Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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A JUDGMENT BY SCHUTZ JA (SMALBERGER JA, NIENABER JA, SCOTT JA and ZULMAN JA concurring)
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26 SEPTEMBER 1997

1997 CLR 587 (A)

Cheques

Notice of dishonour of a cheque is dispensed with in terms of section 48(2)(c)(iv) of the Bills of Exchange Act (no 34 of 1964) when it is shown that the drawee bank is not bound to pay the cheque. Where the cheque in question is 'stale' being presented more than six months after date of the cheque, this in itself may be an indication that the drawee bank is not bound to pay the cheque. Insufficiency of funds to pay the cheque, where shown, will be sufficient indication of the drawee bank not being bound to pay the cheque, even if the bank's stated reasons for not paying the cheque are that the cheque is stale.

THE FACTS

On 3 February 1993, Afonso and three others drew a cheque for R318 155 in favour of Braz or bearer. On 2 June 1994, Braz presented the cheque to the drawee bank for payment. The cheque was returned marked 'stale'. Braz brought an action for provisional sentence, alleging that notice of dishonour had been dispensed with in terms of section 48(2)(c)(iv) of the Bills of Exchange Act (no 34 of 1964). Subsection 48(2)(c)(iv) provides that notice of dishonour is dispensed with as regards the drawer where the drawee is not bound, as between himself and the drawer, to pay the bill.

Braz further alleged that the bank was not bound, as between itself and Afonso (and the other drawers of the cheque), to pay the cheque because (i) the bank had an agreement with its customers that it would not be obliged to pay on a cheque presented for payment more than six months after the date appearing on the cheque, (ii) there were insufficient funds in the account to meet payment of the cheque, alternatively there was no overdraft facility available to meet payment of the cheque.

Afonso contended that the bank had not failed to pay the cheque on the grounds of insufficiency of funds, but on the grounds that the cheque was 'stale', ie was more than six months old. He argued that section 48(2)(c)(iv) was therefore inapplicable, and notice of dishonour had not been dispensed with.

THE DECISION

An allegation that notice of dishonour has been dispensed with because of insufficient funds or an absence of overdraft arrangements is an allegation of the fulfilment of a simple condition which completes the plaintiff's case in an action based on a liquid document. Braz had established fulfilment of the simple condition of insufficiency of funds by making the allegation in regard thereto, Afonso not having denied that the funds had been insufficient.

Afonso's argument was however, that in view of the bank's reasons for returning the cheque, the sufficiency of funds was irrelevant. This argument could not be upheld. Section 48(2)(c)(iv) contemplates only the question whether or not the drawee bank is bound to pay the cheque. The reasons for such a bank not paying a cheque are not relevant, so long as the bank is not, as a matter of law, bound to pay the cheque. The bank in the present case was not, as a matter of law, bound to pay the cheque, because the funds necessary to pay it were insufficient. This Braz had established. Notice of dishonour was therefore dispensed with.

Provisional sentence was granted.

ABSA BANK LTD v STANDARD BANK OF SA LTD

Cheques

A JUDGMENT BY VAN HEERDEN DCJ (MAHOMED CJ, EKSTEEN JA, NIENABER JA and VAN COLLER JA concurring) SUPREME COURT OF APPEAL 19 SEPTEMBER 1997

1997 CLR 583 (A)

When the signature to a cheque is forged, the cheque is a nullity because it fails to comply with the requirement that the cheque be signed by the person giving it, and consequently any payments made under that cheque cannot discharge any indebtedness. A payee bank which pays a cheque to a collecting bank in such circumstances pays the cheque without cause (sine causa) and may recover from the collecting bank the amount of the cheque if the payment which is made unjustifiably enriches the collecting bank.

THE FACTS

On 24 October 1991, a cheque for R150 000 payable to JF Horn, drawn on the Standard Bank of SA Ltd by Unitrans Bulk (Pty) Ltd was deposited into Horn's Volkskas Bank current account. Volkskas presented the cheque to the Standard Bank for payment, and received R150 000 which it provisionally credited to Horn's account. That account had been in overdraft to the extent of R81 843,94. When the Standard Bank paid the forged cheque, it believed that the signatures on it were genuine signatures.

The cheque had been stolen from Unitrans, and the signatures it bore had been forged. When the forgery was discovered, the Standard Bank credited Unitrans with the amount of the cheque, and sought to recover that sum, less the amount by which Horn's account had been in credit, from Volkskas. While the credit to Horn's account was still considered provisional, being within a ten-day clearance period, Volkskas froze operations on Horn's account and refused to allow withdrawals from it.

Standard Bank brought an action against Absa Ltd, which had succeeded Volkskas and assumed its liabilities, based on the condictio sine causa (recovery on the grounds of payment made without cause). Absa Bank defended the action on the grounds that it had not received the R150 000 for itself, but had collected the proceeds of the cheque for the credit of Horn's account and on his behalf. Thereafter, Horn's indebtedness to Volkskas had been extinguished by way of set off.

THE DECISION

The agency relationship contended for by Absa did not exist after Horn's account had been credited with the proceeds of the cheque. After having credited Horn's account with those funds, Absa held them in its own right, and became Horn's debtor to the extent that the account was in positive balance. Since it did not act as Horn's agent when crediting his account, the consequence was that in extinguishing his indebtedness to the bank, it was enriched to that extent. Set off did not operate at all—when Horn's account was credited, the effect was not that one debt was set off against another but that he paid an amount then owing to his bank.

Absa argued that it had not been enriched because it had been paid for a debt then owing to it, ie its claim for payment had been substituted for payment. However, because of the clearance period adhered to by the bank, the payment it had received was provisional. The bank had therefore not been finally paid, and had Absa brought an action against Horn for repayment of his overdraft, Horn would not have been entitled to affirm that the bank had received final payment of all amounts owing to it. Absa had therefore failed to show that it had not been enriched by the payment made into Horn's account.

The appeal was dismissed.

ABSA BANK BPK v COETZEE

Cheques

A JUDGMENT BY EKSTEEN JA (HOWIE JA, OLIVIER JA, SCHUTZ JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 1997

1997 CLR 601 (A)

An action by the payee of a cheque against a collecting bank for negligently collecting a cheque for another person requires proof that the payee is the true owner of the cheque. This will not be shown where there is no proof that the drawer intended payment to be made to the payee of the cheque.

THE FACTS

In terms of a divorce settlement, Coetzee obtained the issue of a Diners Club credit card in his own name and gave it to his ex-wife for her exclusive use. She conducted the account with Diners Club, and paid its account. Some time later, unbeknown to Coetzee, Diners Club issued a cheque for R18 000 in favour of Coetzee and sent the cheque to his ex-wife. The cheque was crossed and marked 'not negotiable: account payee only'. Mrs Coetzee paid the cheque into her account with Absa Bank Bpk, and the bank collected the cheque for her.

Coetzee brought an action against Absa, basing his claim on the allegations that he was the true owner of the cheque, that his signature had been forged on the reverse of the cheque, and that Absa had negligently collected the cheque.

Absa denied the allegations.

THE DECISION

It was essential to the success of Coetzee's action that he prove that he was the true owner of the cheque. To show that he was the true owner, it was necessary for him to show that transfer of ownership had taken place, according to the common law rules for transfer of ownership.

One of these rules is that the transferor (Diners Club in the present case) intends to transfer ownership to the transferee. There was however, no evidence that Diners intended to transfer ownership of the cheque to Coetzee. Furthermore, in obtaining the cheque from Diners, Mrs Coetzee did not act as Coetzee's agent: Coetzee had not been aware of the existence of the cheque at this time, and there had never been any intention that Mrs Coetzee should use the card for anyone other than herself. Mrs Coetzee had never intended the cheque, nor its proceeds to be Coetzee's.

Section 19(4) of the Bills of Exchange Act (no 34 of 1964) provides that if a cheque is no longer in the possession of the drawer, a valid and unconditional delivery would be presumed until the contrary was proved. This section however, did not assist Coetzee as it referred to the possession of a cheque and not the transfer of it.

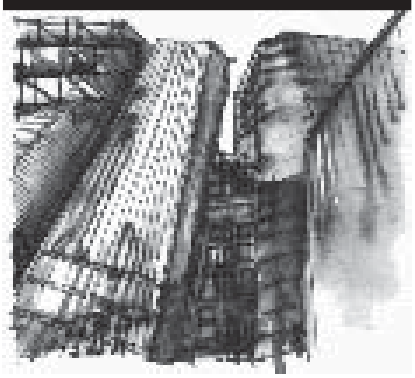
Coetzee had not shown that he was the true owner of the cheque. His action against Absa was dismissed.

GOVERNMENT OF THE REPUBLIC OF THE EASTERN CAPE v FRONTIER SAFARIS (PTY) LTD

A JUDGMENT BY PLEWMAN JA (SMALBERGER JA, FH GROSSKOPF JA and HARMS JA concurring, STREICHER JA dissenting)
SUPREME COURT OF APPEAL
29 SEPTEMBER 1997

UNREPORTED

Property



An Act conferring on the government the power of control and management over a certain area does not preclude the government from handing over such control and management to another party in terms of a contract to that effect provided that the government does not thereby surrender ultimate control of such control and management to the other contracting party.

THE FACTS

The Government of the Republic of Ciskei leased to Frontier Safaris (Pty) Ltd an area of land consisting of three game reserves forming part of a national nature reserve. In terms of the lease, the Government was obliged to maintain the infrastructure of the land, including main access roads within the reserves and fencing. Frontier Safaris was obliged to maintain certain aspects of the infrastructure of the area, such as surface drinking water, and it was obliged to carry out management and other maintenance tasks. In terms of clause 7.1 of the lease, Frontier Safaris undertook to employ and pay all staff necessary for the administration and maintenance of the reserves, and to accommodate residents of the reserves with such benefits as the provision of surplus meat at a privileged rate, the right to obtain herbs for their own use and the collection of thatching grass and firewood.

