in the running of a business which is sold does not compete unlawfully with the new owner of the business by establishing and running a competing business.***

### THE FACTS

Lord Montague Pub CC sold a business known as the Lord Montague Pub to Renpal Entertainment CC for R560 000. The sale agreement included a restraint of trade provision preventing the Lord Montague Pub CC from being interested or engaged in any business trading as a pub for three years from the effective date of sale and within a radius of four kilometres from the site of the business. The members of the Lord Montague Pub CC also bound themselves to observe the restraint. They were a certain John Lambrechts and Vasili Manousakis.

Negotiations for the sale of the business were conducted for the seller by George Manousakis. He had assisted Lambrechts and Vasili, his son, with the running of the business.

During the three-year restraint period, Boom Props 1027 CC opened a restaurant with a liquor licence within the area of the restraint. The members of this close corporation were Dimitri, another son of George Manousakis, and a certain Gerrit Pharo.

Renpal alleged that Manousakis had been the real owner of the Lord Montague Pub business and

its goodwill, and had attempted to entice its customers to the Boom Props restaurant by using pamphlets describing himself as formerly of the Lord Montague Pub. It applied for an interdict restraining him and Vasili from being interested in or engaged in the restaurant business being run by Boom Props. Its claim against Manousakis was based on the contention that his activities amounted to unlawful competition. Vasili admitted that he had breached the restraint provisions and undertook to refrain from doing so. Manousakis opposed the application.

THE DECISION

A person who has been actively involved in the affairs of a business does not compete unlawfully with the purchaser of the business merely by participating in a competing business after the sale. In the absence of a contractual restraint upon him, he is entitled to engage in such competitive activity.

Manousakis had done precisely this. He had not been subject to the contractual restraint that his son had been subject to, despite the opportunity Renpal had had prior to concluding the sale agreement to secure his agreement to such a restraint. Manousakis had not sold any goodwill which he may have had in respect of the business and was therefore under no obligation toward Renpal in respect of any such goodwill.

Renpal was not entitled to an interdict against Manousakis. Renpal was also not entitled to a temporary interdict pending an action to be brought against him based on allegations of unlawful competition. The relief Renpal sought against him went further than to require him not to distribute pamphlets enticing away its own customers—it extended to requiring that he not compete with it at all. This was not justified, and did not entitle Renpal to a temporary interdict either.

## *DEN NORSKE BANK ASA v MV* OCEAN KING

A JUDGMENT BY KING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
11 DECEMBER 1996

1997 (4) SA 349 (C)

***Shipping***

***The appointment of an auctioneer to attend to the sale of an arrested ship does not detract from the power and duty of the sheriff to hold custody of the ship and ensure its maintenance and preservation as required in Rule 19 of the Admiralty Proceedings Rules.***

THE FACTS

The *Ocean King* was arrested on 10 November 1996. The court then granted a rule nisi calling upon interested persons to show cause why the vessel should not be sold by public auction by auctioneers authorised by the court.

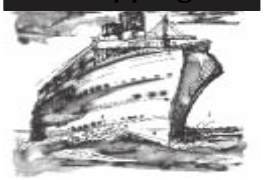
The terms of appointment of the auctioneers provided that they were to be concerned with:
(i) matters affecting the master and crew, including the termination of their employment and payment of their wages and other expenses;
(ii) the maintenance and safeguarding of the vessel;
(iii) the employment of an agent in respect of the vessel, and thereafter the fund created by the sale;
(iv) the maintenance of the vessel;
(v) insurance of the vessel;
(vi) matters relating to approaching the court for directions concerning the discharge of cargo;
(vii) arranging the shifting or berthing of the vessel;
(viii) handling and disposing of the ship's documents.

The sheriff objected to the terms of appointment of the auctioneer, contending that they took away from him effective custody and control of the vessel, while he retained his obligations in respect of the vessel in terms of Rule 19(1) of the Admiralty Proceedings Rules. In terms of Rule 19(1), arrested property is to be kept in the custody of the sheriff who may take all such steps as the court may order as appear to him to be appropriate for the custody and preservation of the property.

THE DECISION

Custody of the vessel, and the duty to preserve it, rested with the sheriff. Where the terms of appointment of the auctioneers placed the responsibility for these matters on the auctioneers instead of on the sheriff, they were unacceptable and had to be amended.

This meant that in respect of the



terms of appointment concerned with the matters referred to in (i) to (iv), being preservatory in nature, these were not properly the concern of the auctioneers but fell appropriately within the concerns of the sheriff. The matters referred to in the other headings of concern were also properly the concern of the sheriff and were not to be removed from him and given to the auctioneers. The auctioneers were there to conduct the sale, advertise it and secure the necessary payments, but they were not to assume those powers and duties of the sheriff which were necessary for him to take custody and control of the vessel and ensure its preservation.

In order to ensure that the sheriff was able to exercise the powers and duties given to him in terms of the rules, it was necessary for him to have custody and control of the ship. To that end, he was authorised to see to all of the matters referred to in (i) to (viii) above.