In terms of section 25(1) of the Ciskei Nature Conservation Act (no 10 of 1987) the control, maintenance, development and management of a national nature reserve vests in the Department of Agriculture, Forestry and Rural Development.

Frontier Safaris brought various claims against the Government, based on allegations of breach of the contract of lease. The Government raised the special plea that the lease purported to divest the Department of Agriculture, Forestry and Rural Development of the control, maintenance, development and management of the national nature reserves referred to in the lease, that it was not in law competent to conclude such a contract, and that accordingly, the Government was not liable for damage flowing from the alleged breach.

THE DECISION

The vesting of the management of the reserves as referred to in section 25(1) imposed a duty on the government to manage the reserves. However, this power was permissive and not directory. On a proper interpretation of the language of the section, the government was not precluded from engaging an outside body to carry out any of the activities referred to in the section.

Clause 7.1 provided for an undertaking by Frontier Safaris, and not an all-embracing right to manage the reserves. The clause was subsidiary to the limitations elsewhere provided for in the contract, and it did not operate to divest control of the management of the reserves from the government. The overall effect of the contract was to create a series of reciprocal obligations on the parties all of which were consistent with the legislation. It was not possible to say that the effect of the contract was to divest the government of the powers of control, maintenance, development and management of the reserves, as given to it in the Act.

The special plea was dismissed.

BENKENSTEIN v NEISIUS

A JUDGMENT BY FITZGERALD AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
9 JUNE 1997

1997 (4) SA 835 (C)

An agreement for the sale of land may be revived after the failure of a suspensive condition where the parties to the original sale enter into an agreement amending the previous sale by waiving the suspensive condition. Subsequent conduct by the parties to an agreement may indicate an intention to substitute the seller for another, but this will not necessarily mean that the parties' intention was to renounce the original agreement in toto. The fact that the parties make provision for subsequent agreement regarding the identification of subdivided parts of the property does not render the description of the property vague on the grounds that the property sold is not readily ascertainable.

THE FACTS

In June 1996, Benkenstein concluded an agreement with Neisius and the second respondent in terms of which he purchased 'portion A of the farm Meerendal, measuring 4,2826 ha which is to be subdivided'. It was recorded that the size of the property might differ from that reflected on the diagrams still to be approved and had to be divided in two equal portions with both parties' approval. The property was then registered in the name of the third respondent, a close corporation, of which Neisius and the second respondent were members. The agreement was subject to two suspensive conditions: (i) the sale of certain fixed property owned by Benkenstein by 6 August 1996 for R350 000, and (ii) the approval of a subdivision of the property, to be secured by Benkenstein.

The agreement was amended twice, firstly by extending the period within which Benkenstein was to sell his own property by one month to 6 September 1996, and later by waiving the first suspensive condition completely. The second amendment was effected on 13 September 1996, by which time Benkenstein had not sold his own property.

On 12 February 1997, Benkenstein's attorney wrote to Neisius and the second respondent and sought their written confirmation that they had been duly authorised to act for the close corporation, that they intended to uphold the original agreement, would not enter into any other agreements with other parties regarding the property, and would not effect transfer of the property to a certain Mr and Mrs Prestage or to any other party.

In November 1996, Neisius and the second respondent had purported to sell the property to Mr and Mrs Prestage, but later cancelled the sale after Benkenstein objected to this. On 3 February 1997, they had confirmed that the original agreement was valid and binding between the parties to it.

Benkenstein applied for an order interdicting the close corporation from dealing with the property and directing Neisius and the second respondent to take all steps necessary to procure transfer of the property to him.

THE DECISION

The non-fulfilment of the first suspensive condition by 6 September 1996 meant that the agreement terminated automatically on that date and became void ab initio. Benkenstein however, contended that the agreement was later revived when the parties effected the second amendment of 13 September 1996.

When the parties entered into the second amendment, they effectively reaffirmed their intention to sell the property, even though they referred to the second suspensive condition as having been 'waived'. The revival of the earlier agreement was possible in such circumstances, and there was no question of there having been any failure to comply with the provisions of the Alienation of Land Act (no 68 of 1981) since the parties had effected the amendment in writing. Benkenstein's contention was therefore correct.

Neisius however, contended that Benkenstein's conduct subsequent to the conclusion of the amendment on 13 September 1996 showed that he did not intend to revive the original agreement because he had attempted to enter into an agreement with the close corporation which owned the land and not the original sellers. It was clear however, from the fact that Benkenstein's attorney had referred to the original agreement in correspondence with the original sellers, and had obtained

the confirmation from them that the original sale would be upheld, that the parties' later conduct was not inconsistent with an intention to sell the property in accordance with the original agreement.

Neisius also contended that the property as described in the agreement was not readily ascertainable. However, the property was identifiable, in view of the fact that subdivision had taken place, and the fact that the agreement provided for further agreement regarding the subdivision into two equal portions did not detract from the identification of the property: the precise manner of subdivision was a separate matter for the agreement of the parties.

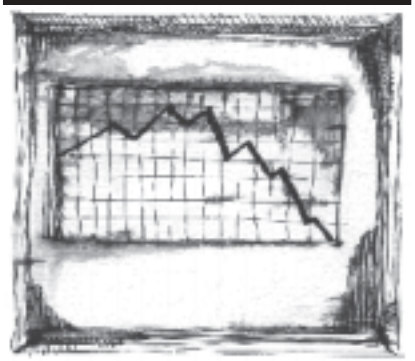
Benkenstein was granted the order he sought.

HARKSEN v LANE N.O.

A JUDGMENT BY GOLDSTONE J (CHASKALSON P, LANGA JP, ACKERMANN J and KRIEGLER J concurring, O'REGAN J, MADALA J, MOKGORO J and SACHS J dissenting)
CONSTITUTIONAL COURT
7 OCTOBER 1997

1998 (1) SA 300 (CC)

Insolvency



Sections 21, 64 and 65 of the Insolvency Act (no 24 of 1936) are not in conflict with the provisions of the Constitution of the Republic of South Africa Act (no 200 of 1993) and do not offend against the rights of the solvent spouse whose property has been attached in terms thereof.

THE FACTS

Harksen was married to her husband out of community of property. Her husband's estate was sequestrated. The trustees attached Harksen's property in terms of section 21 of the Insolvency Act (no 24 of 1936). She was also summoned to an interrogation in terms of section 64 of the Act and ordered to produce books and documents there.

Harksen attacked the constitutionality of these provisions, arguing that they offended her rights as provided for in sections 8 and 28 of the Constitution of the Republic of South Africa Act (no 200 of 1993).

Section 21(1) provides that the effect of the sequestration of the separate estate of one of two spouses shall be to vest in the Master and then the trustee, all the property of the solvent spouse. Section 21(2) provides that the trustee shall release any property of the solvent spouse proved to have been the property of that spouse immediately before his or her marriage to the insolvent, as well as other property falling into certain specified categories.

Section 64 provides that the presiding officer of an inquiry into the affairs of an insolvent estate may require the interrogation of any person who is able to give material information concerning the business affairs of the insolvent person, or the insolvent person's spouse. Section 65 entitles any person so interrogated to invoke the law relating to privilege applicable to a witness summoned to produce a book or document in a court of law.

Section 8 of the Constitution ('the equality clause') provides that every person shall have the right to equality before the law and to equal protection of the law, and no person shall be unfairly discriminated against. Section 28(1) of the Constitution ('the property clause') provides that every person shall have the right to acquire and hold rights in property. Section 28(3) provides that where any rights are expropriated pursuant to a law, such expropriation shall be permissible for public purposes only and shall be subject to the payment of compensation agreed to or determined by a court of law.

The matter was referred to the Constitutional Court for decision.

THE DECISION

The property clause

Expropriation may take the form of compulsory acquisition of rights in property by a public authority for a public purpose, or a deprivation of rights in property. While no such distinction was made in section 28, it was clear that the section did impose requirements for any expropriation made against a person's property. The question was whether the 'transfer' of the property of a solvent spouse in terms of section 21 of the Insolvency Act constituted an expropriation at all of that spouse's property.

In order to answer this question, it was necessary to look at the broad context and purpose of section 21 as a whole. The purpose and effect of this provision was not to divest the solvent spouse of ownership of his or her property. Its purpose was to ensure that the insolvent estate was not deprived of property to which it was entitled. The onus of proving that such property was that of the solvent spouse might rest on the solvent spouse, but this did not affect the purpose of the provision. Section 21 does not intend that the transfer shall be permanent, or for any purpose other than to enable the Master or trustee to determine whether the property forms part of the insolvent estate.

Section 21 did not amount to an expropriating provision, neither by a public authority as referred to in section 28, or at all. It therefore did not offend against the rights created in section 28 and was not to be struck down as being unconstitutional.

The equality clause

In order to determine whether a statutory provision offends against the equality clause, it is necessary to determine firstly whether the provision differentiates between people or categories of people. If it does, the next inquiry is whether the differentiation bears a rational connection to a legitimate government purpose. If it does not, section 8(1) of the Constitution is violated; if it does, the next inquiry is whether the differentiation amounts to unfair discrimination.

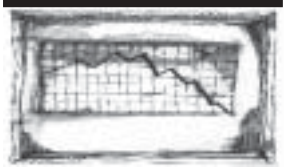
Section 21 of the Insolvency Act clearly differentiated between people: it differentiated between the solvent spouse of an insolvent person and other persons. This differentiation was however, not without a rational connection to a legitimate government purpose. Given the increase in economically active spouses, and the intermingling of their assets when acquired during the marriage, the practical constraints on a trustee of the insolvent spouse in having to distinguish one spouse's assets from the other's required that some assistance be given to the trustee in completing his task. While it might be true that the effect of the section would be to create inconvenience for the solvent spouse, its provisions could not be said to be arbitrary or lacking in rationality. Because the facts necessary for the determination of which spouse could claim ownership of the assets alleged to be those of the solvent spouse would lie peculiarly within the knowledge of that spouse, the onus of proving that those assets were those of that spouse lay properly upon him or her.

The differentiation imposed by section 21 clearly amounted to discrimination: the solvent spouse—as opposed to others associated with the insolvent spouse—was affected. However, the section does not divest the solvent spouse of his or her property, though it does cast an onus on the solvent spouse to prove that the property is his or hers. This inconvenience does not exceed the inconvenience and burden faced by ordinary citizens when forced into litigation in order to enforce their rights.

The same reasoning in respect of sections 64 and 65 of the Insolvency Act applied.

The sections of the Insolvency Act attacked by Harksen did not offend her constitutional rights, and could not be considered in violation of the Constitution.

PARK-ROSS v DIRECTOR: OFFICE FOR SERIOUS ECONOMIC OFFENCES



A JUDGMENT BY FARLAM J
CAPE OF GOOD HOPE
PROVINICIAL DIVISION
20 JUNE 1997

1998 (1) SA 108 (C)

The Director of the Office for Serious Economic Offences is not obliged to furnish the evidence obtained in inquiries conducted under the Investigation of Serious Economic Offences Act (no 117 of 1991) to the person whose activities have been investigated either before obtaining the evidence of that person, or as a precondition to referring the matter to the Attorney-General in terms of the Act.

THE FACTS

The Director of the Office for Serious Economic Offences conducted investigations into the affairs of Southern Oceanic Services (Pty) Ltd. Evidence given to the Director implicated Park-Ross in fraudulent and corrupt activities, and the Director informed Park-Ross of this fact. The Director informed Park-Ross that in all probability he would recommend to the Attorney-General that he consider prosecuting Park-Ross on charges of corruption, fraud, theft and contraventions of the Companies Act (no 61 of 1973). He invited Park-Ross to give evidence in reply to the allegations made against him, before he submitted a final recommendation to the Attorney-General.

Park-Ross responded to the Director's approach by stating that he could not decide whether to give evidence to him, as requested, until such time as he had perused all of the evidence so far submitted to the Director. He requested the transcript of the proceedings which had already taken place before the Director, as well as all documentation pertaining to it.

The Director refused to furnish the transcript and documentation. Park-Ross then brought an application for an order allowing him sight of the complete transcript of the evidence given by witnesses at the inquiry conducted by the Director, and all written statements made by witnesses at the inquiry. He also sought an interdict preventing the Director from making any recommendation to the Attorney-General in terms of section 5(1) of the Investigation of Serious Economic Offences Act (no 117 of 1991).

THE DECISION

Park-Ross argued that in terms of section 23 of the Constitution, he was entitled to the transcript and documentation. The section provides that every person shall have the right of access to all information held by the State or any of its organs insofar as such information is required for the exercise or protection of any of his or her rights.

This was a right however, which could be exercised only if Park-Ross had the right to be heard by the Director, or a legitimate expectation that he would be heard, and given access to all the documents he required, before the Director submitted his report in terms of the Act. Park-Ross had no such right. In terms of the Act, the Director is empowered to make inquiries, where he has reason to suspect that a serious economic offence has been committed. His powers are of a preliminary and investigative nature, like the powers of the police. The Act did not make the investigation into a person suspected of having committed a serious economic offence any different from the investigation conducted by an ordinary detective in the police force. Those being the limited powers of the Director, Park-Ross could not contend that he had any rights which might be affected by their exercise.

There was also no reason to recognise any right to inspect the transcript and documentation before it was sent to the Attorney-General. The Attorney-General himself was not obliged to seek the comments of a suspect before deciding to prosecute. An investigating officer such as the Director was similarly not obliged to seek the comments of a person he has investigated, before deciding to refer the matter to the Attorney-General.

The application was dismissed.

COOPER v MASTER OF THE SUPREME COURT

Insolvency

A JUDGMENT BY HUGO J
(BROOME DJP and NICHOLSON J concurring)
NATAL PROVINCIAL DIVISION
30 OCTOBER 1997

[1998] 1 All SA 158 (N)

Where co-trustees of an insolvent estate disagree about the proportion of the remuneration to be paid to them, a court may intervene to determine the proportion each should receive, provided that this is a matter which can properly be said to be a matter relating to the estate.

THE FACTS

Cooper and the second and third respondents were co-trustees in an insolvent estate. Cooper disagreed with the award of a special fee to the second respondent by the Master of the Supreme Court. He brought an action against the Master and the other two respondents inter alia reviewing the award of the special fee, and for an order that appropriate directions be given as to the procedure and manner in which an appropriate allocation of any special fee amongst the three co-trustees was to be determined, and declaring that in the absence of agreement, such fee was to be divided equally between them.

The court granted an order reviewing the award of the special fee, but refused to grant the order giving directions for the appropriate allocation of a special fee. Cooper appealed against this refusal.

THE DECISION

Section 56(5) of the Insolvency Act (no 24 of 1936) provides that whenever trustees in the insolvent estate disagree on any matter relating to the estate, the matter shall be referred to the Master who shall determine the question in issue. The question was whether the disputed between the co-trustees in the present case was a disagreement 'relating to the estate' and therefore one which could be adjudicated upon in terms of this section.

The determination of the quantum of the remuneration to be paid to trustees was a matter provided for in the tariffs laid down in terms of the Insolvency Act. Any disagreement about this was clearly a matter relating to the estate. Any disagreement at that stage, about the proportion of the work to be done by each trustee, and the corresponding remuneration to be paid to each, would be a matter relating to the estate, and could be dealt with by the Master in terms of section 56(5). Where however, the quantum of remuneration had been determined, and there was disagreement was about the proportion of remuneration to be paid to each co-trustee, this would be a dispute between the trustees which be of no interest to the estate.

The dispute between the co-trustees in the present case was a disagreement about the quantum of remuneration to be paid to them. It was therefore a disagreement relating to the estate, and one which could be determined in terms of section 56(5). The court was entitled to apply the provisions of the section and give directions for the appropriate allocation of a special fee. In the absence of agreement between the co-trustees, as to the division of any remuneration the Master might allow, the fee was to be divided equally between them.

LORENTZ v TEK CORPORATION PROVIDENT FUND

A JUDGMENT BY NAVSA J
WITWATERSRAND LOCAL DIVISION
31 JULY 1997

1998 (1) SA 192 (W)

Contract

The trustees of a pension fund are not entitled to allow the employer contributing to the pension fund a contribution holiday, merely because there is a surplus in the pension fund. Normally, the employer may be allowed a contribution holiday only in circumstances where the surplus is attributable to past overcontributions. In approving the transfer of the assets of the pension fund to a new fund, when the transfer has been agreed to by members of the fund, the trustees must ensure that the interest of the members have been safeguarded and apply any surplus funds then existing in the transferring pension fund.

THE FACTS

Lorentz was employed by Tek Corporation Ltd in its Defy Applicances Division. He was a member and trustee of Tek's pension fund.

In 1993, the trustees of the pension fund decided to form a provident fund and eighty seven percent of the members of the pension fund transferred their membership to the provident fund then formed, together with their actuarial reserve. The provident fund was the Tek Corporation Provident Fund. At the time of the transfer from the pension fund to the provident fund, there was a surplus in the pension fund of R17,7m. By July 1995, this surplus had increased to R27m. Tek used this surplus to meet its own obligations to the pension fund, and from inception of the fund, paid no contributions to it.

Rule 4.2.1 of the pension fund rules provided that Tek was obliged to contribute such amounts as were agreed upon from time to time between the employer and the trustees. Such amounts were not to be less than the amounts determined by the actuary to be necessary to ensure that the Registrar's requirements with regard to the financial soundness of the pension fund was met. Tek cited this rule to justify having taken the contribution holiday. In terms of rule 19.5.2 , if an actuarial valuation of pension fund assets disclose that there was a substantial actuarial surplus or that there is a deficit that required to be funded, the manner of dealing with the surplus or funding the deficit was to be considered by the trustees and recommendations made to Tek for a decision. Tek's decision was to be made within the limitations imposed by the Act and would be final.

In 1994, Tek sold Defy to Malbak Industrial Holdings Ltd. Two-thirds of the previous members of the pension fund, ie those employees who were employed in Tek's Defy Division, ceased being members of the provident fund and their credits in it were to be transferred to Malbak's provident fund. At this time, the employees of Tek's Defy Division, led by Lorentz, contended that the pension fund should have transferred its surplus of R17,7m to the provident fund in 1993. He applied for orders declaring that the trustees of the pension fund were not entitled to use the surplus in the pension fund to allow Tek to avoid making contributions to the provident fund, and directing the trustees of the pension fund to determine the portion of surplus funds to be transferred to the provident fund and effect payment of the amount so determined to the provident fund.

The provident fund and the pension fund opposed the application, contending that the pension fund had been entitled to use the surplus to allow Tek a contribution holiday, provided it met its obligations to the pension fund, and that employees who were members of the fund enjoyed no rights to the surplus of the pension fund when this arose.

THE DECISION

The object of the fund was to provide retirement and other benefits for employees: the fund was therefore a trust, and this meant that the trustees of the pension fund bore a fiduciary duty to the beneficiaries of the fund. It was not necessarily inconsistent with that duty for the trustees to allow the employer a complete contribution holiday, but whether or not that should have been allowed depended on the question why the surplus in the pension fund arose. If the surplus was a result of previous

overcontributions by the employer, the trustees might have been entitled to allow a contribution holiday. It was wrong in principle to give the benefit of earnings from sources other than the employer's overcontribution to the employer. In the present case however, there was no clear evidence that overcontribution was the cause of the surplus.