## *OWNERS OF THE CARGO LATELY LADEN ABOARD THE MV* SEAJOY *v MV* SEAJOY

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
7 AUGUST 1997

[1997] 4 All SA 191 (C)

***Where it is shown that the carrier is responsible for the loading and stowage of cargo, the carrier is liable to the shipper and owner of the cargo for any damage arising from the improper loading and stowage of such cargo. The carrier's duty to the shipper in this respect persists even when the bill of lading contains a FIOS (free in out stowed) provision to the effect that the shipper is to arrange for the loading and stowage of the cargo. Interest on an unliquidated debt, such as cargo owners' claim for damages, runs from a date earlier than the coming into operation of the amendment to the Prescribed Rate of Interest Act (no 55 of 1975) in April 1997 provided that the debt was outstanding as at the date of the coming into operation of the amendment and provided that the debtor was properly apprised of the quantum of the claim for damages.***

### THE FACTS

The owners of 539 metric tonnes of supawood and particle board, shipped this cargo on Sea Joy Shipping Ltd's vessel *Sea Joy*, under a bill of lading issued in Durban on 31 August 1992. The bill of lading was entered into between the owners of the cargo, as shipper, and Sea Joy Shipping Ltd, as carrier. When loaded, the cargo was improperly stowed, as a result of which it shifted, collapsed and was damaged while the vessel was at sea. The cargo was loaded by Keeley Stevedoring (Pty) Ltd on the ultimate instructions of the ship's charterers, Seagull Charterers Ltd.

In terms of the general paramount clause in the bill of lading, and in terms of the Carriage of Goods by Sea Act (no 1 of 1986), the Hague-Visby Rules were applicable to the carriage. Article III, Rule 2 of those Rules provides that the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. Article IV provides that neither the carrier nor the ship shall be responsible for loss or damage arising from (i) an act or omission of the shipper or owner of the goods, his agent or representative, nor from (ii) any other cause arising without the actual fault or privity of the carrier. Article III, Rule 8 provides that any provision in a contract of carriage relieving the carrier or ship from liability for loss or damage to goods arising from fault, otherwise than as provided in the Rules would be null and void.

Clause 8 of the bill of lading provided that loading, discharging and delivery of the cargo would be arranged by the carrier's agent. On the face of the bill of lading, there appeared the acronym 'FIOS' in a box headed 'Freight details, charges etc'. The acronym was an abbreviation for 'free in out stowed'. Clause 19(a) of the bill of lading provided that goods could be stowed by the carrier as received or at the carrier's option, by means of containers or similar articles of transport used to consolidate goods.

The charterparty concluded between Sea Joy Shipping Ltd and Seagull Charterers provided that the captain would be under the orders and directions of the

charterers as regards employment and agency, and the charterers were to load, stow, trim and discharge the cargo at their expense under the supervision of the captain.

The owner of the cargo brought an action for damages against the MV *Seajoy*, founding its claim on Article III, Rule 2 of the Hague-Visby Rules. It served summons on the ship on 8 September 1992, and set out the quantum of its damages in particulars of claim on 27 August 1993. On 24 April 1997, the parties agreed that the quantum of damages was $154 416,84 less R242 925,28. MV *Seajoy* defended the action on a number of grounds, the principal ground being that by virtue of the FIOS qualification on the bill of lading, it as carrier, was relieved of its obligation to arrange the loading, stowage, discharge and delivery of the cargo as provided for in Article III, Rule 2, with the result that it was relieved of liability for any failure to do so properly and carefully.

## THE DECISION

The loading of the cargo was not effected by the cargo owner's agent. The loading was also not shown to have been effected without negligence on the part of *Sea Joy*'s captain. Accordingly Article IV could not assist *Sea Joy*.

The bill of lading, in the present case, did not expressly state who was responsible for the loading of the cargo. The charterparty made provision for arrangements to be made for the loading of the cargo by the charterers, but this in itself did not relieve the *Sea Joy* of any duty to ensure that the cargo was properly stowed—that contract was in any event, one between different parties.

The bill of lading did however, give indications of whose responsibility the loading and stowage of the cargo was. Clause 19(a) did so in that it gave an option to the carrier as to the method of stowing the cargo. Furthermore, the addition of the FIOS provision in the place reserved for recording particulars of freight details suggested that the operation of this provision was intended to apply to such matters, rather than to questions of liability for improper stowage. None of the parties had considered that the FIOS provision meant any more than that the shipper was to arrange and pay for the loading and stowage of the cargo. The captain had in fact concerned himself with the loading and stowage of the cargo and thereby shown that the *Sea Joy* understood its responsibility to include the performance of those duties.

The *Sea Joy*'s owners could not validly contract out of its liability in this regard because of Article III, Rule 8.

*Sea Joy* was liable to the owners of the cargo for the damages suffered. The date from which interest on its damages was to run was 27 August 1993, this being the date from which the *Sea Joy* became aware of the quantum of the cargo owners' claim. The Prescribed Rate of Interest Act (no 55 of 1975) having been amended on 5 April 1997 to allow for the recovery of interest on an unliquidated debt as determined by a court of law, from the date on which payment of the debt is claimed by service on the debtor of a demand or summons, interest on the amount then outstanding was payable as calculated from the date on which the defendant was first apprised of the extent of the plaintiff's claim.

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