The pension fund was a legal person, separate and distinct from the employer which was the predecessor of the present employer. Given the lack of evidence as to the source of the surplus, it should properly be regarded as belonging to the pension fund, and no-one else. The argument that the employer took the investment risk in relation to pension funds, would be obliged to make good any deficit that might arise in the pension fund, and was therefore entitled to lay claim to any surplus, was unacceptable.

Properly interpreted, rule 4.2.1 entitled the trustees to allow a contribution holiday in the event of Tek having overcontributed to the fund. In applying such an interpretation of the rule, and allowing Tek a contribution holiday, Tek would not receive any financial advantage, and would gain only access to the overcontribution. The trustees had however, allowed the contribution holiday without determining whether or not Tek had overcontributed to the fund. Furthermore, they had neglected to exercise their fiduciary duties to apply pension fund assets to meet the objects of the fund, and had failed to ensure that when the transfer of assets to the provident fund took place, this was done for the benefit of members. Although rule 19.5.2 gave Tek the final say in what to do with a surplus, it could not act arbitrarily and only in its own financial interests in that regard. It was still obliged to act bona fide, and could not use pension fund assets to its own advantage.

Section 14(1)(c)(i) of the Pension Funds Act (no 24 of 1956) imposes conditions on the transfer of business from a registered fund to any other person. The conditions referred to in that section must be considered by the trustees when approving the transfer of the assets of the pension fund, and they must ensure that the interests of pensioners have been adequately safeguarded.

The application was granted.

SA FIDELITY GUARDS HOLDINGS (PTY) LTD v PEARMAIN

A JUDGMENT BY LIEBENBERG J
SOUTH EASTERN CAPE LOCAL DIVISION
16 JULY 1997

[1997] 4 All SA 650 (SE)

An employer is entitled to interdict an employee who has agreed to a restraint on his activities following termination of his employment, even where the employee gives an undertaking not to contact customers of the employer with a view to enticing them to his new employer.

THE FACTS

SA Fidelity Guards Holdings (Pty) Ltd employed Pearmain as a branch manager in one of its offices. In terms of the employment agreement, Pearmain was restrained from being interested in a business similar to that being carried on by Fidelity Guards, or in any business competing with the business being conducted by Fidelity Guards. The restraint was to apply until after the end of a twelve month period following any termination of Pearmain's employment.

Pearmain resigned from Fidelity Guard's employ on 2 January 1997. In the middle of that month, Pearmain began employment with a close corporation whose business was similar to that of Fidelity Guards. Fidelity Guards sought an interdict to enforce the restraint and to prevent Pearmain from soliciting business from existing clients and from enticing employees to terminate their employment with Fidelity Guards. Pearmain contended that the restraint could not be enforced beyond protecting Fidelity Guard's customer base. He undertook not to contract with or contact any of Fidelity Guard's customers, and contended that with this undertaking, Fidelity's interests were adequately protected.

THE DECISION

Fidelity Guards had shown that its interests were wider than its customer base alone. Pearmain had had regular contact with customers of Fidelity Guards, and had established good relationships with them. As a result of this, and his intimate knowledge of customer requirements, he was in a position to exploit the confidential information of the company and its trade secrets, to the detriment of Fidelity Guards. In view of this, the undertaking given by Pearmain was not sufficient to protect the company's interests.

Even if it were held that Fidelity Guards did not have any interest going beyond the protection of its customer base, the undertaking given by Pearmain was insufficient. Fidelity Guards was still entitled to an interdict to prevent the possibility of Pearmain exploiting its trade secrets or business connections in his new employment. It was entitled to depend on the terms of the restraint to obtain such an interdict.

The interdict was granted.

FOCKEMA v FOCKEMA

A JUDGMENT BY STEGMANN J
WITWATERSRAND LOCAL DIVISION
17 OCTOBER 1997

1997 CLR 616 (W)

A deed of donation complies with section 5 of the General Law Amendment Act (no 50 of 1956) when it is recorded in writing after it has been orally accepted following an oral communication to the donee of the donation, even when the items donated as recorded in the written deed of donation are not the full complement of items earlier donated orally. The donor divests himself of ownership of the items so donated when he does everything necessary to enable transfer of the items.

THE FACTS

Acting on concerns expressed by his wife regarding her anticipated financial needs following his death, Dr R A P Fockema consulted an attorney to discuss the possibility of donating certain of his assets to her prior to his death. It was decided that Fockema would donate his share portfolio to his wife. Fockema stated to his wife that he would do this and she told him that she accepted the donation.

The attorney prepared a deed of donation which listed the shares to be donated to Fockema's wife, and annexed share securities transfer forms for the purposes of transfer of the shares. The deed confirmed that Fockema had donated the shares to his wife. Fockema signed it and the share transfer forms, attached the relevant share certificates to the forms, and placed them in an envelope in a strong room in the common home. Fockema later told his wife that he had done this, and she thanked him for the shares. Fockema told his wife that the deed of donation and accompanying documentation was in the safe.

After Fockema died, Fockema's will revealed that he bequeathed his estate to his wife and three children in equal shares. His wife disclosed the fact that the donation had been made. In the face of reluctance to accept the validity of the donation, she brought an action against the executor, the Master and the three children for an order declaring that Fockema had made a valid donation prior to his death and that the executor should amend the liquidation and distribution account to accord with the donation and take all steps necessary to have the shares registered in her name. She obtained this order. The children appealed.

THE DECISION

Section 5 of the General Law Amendment Act (no 50 of 1956) provides that for an executory contract of donation to be valid, the terms thereof must be embodied in a written document signed

by the donor. In order to comply with the section, a donor may record the donation in writing, and thereafter the acceptance of the donee may be obtained either orally or in writing. Alternatively, the donor may make the donation orally, and thereafter the acceptance of the donee may be obtained orally, the inchoate contract so formed becoming a formally valid and binding contract when it is recorded in writing and signed by the donor.

In the present case, the donation embodied in the deed of donation signed by Fockema was essentially the donation which had earlier been accepted by his wife. Though this did not encompass all of the shares in his portfolio, no further acceptance of the donation was required of his wife in order to render the executory contract valid in terms of section 5.

By thanking Fockema for the shares, his wife accepted whatever shares he had donated to her. By indicating to her that the deed of donation was in the safe, signing the share transfer forms and providing the share certificates, Fockema divested himself of ownership of the shares. Delivery of them to her had been effected by the method of 'longa manu'.

There was no room for an interpretation of the events surrounding the conclusion of the deed of donation that Fockema had intended that the donation would only take effect upon his death. There was therefore no evidence to suggest that the donation had been made in contemplation of death (mortis causa) and was for that reason invalid as not complying with the Wills Act (no 7 of 1953).

The appeal was dismissed.

BARKHUIZEN v FORBES

A JUDGMENT BY LEACH J
(LIEBENBERG J dissenting,
FRONEMAN J concurring)
EASTERN CAPE DIVISION
28 NOVEMBER 1996

1998 (1) SA 140 (E)

Although it may be said that there is a presumption against a donation having been made, such a presumption does not absolve the person alleging facts inconsistent with such a donation having been made—such as that a loan was made—from proving those facts.

THE FACTS

Barkhuizen brought an action against Forbes for repayment of various loans which she alleged she had made to him. Forbes responded to the claim by stating that Barkhuizen had donated the money and items which she alleged had been lent to him. In assessing the defence, Liebenberg J took the view that Forbes bore the onus of proving that a donation had been made, and found that he had failed to discharge this onus. Froneman J took the view that Forbes' defence that a donation had been made did not absolve Barkhuizen of having to prove that she had made the loans to Forbes. Although both judges awarded Barkhuizen her claims, in view of their differing assessments of the onus of proof, they awarded payment of differing amounts to Barkhuizen. Leach J gave a judgment resolving the difference between the judgments of Liebenberg J and Froneman J.

THE DECISION

Although it is stated that there is a presumption against donations having been made, in applying such a presumption, there was no reason to vary the normal rule that the person alleging a contract must prove it. The fact therefore, that Forbes alleged a donation, did not absolve Barkhuizen of having to prove the contract of loan which she alleged formed the basis of her claim. The presumption against donations meant that the court had to give consideration to the fact that a donation was unlikely, and give weight to that consideration in the particular circumstances of the case.

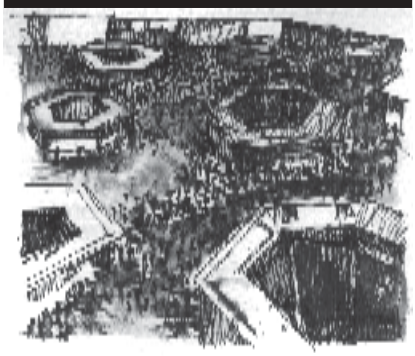
Barkhuizen's claims were substantially awarded to her.

AGRO-DRIP (PTY) LTD v FEDGEN INSURANCE CO LTD

A JUDGMENT BY STREICHER J
WITWATERSRAND LOCAL DIVISION
2 JULY 1996

1996 CLD 708 (W)

Companies



A company ordered to furnish security for the costs of the defendant

THE FACTS

After Agro-drip (Pty) Ltd's factory was destroyed by fire, in terms of a policy of insurance, Fedgen paid it R3 527 424. Alleging fraud on the part of Agro-drip in making the claim, and that Agro-drip was indebted to it in the sum of R3 527 424, Fedgen applied for the liquidation of the company. It obtained a provisional order for its liquidation, but its application was later withdrawn, and the order was discharged.

Agro-drip brought an action against Fedgen for payment of R1 882 576 being the balance of its claim in terms of the insurance policy. At the time that it brought this action, Agro-drip's business had been destroyed, it had insufficient working capital to continue and/or revive its business, it had no reasonable prospect of reviving its business, and it had no machinery or other assets in South Africa.

Agro-drip alleged that despite its financial position, it had a claim against Unicor GmbH for delivery of a machine purchased for DM1 370 000, or for repayment of the amounts paid to that company for the machine, and that the amount due to it on that account exceeded the amount of any costs order Fedgen might obtain. It alleged that because of Fedgen's application for its liquidation, its bank had called up its overdraft facility and the liquidator had frozen its business, and the result of these events was that it had been put into an impecunious situation.

Fedgen counterclaimed repayment of R3 527 424, and sought an order that Agro-drip furnish security for its costs in the action instituted by it. Fedgen relied for its counterclaim partly on the evidence of an individual who had been convicted in a Jerusalem court of perjury and the fabrication of evidence.

Agro-drip brought a second action against Fedgen in which it claimed it had suffered damages in the sum of R13 403 530,13 as a result of the loss of its business caused by Fedgen's application for its liquidation.

Agro-drip opposed the application for an order that Agro-drip furnish security for costs.

THE DECISION

Fedgen would be entitled to security for its costs if it could show that it fell within the terms of section 13 of the Companies Act (no 61 of 1973). The section provides that where a company is a plaintiff or applicant in any legal proceedings, the court may at any stage, if it appears that there is reason to believe that the company will be unable to pay the defendant's costs if successful in its defence, require sufficient security to be given for those costs.

The first question to be determined was therefore whether or not there was reason to believe that Agro-drip would be unable to pay Fedgen's costs if the latter company was successful in its defence. The allegations made by Agro-drip concerning the amounts due to it from Unicor were unsubstantiated. It had not indicated what amounts it had paid to Unicor, and had given insufficient details of the complaint it had in regard to the machine returned to that company and who would be liable for the cost of repairs to it. It had not even placed a value on the machine. Given the fact that Agro-drip had no liquid funds, there was every reason to believe that it would not be able to pay Fedgen's costs. Accordingly, unless there were other relevant special circumstances, Agro-drip should be required to furnish security for Fedgen's costs.

A special circumstance suggested by Agro-drip was that Fedgen's defence was not bona fide because it depended on the evidence of a person who had perjured himself in the Jerusalem court. However, Fedgen did not only depend on this person's evidence, nor did it depend only on the allegation that Agro-drip was the cause of the fire giving rise to the insurance claim. Fedgen's claim could furthermore, not be said to be vexatious or hopeless.

Agro-drip further alleged that its financial position was a direct result of Fedgen's action in bringing liquidation proceedings against it. However, this allegation was not properly substantiated, and there was no prima facie case that Fedgen's action had been responsible for Agro-drip's financial position.

The fact that Fedgen would incur very little costs in respect of its counterclaim in addition to the costs it would incur in defending Agro-drip's claim, was not a special circumstance relevant to the question of security for costs. It could also not be said that Fedgen had unnecessarily delayed in bringing its application for security for costs.

Agro-drip was ordered to furnish security for costs.

LAPPEMAN DIAMOND CUTTING WORKS (PTY) LTD v MIB GROUP (PTY) LTD

A JUDGMENT BY JOFFE J
WITWATERSRAND LOCAL DIVISION
17 APRIL 1997

1997 (4) SA 908 (W)

A court will not be predisposed to order a company plaintiff to provide security for costs for the defendant in terms of section 13 of the Companies Act (no 62 of 1973) but will exercise its discretion in making such an order bearing in mind the values of the Constitution which confers on every person the right to have justiciable disputes settled by a court of law.

THE FACTS

Lappeman Diamond Cutting Works (Pty) Ltd brought an action for damages against MIB Group (Pty) Ltd. In July 1995, Lappeman was ordered to furnish security for MIB's costs in the action, in terms of section 13 of the Companies Act (no 61 of 1973). In November 1995, it was ordered that certain issues would be determined separately from other issues relevant to the matter, and in the same month, the amount of security payable by Lappeman was fixed at R185 000.

After the trial commenced in January 1997, proceedings were still taking place before the Taxing Master for the provision of increased security for additional costs incurred during 1996. These proceedings had begun earlier in January 1997. The Taxing Master ordered that the matter be decided by the trial judge or another judge. The matter was referred to the trial judge.

In argument before the trial judge, Lappeman contended that section 13 was unconstitutional, alternatively that the judge should exercise his discretion against MIB. Section 13 provides that where a company is plaintiff or applicant in any legal proceedings, the court may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant or respondent if successful in its defence, require sufficient security to be given for those costs.

Section 22 of the Constitution provides that every person shall have the right to have justiciable disputes settled by a court of law or another independent and impartial forum.

MIB applied for the provision of increased security.

THE DECISION

Section 13 gives the court a discretion in determining whether a plaintiff company should be ordered to provide security for costs. The question was in what manner the discretion should be exercised. A court may have regard to the manner in which the discretion has been exercised in the past, but binding authority need not be followed where this is inimical to the spirit, purpose and objects of the Constitution.

In the past, courts have adopted the attitude that in the absence of special circumstances, security for costs will be ordered. The object of section 13 is to protect a person from being forced to defend an action brought by a litigant which is insolvent and consequently in no position to pay the defendant's costs in the event of a costs order being granted against it. This object is not necessarily inconsistent with the object of maintaining the values of the Constitution so long as courts retain a wide discretion in applying the section. However, if such a wide discretion is to be retained, the attitude adopted by the courts in the past cannot be followed. In deciding whether or not to order that a plaintiff must furnish security for costs, a court must be predisposed neither to order that security for costs be furnished nor to refrain from so ordering.

In the present case, MIB had delayed in bringing the application for the provision of security. It must have been aware long before it brought its application that additional costs were being incurred for which security had not been furnished. On the other hand, Lappeman had obviously secured payment of its own legal services in engaging its own legal representatives in the matter. It was appropriate therefore to order that Lappeman furnish additional security for each day of continuation of the trial, but not in respect of costs incurred subsequent to the separation order granted in November 1995.

The application was granted.

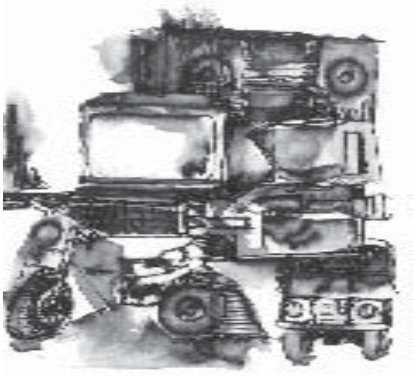
The object of s 13 is to protect the public in litigation by bankrupt companies (Hudson & Son v London Trading Co Ltd 1930 WLD 288). The bankrupt company is not excluded from the courts but only prevented if it cannot find security from dragging its opponent from one court to another (Cowell v Taylor (1885) 31 ChD 34 (CA) at 38). In my view this object can be achieved and the values of the Constitution referred to above can be respected if the discretion contained in s 13 is approached, neither with a predisposition to granting security, as is the present approach in this Division, nor with the predisposition not to grant security. The wide discretion favoured by the English cases, pursuant to which the discretion is approached without any commitment in advance as to how the discretion is to be exercised, will achieve the desired result.

NBS BANK LTD v BADENHORST-SCHNETLER BEDRYFSDIENSTE BK

A JUDGMENT BY STEGMANN J
WITWATERSRAND LOCAL DIVISION
11 SEPTEMBER 1997

1997 CLR 606 (W)

Credit Transactions



A provision in a money lending contract which gives one of the parties the right to vary the interest rate arbitrarily and without reference to any objective criteria is invalid.

THE FACTS

Mrs Badenhorst-Schnetler signed a power of attorney for Badenhorst-Schnetler Bedryfsdienst BK authorising the execution and registration of a bond in favour of NBS Bank Ltd. The bond was passed over the close corporation's property as security for money lent or to be lent by the bank to it.

The bond provided that the close corporation was to repay the sum advanced in monthly instalments, and that the interest rate payable on the sum advanced would be 16.25% per annum or at such other rate as the bank might determine from time to time. In terms of clause 14, the bank was entitled to vary the interest rate from time to time, as well as the corresponding monthly instalments. In terms of clause 19, interest would be calculated on the monthly balance outstanding and would capitalised monthly.

The close corporation did not properly pay the monthly instalments as provided for in the bond and the bank issued summons against it for repayment of the loan. The close corporation defended the action on the grounds that the provisions for determination of the interest rate were vague and rendered the bond void for uncertainty. The bank applied for summary judgment.

THE DECISION

A money lending contract is similar to a contract of letting and hiring of property in that, like a provision for rental, the money lending contract must include a stipulation for a particular interest rate or one which can be ascertained without reference to the will of either of the parties. It is fundamental to the validity of the contract that the interest rate should be determined by agreement or by reference to some objective criterion. If the bond had incorporated some such method of determining the interest rate, such as that the bank was entitled to give notice of an interest rate change and thereafter vary the rate accordingly, it would have been unobjectionable. However, the bond did not incorporate a provision to that effect.

Whereas the bank might have been entitled to vary the interest rate, according to banking practice, it was not entitled to unilaterally determine the rate of interest to be paid by the borrower from time to time. Banking practice might entitle a bank to do so in the case of an overdraft, but the general rule that the essentials of a contract must be certain in themselves, applied in the case of a money lending contract. If the contract is lacking in that respect, it is void for vagueness.

It followed that because clause 14 of the bond conferred on the bank the power to vary the interest rate arbitrarily and in its own discretion and without reference to objectively ascertainable criteria, it was null and void. Summary judgment was refused.

FOURIE v SENTRASURE BPK

A JUDGMENT BY VAN DEN HEEVER AJ
NORTHERN CAPE DIVISION
13 JANUARY 1997

1997 (4) SA 950 (NCD)

Insurance

An insurance policy which renders the policy void in the event of the insured making an untrue statement in support of a claim is not rendered void when the insured makes an untrue statement to the insurer's assessor after having submitted a claim and the untrue statement is not made 'in support of' the claim. A provision that such a policy is rendered void in such circumstances refers to a statement made in response to a request for such details as the insurer reasonably requires in terms of the insured's obligation to notify the insurer of the event giving rise to the claim.

THE FACTS

Sentrasure Bpk insured Fourie against damages caused by fire to his house and the contents thereof. In terms of clause 7 of the policy, if in any statement or declaration made in support of any claim, there was an untruth, the policy would become null and void and ineffective. In terms of clause 9 of the policy, the insured was obliged to notify the insurer of any event giving rise to a claim within 30 days of the event and furnish such details as Sentrasure might reasonably require.

A fire took place at Fourie's house. Fourie submitted a claim in terms of the policy to Sentrasure, and Sentrasure appointed an assessor to investigate the claim. The police also investigated the incident, and took fingerprints from various items which had been removed from the house before the fire. The police matched the fingerprints on one of these items, a microwave oven, to the fingerprints of Fourie. They telephoned Fourie and told him of this. He told them that he had recently had occasion to move the oven, and thought that his fingerprints had got onto the oven at this time.

The following month, Fourie stated to Sentrasure's assessor that he had not received any report from the police regarding the incident. He made this statement at a time when the police fingerprint investigation had not yet been completed, and before a later report came from the police regarding further fingerprint findings on the microwave oven. Fourie later admitted that this statement was not the truth, but added that he had thought the police report was of little importance and he did not wish to do anything which might delay the processing of his claim.

Sentrasure repudiated Fourie's claim on the grounds that the provisions of clause 7 applied and the policy had become null and void and ineffective as a result of Fourie's untruthful statement made to its assessor.

THE DECISION

The onus of proving the right to repudiate rested on Sentrasure. Its own evidence however, showed that when Fourie made the statement to its assessor, the police investigation was not complete, and the statement had been made in the face of suspicions by the assessor that Fourie's claim was a fraudulent one. In these circumstances, Fourie's statement could not be considered to be untruthful, despite his later admission that it was.

Even if Fourie were to be held to his admission, because clause 7 referred to any statement made 'in support of any claim', the question still remained whether Fourie's statement had been made in support of his claim. His statement had not been made in terms of clause 9 of the policy, ie it was not one made for the purposes of submitting a claim and providing the details which might be required by Sentrasure in that regard. Yet, this was the statement referred to by clause 7. Any doubt as to which statement clause 7 might be referring to—one made in terms of clause 9 or one made later—had to be resolved in favour of Fourie who had not been the author of the policy. His statement could therefore not be said to have been made in support of his claim, and therefore could not be said to have been made in terms of clause 7. Sentrasure was not entitled to depend on this clause to repudiate Fourie's claim.

Even if this interpretation of clause 7 was incorrect, it had to be remembered that Fourie's state-

ment had been made in response to an investigation by the assessor into the cause of the fire, and the quantum of the ensuing claim—not in support of Fourie's claim. It was also not a statement which, had it not been made, would have resulted in Sentrasure not paying out on the claim. As such, it was not material to the outcome of the claim.

Sentrasure was not entitled to repudiate Fourie's claim.

CADBURY (PTY) LTD v BEACON SWEETS AND CHOCOLATES (PTY) LTD

A JUDGMENT BY MARITZ AJ
TRANSVAAL PROVINCIAL DIVISION
26 SEPTEMBER 1997

1998 (1) SA 59 (T)

Trade Mark

Provided that a trade mark distinguishes the trade mark proprietor's goods from those of another, the trade mark is capable of registration without the addition of any disclaimer, even if the trade mark incorporates a description of the goods or services in respect of which the trade mark has been registered.

THE FACTS

Beacon Sweets and Chocolates (Pty) Ltd was the registered proprietor of the Liquorice Allsorts and Device trade mark. The registered mark contained a memorandum which recorded that registration of the mark would not give the right to the exclusive use of a sweet device separately from the mark. The sweet device was a representation of sweets in a bowl. The memorandum also recorded that a blank space in the mark would only be occupied by matter of a wholly descriptive or non-distinctive character, or by a trade mark registered in the name of Beacon or of which Beacon was the registered user. It was also recorded that Beacon undertook that in use the trade mark would only be used in respect of goods containing liquorice or a liquorice flavour.

Cadbury (Pty) Ltd applied for an order that a memorandum be entered against the mark that the registrant disclaimed exclusive rights in the phrase Liquorice Allsorts separately from the mark and admitted that registration would not debar third parties from describing their confectionery by the phrase Liquorice Allsorts.

THE DECISION

Cadbury was seeking, in effect, a declaratory order that by dealing in sweets under the name 'Liquorice Allsorts' it would not be infringing Beacon's trade mark.

Section 24(1) of the Trade Marks Act (no 194 of 1993) provides that in the event of non-insertion in or omission from the register of any entry, or of any entry wrongly made in or wrongly remaining on the register, or of any error or defect in any entry in the register, any interested person may apply to court for the desired relief. The 'non-insertion in or omission' referred to in this section was a reference to matters such as disclaimers, conditions of registration and memoranda, the non-insertion or omission of which might confer on the registered proprietor rights greater than those to which he was legitimately entitled.

Cadbury contended that this section should be applied in the present case by the addition of the disclaimer because the phrase Liquorice Allsort was not capable of distinguishing Beacon's sweets, as required by section 9 of the Act, because it consisted exclusively of a sign serving to designate the kind or quality of the sweets.

In determining whether a disclaimer should be added, the court exercises a discretion. It determines whether the mark is distinctive, ie adapted to distinguish the goods or services sold by the proprietor of the trade mark. The question was therefore whether the phrase Liquorice Allsorts could be seen as capable of distinguishing Beacon's sweets from the sweets of another person.

The phrase Liquorice Allsorts was not merely a phrase descriptive of Beacon's sweets. It conveyed the meaning of a combination of different sweets sold by Beacon, and was inherently capable of distinguishing its sweets from those of any other person. It was therefore not merely a phrase indicating the kind or quality of the sweets, and its registration as a trade mark did not require the addition of any disclaimer.

The application was dismissed.

METEQUITY LTD v NWN PROPERTIES LTD

A JUDGMENT BY VAN DIJKHORST J
TRANSVAAL PROVINCIAL DIVISION
11 SEPTEMBER 1997

[1997] 4 All SA 607 (T)

Trusts

While a corporate trustee acts through the agency of a natural person who is its nominee appointed in terms of section 6 of the Trust Property Control Act (no 57 of 1988) it is the entity which brings and defends actions and not its nominee. The proper plaintiff or defendant in any such action is therefore the trust itself and not its nominee.

THE FACTS

In July 1990, the Master of the Supreme Court issued Letters of Authority certifying that Peter Quinton in his capacity as nominee of Metequity Ltd and Metboard Ltd was authorised to act as trustee of the Jan Nel Bond Trust. In terms of clause 14 of the trust deed, the trustees were empowered to do all things necessary for the carrying out of any act to be carried out by the trustees, and were empowered to exercise any of the powers conferred on them through any of their duly authorised officers from time to time, including the instituting of any actions affecting the trust.

Metequity Ltd and Metboard Ltd brought an action against NWN Properties Ltd for the recovery of money owing under a mortgage bond passed in favour of the trust. NWN defended the action on the ground that no Letters of Authority were issued to Metequity and Metboard and that they—as opposed to Quinton—therefore did not have locus standi to sue. NWN relied on section 6(4) of the Trust Property Control Act (no 57 of 1988) which provides that if any authorisation is given to a trustee to act as trustee and the trustee is a corporation, such authorisation shall be given in the name of a nominee of the corporation. It contended that the authorisation given in terms of this section was given to the 'duly authorised officers' of the trustees as referred to in clause 14 of the trust deed, ie to Quinton, who alone was entitled to act for the trust.

THE DECISION

NWN's contentions could not be upheld. Every company acts through its directors, and every company required to carry out duties must do so through the actions of a natural person acting on its behalf. The position of a corporate trustee, as the position of any other trustee, is not the same as that of the executor of a deceased estate who is appointed by the issuing of letters of executorship after being nominated in a will. The corporate trustee is appointed in a trust deed and derives its authority from that founding document. That authorisation is later confirmed by the authorisation given by the Master

in terms of the Trust Property Control Act.

An authorisation given in terms of section 6(4) of that Act applies the conferring of such authorisation to the case of a corporate trustee. The section recognises that the trustee is the company and confirms this by referring to the natural person as the company's nominee. The natural person is merely the person to whom representations to the company may be addressed, and the person by whom the actions of the company may be exercised.

NWN's contentions were rejected.

THE MV RECIFE: SAFBANK LINE LTD v CONTROL CHEMICALS (PTY) LTD

A JUDGMENT BY FITZGERALD AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
1 JULY 1997

1997 (4) SA 852 (C)

Shipping

A carrier which is aware of the risks inherent in a product which it agrees to transport for a shipper is not, merely by virtue of its awareness of the risk, precluded from claiming damages from the shipper for damage caused by the product. Provided that the damages arise from something other than the damages which might normally be expected to arise from such a product, in circumstances where Article IV, paragraph 6 of the Carriage of Goods by Sea Act (no 1 of 1986) apply, the shipper is liable to compensate the carrier for damages so sustained.

THE FACTS

Control Chemicals (Pty) Ltd as shipper entered into a contract of carriage with Safbank Line Ltd as carrier for the shipment of calcium hypochlorite aboard the MV *Recife.* As a result of a contaminant or defect in the product or its packaging, an explosion took place in the container holding the calcium hypochlorite, as a result of which Safbank and the other plaintiffs suffered damages.

In terms of clause 6 of the bill of lading, Safbank would not be responsible for the safe and proper stowing of cargo in containers where containers were packed by the shipper. The shipper was to carefully inspect and clean containers before packing them, and agreed to be liable for and indemnify the carrier for any injury loss or damage arising from its failure to stow the goods properly in containers, and for any damage or expense caused by the contents of the container to other property or persons. The bill of lading was governed by the provisions of the Carriage of Goods by Sea Act (no 1 of 1986). Article IV, paragraph 6 of the Schedule to the Act provides that the shipper of goods of an inflammable, explosive or dangerous nature, to which the carrier has not consented, shall be liable for all damage and expenses arising out of such shipment.

In the early 1970s, Safbank received a circular from the P&I club of its ship which indicated that the carriage of calcium hypochlorite had given rise to marine disasters involving fires and explosions. A circular issued by the second plaintiff, the time charterer of the ship, repeated the warning contained in the P&I club circular, and stated that all consignments of the chemical should be shipped on deck at the shipper's risk. In 1976, the second plaintiff's general manager had warned again of the possibilities of accidental ignition of calcium hypochlorite.

Calcium hypochlorite fell within the category of substances provided for by the International Maritime Dangerous Goods Code (the IMDG code). The code provides that the chemical should be stored away from sources of radiant heat. The calcium hypochlorite was in fact stored in a container which was exposed to the sun, and Control Chemicals contended that this was a contributory cause of the explosion which had occurred.

The parties asked the court to determine* whether in consequence of the explosion, Control Chemicals was liable to indemnify the plaintiffs for the loss they had sustained.

THE DECISION

Safbank was aware of the dangers inherent in the shipping of calcium hypochlorite and had accepted the normal risk of carriage of this product. In the case of calcium hypochlorite, the norm is that the product does not explode spontaneously, as is evident from the fact that despite being transported on a continual basis, such explosions are not known to occur continually. Safbank's acceptance of the risk of carrying the product was no more than that determined by the risk of such normal carriage of the product.

The circulars received by Safbank concerning the risks inherent in calcium hypochlorite indicated that it knew of the dangers of this product as they existed at the time when the circulars were issued, and not necessarily as they were when the explosion actually occurred. They were therefore no proof that Safbank had accepted all risks associated with the product at the time it undertook the carriage of the product. The presence in the cargo transported by Safbank of a contaminant or defect, such as was the cause of the explosion in the present case, was not part of the risk accepted by Safbank. Safbank had never contracted to bear this risk, and did not consent to it.

As far as Control Chemicals' contention regarding the contribution of the sun's heat to the explosion was concerned, the terms of the IMDG code were that the heat sources referred to were man-made sources such as flames, sparks and heating coils, rather than the radiant heat of the sun.

It followed that Safbank was entitled to rely on article IV, paragraph 6 of the Carriage of Goods by Sea Act, and accordingly Control Chemicals was liable to indemnify the plaintiffs for the loss they had sustained.

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* The court was also asked to determine the cause of the explosion, and the court found it to have been caused by a containment or defect in the product or its packaging.

PHILOTEX (PTY) LTD v SNYMAN
BRAITEX (PTY) LTD v SNYMAN

A JUDGMENT BY HOWIE JA (EKSTEEN JA, MARAIS JA, SCHUTZ JA and VAN COLLER JA concurring)
SUPREME COURT OF APPEAL
13 NOVEMBER 1997

1998 (2) SA 138 (A)

Corporations

Personal liability of a director for the debts of his company is imposed by section 424 of the Companies Act (no 61 of 1973) where the 'business of the company was ... carried on recklessly or with intent to defraud creditors of the company'. A director alleged to have carried on the business of his company recklessly is measured against the standard of the reasonable person belonging to the same class of person to which the director belongs, and having the same knowledge or means to knowledge possessed by the director.

THE FACTS

Wolnit Ltd was a member of the Rentmeester group, 65% of its shares being held by Rentmeester Versekeraars Ltd.Wolnit's directors acted as a board. They were J Vermooten, P J Gous, PJ Niemandt, S J Nel, S J Du Plooy, SM Pretorius and NB Read.

In January 1986, Wolnit negotiated a new lease in respect of a factory which was owned by Rustenburgse Nywerheid-Beleggings (Pty) Ltd (RNB). The lease was concluded by means of an agreement with the Industrial Development Corporation, which held the shares in RNB. In terms of this agreement, the IDC purchased an option held by Wolnit in respect of the RNB shares for R1,55m. Simultaneously, the IDC gave Wolnit the option to purchase the same shares, which option when exercised would oblige Wolnit to pay the IDC R2,15m. Wolnit would be obliged to exercise this option at the end of the ten-year period of the lease. In Wolnit's financial statements for the 1986 financial year, the sum of R1,55m received from the IDC was reflected as an extraordinary profit, and a sum of R387 875 which the IDC had exacted as the repurchase price for the RNB shares upon termination of an earlier ten-year lease, was reflected as pre-paid rental. Wolnit traded at a loss for the year at R926 150. Shareholders' interest was shown at a positive figure.

After draft financial statements had been prepared for the period ending December 1986, Wolnit's auditors wrote to the company indicating that the company's solvency had depended on the extraordinary profit reflected in the earlier financial statements and that the question was whether Wolnit could continue to operate as a going concern.

In 1987, Wolnit's net loss rose to R1,2m. Trebbob Beleggings (Pty) Ltd, another company in the Rentmeester group, had lent Wolnit money which with interest resulted in Wolnit's indebtedness to that company in the sum of R1,12m as at 30 June 1987, and R2,2m by 29 March 1988. R1,1m of this was later capitalised.The directors explained the loss for 1987 in the same as they had explained the loss in the previous year, ie by ascribing it to weak economic circumstances, undercapitalisation of the concern and uncontrollable factors in the financial controls. In the first half of 1988, the company's loss stood at R762 925.

Wolnit's financial position was discussed at a Rentmeesterbeleggings Ltd (Rentbel) board meeting on 29 March 1988. It was decided that Wolnit would continue to trade and that its creditors would be addressed with letters of comfort. Credit Guarantee Corporation, which had insured against non-payment of Wolnit's trade suppliers, expressed concern about the issue of the letters of comfort and informed the company that it would be limiting its exposure to R1,5m.

In 1988, Wolnit showed a loss of R1,1m. It that year, it announced its intention to enter the fashion market. It also passed two mortgage bonds, one in favour of its banker, Volkskas Bank, and the other in favour of Trebbob. The latter was passed without the knowledge of Credit Guarantee, which had earlier addressed Wolnit with the suggestion that Trebbob's loan be subordinated. A management report to Wolnit's board of directors described the company's results as disappointing, the company's bank account overdrawn close to its limit of R1m, and stated that the company's stocks would have to be sold

at cut prices to maintain cash flow. The report stated that management remained confident that the cash flow position would change, that the results for January 1989 showed a profit before interest, and that the future of the company looked a lot better. A negative shareholders' interest was reflected. Wolnit's board of directors considered this report in February 1989, as well as the company secretary's prediction that a projected loss of only R140 000 at the end of the financial year could be expected. At this meeting, the difficult cash flow position was acknowledged, as well as difficulties with obtaining insurance with Credit Guarantee and the fact that the company's auditors were not prepared to issue financial statements without qualification. One of the directors requested representatives from Rentbel and Rentmeester to guarantee the company's loan account to ensure that the financial statements could be issued. Liquidation of the company was not considered to be an option as the directors considered that the company was in the process of improving.

When the Wolnit board met again in April 1989, it considered the February and March management reports, both of which stated that profit levels before interest were increasing but that cash flow remained critical. Shareholders' interest was shown as negative and the company's problems due to such factors as inflation and increases in input costs were referred to as sources of these problems. The April report stated that there had been a net loss after interest of R34 301, and the May report stated that there had been a net profit after interest of R7 402.

Wolnit's draft financial statements for the 1989 financial year reported a trading loss of R946 936, and they were qualified by the auditors. In July 1989, Wolnit reported on its position to the board of Rentbel, Wolnit's ultimate holding company, indicating that operating capital needed to be injected into the company to ameliorate its cash flow problems, that the only alternative to this as a solution was to sell stock, but that this would affect profitability. Rentbel had in the past supported the company by giving guarantees to creditors such as Volkskas.

The Wolnit board considered management reports for June and July. Both continued to report cash flow problems, giving as the possible solutions either reduction of stocks or the acquisition of funding to hold stock until more realistic prices could be obtained. The reports recommended proper funding for the company and rationalisation within it. The August report stated that there had been a trading loss of R164 124 and ex-stock sales of R303 343 involving cut prices. In November, the Wolnit directors met at the premises of Rentbel. It considered a summary of results for the period July to September. These indicated a trading loss of R594 301 for September and that profit before interest and tax was R938 000 below budget. Gross profit was a negative figure due to sales of finished goods at losses. Trade creditors which had stood at R655 000 in July, then stood at R2,43m. It was decided to sell the business of the company, but nothing came of this. Later in the month, the company was put into liquidation.

THE DECISION

A director alleged to have carried on the business of his company recklessly is measured against the standard of the reasonable person belonging to the same class of person to which the director belongs, and having the same knowledge or means to knowledge possessed by the director. In applying this test, a court should have regard to the scope of operations of the company, the role functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects of recovery.

In determining whether or not a director has been reckless in this sense an evidential test is whether or not the director has allowed the company to carry on business and incurr debts when in the opinion of reasonable businessmen, there would be no reasonable prospect of the creditors receiving payment when due. Were that to occur, the proper inference would be that the business was being carried on recklessly. This is not to say the directors cannot take risks: participation in business necessarily involves taking risks. However, a director may not take the risk of a creditor not being paid when a reasonable businessman would not take such a risk. Such would be the case where it is realised that payment will not be made when payment becomes due, or where it is realised that there is a very strong chance that payment will not be made when payment becomes due. A director's honest belief that payment would be made when due would be irrelevant when the allegation is that he acted recklessly, as opposed to fraudulently.

It must also be remembered that in assessing the director's behaviour, the director's particular knowledge, qualifications and experience may be taken into account.

Applying the legal principles

The 1986 financial statements which showed an extraordinary profit and an asset in the form of pre-paid rental were inaccurate. They were presented by the

directors in that manner in order to show Wolnit in a better light than it actually was, and the effect of this was to mislead creditors of the company. As a result of this manner of rendering the financial statements, the shareholders' interest was incorrectly stated as being positive, whereas it should have been stated as being negative. That figure was a litmus test of solvency and it accordingly showed the company to be solvent when it was not. Whether or not the directors' intention was to prejudice creditors was irrelevant to the question whether they had been reckless. Being a public company, Wolnit's financial statements could have been scrutinised by anyone. Had any creditor done so, it would have been misled by them. Wolnit was factually insolvent at all times from 1986 until its liquidation.

As far as the commercial solvency of the company was concerned, it was significant that the auditors had warned that they might have to add a 'going concern' qualification to the financial statements. Wolnit's directors at all times knew of the company's inability to trade and pay its debts without group support. This should have prompted them, as reasonable businessmen, to obtain certainty on what financial support the group would provide and the duration thereof. In fact, the companies of the Rentmeester group had given only token assistance to Wolnit, held a negative view of its prospects and were not prepared to inject any funds into the company. Its companies made no direct payments to Wolnit's creditors, merely switching existing guarantees from one creditor to another, and its capitalisation of the Trebbob loan was done merely to restore ostensible solvency to the company. Being commercially insolvent, Wolnit was left with the destructive course of having to sell stock to obtain cash flow. The result of this were the losses which eventually led the directors to the conclusion that the business of the company should be terminated. This was a realisation that should have come to them a year earlier.

Wolnit's attitude to its creditors indicated that its directors were carrying on the business of the company recklessly. The directors failed to inform Credit Guarantee of the registration of the bond in favour of Trebbob, when they knew that Credit Gurarantee had expressed concern about Trebbob's position, requesting consideration of the subordination of its claim. The effect of registering the bond in favour of Trebbob was to prejudice other creditors, subjecting them to greater exposure than before. In doing this, the Rentmeester group was taking steps to protect itself and Wolnit was carrying on business in disregard of creditors' interests.

The Rentmeester group had exhibited no confidence in Wolnit. The motivation to carry on Wolnit's business was therefore limited only to the hope that the company would be saved by an amalgamation with another company or a management buyout. The Wolnit board could not say that it had been persuaded by the optimism of the management reports. As reasonable businessmen, they should have discounted the optimism of these reports which had normally been based on generalities. Their incurring of further debt during the months leading up to liquidation of the company showed a complete lack of financial planning which would have been necessary to keep Wolnit from commercial insolvency.

The evidence established that the directors were knowingly parties to reckless trading and were personally liable to the creditors for the debts of the company.

TJ JONCK BK v DU PLESSIS N.O.

A JUDGMENT BY HATTINGH J
ORANGE FREE STATE PROVINCIAL DIVISION
14 MARCH 1997

1998 (1) SA 971 (O)

To show that a person has carried on the business of a close corporation with gross negligence, it is necessary to take into account the scope of business of the corporation, the person's role function and power, the amount of the debts of the corporation, the extent of the corporation's financial difficulties, the prospects of recovery, and the degree to which the person has deviated from the standard of the reasonable man.

THE FACTS

From inception of Price Chain CC in February 1990, the close corporation experienced losses and its liabilties exceeded its assets by more than R400 000. In all but one year of its existence, it continued to make losses, and its liabilities always exceeded its assets. In February 1993, its accumulated loss was R655 956,88 and its liabilties exceeded its assets by some R370 000.

The member of Price Chain, a certain Mr Oosthuizen, lent money to the close corporation throughout its existence. By February 1993, his loan to Price Chain was some R500 000 and he had secured this loan by means of a notarial bond over the moveables of the close corporation.

Oosthuizen owned several businesses and was a successful farmer. He was in control of the business of Price Chain at all times. In May 1993, Oosthuizen's notarial bond was perfected with the granting of an order in the magistrate's court entitling him to take possession of the moveables subject to the bond. At the same time, Price Chain waived all its rights against Oosthuizen.

TJ Jonck BK sold and delivered goods on credit to Price Chain CC. Upon being asked by TJ Jonck about the financial position of Price Chain, Oosthuizen replied that he had struggled for a long time with the business and he was busy with it. He later stated that TJ Jonck's money was safe.

When Price Chain went into liquidation, it owed TJ Jonck R117 639,42 in respect of such sales. TJ Jonck brought an action against Oosthuizen in terms of section 64 of the Close Corporations Act (no 69 of 1984) to declare him personally liable for the debts of Price Chain.

THE DECISION

Section 64 of the Close Corporations Act provides that if at any time it appears that any business of a corporation was being carried on with gross negligence or with intent to defraud any person, a court may declare that any person who was knowingly a party to the carrying on of the business in such manner, shall be personally liable for all or any of the debts of the corporation.

To show that he had done so with gross negligence, it was necessary to take into account the scope of business of the corporation, Oosthuizen's role function and power, the amount of the debts of the corporation, the extent of the corporation's financial difficulties, the prospects of recovery, and the degree to which Oosthuizen had deviated from the standard of the reasonable man.

It was clear that Oosthuizen had actively taken part in the business of the corporation. He was an experienced businessman. From at least February 1992, the corporation was factually insolvent and Oosthuizen had expressed concern about the financial position of the coporation from that time. In passing the notarial bond and perfecting it without the knowledge of his trade creditors, he had acted to their prejudice and purely in his own interests. He had assured TJ Jonck that it would be paid at a time when he knew it would not be.

In these circumstances, Oosthuizen carried on the business of the corporation with gross negligence. In terms of section 64, he was liable for the debts of the corporation.

JOWELL v BRAMWELL-JONES

A JUDGMENT BY HEHER J
WITWATERSRAND LOCAL DIVISION
24 JANUARY 1996

1998 (1) SA 836 (W)

The shares in a company as referred to in a contract will be considered to be the shares in the company so named, even if that company's only asset is the shares in another company the benefits of which are intended to be for the enjoyment of the person holding the shares in the company referred to.

THE FACTS*

Dr A Jowell executed a will in terms of which he created a trust whose trustee, Mrs Jowell, would be invested with the shares in Glencordale (Pty) Ltd. The capital beneficiaries of the trust were to be Dr Jowell's surviving children, and the income beneficiary was to be Mrs Jowell. In the event of Mrs Jowell surviving Dr Jowell, as trustee of the trust, she would not have the power to dispose of the Glencordale shares. In the event of Dr Jowell surviving Mrs Jowell, the trustees would have the power to dispose of these shares.

Glencordale's only asset was a tranche of 247 000 shares in Trencor Ltd. 75% of the shares in Glencordale were owned by Dr Jowell during his lifetime and 25% by Mrs Jowell. During Glencordale's holding of the shares in Trencor, their value increased and at all times they paid a dividend sufficient to support both Dr and Mrs Jowell.

Dr Jowell died in January 1970, leaving his wife and four surviving children, one of whom was the plaintiff. The income from the trust then supported Mrs Jowell, as it had in the past, and the value of the shares in Trencor increased.

In 1989, Mrs Jowell decided to emigrate to Canada. She obtained the advice of stockbrokers, accountants and legal advisers, the defendants, to assist her in deciding how best to arrange her financial affairs in view of her decision. The defendants advised her to sell the shares in Trencor held by Glencordale, lend the proceeds of the sale to the Alan Jowell Trust and cause that trust to purchase Escom loan stock. Mrs Jowell followed this advice, and the effect of doing so was to give her a greater income than she had had previously enjoyed from the trust. The Alan Jowell Trust had been created by Dr Jowell during his lifetime, and in terms of it, Mrs Jowell was entitled to the income from that trust while the four children of the Jowells were its capital beneficiaries.

Jowell, the plaintiff, alleged that the transactions entered into upon the advice of the defendants were in breach of the will trust and were beyond the power (ultra vires) of that trust and the Alan Jowell Trust. He alleged that the result was the loss of assets capable of bringing about the income contemplated by Dr Jowell in his will and the denial of any benefit to the capital beneficiaries. Jowell alleged that the defendant's action was wrongful and negligent and had resulted in loss to him by virtue of the subtraction of the Glencordale shares from the assets of the trust and that this loss amounted in damages to the sum of R10 844 098. He claimed that damages in this amount were calculated by assessing the value of the Trencor shares as at the probable date of Mrs Jowell's death compared to the value of the Escom loan stock as at that date, basing this assessment on the contention that the true subject of the trust was the Trencor shares which were held through the Glencordale shares.

The defendants excepted to the claim on a number of grounds, the first of which was that the amount of the plaintiff's claim was calculated on the value of the Trencor shares whereas the plaintiff had only alleged a right as against the

* (i) This matter being an exception, the facts as stated here are as they were alleged in the plaintiff's particulars of claim. (ii) Some aspects of the exceptions taken, not being of a commercial nature, are not considered in this summary.

Glencordale shares*. The plaintiff's allegation involved the claim that the Trencor shares were subject to a restraint on alienation, but the terms of the will, which were clear and unambiguous, provided for no such restraint and did not give Jowell a vested right to the Trencor shares on the death of Mrs Jowell.

THE DECISION

While the stage when exception was being taken was not an appropriate time for the interpretation of the will or contract underlying the dispute, in the present case the terms of the will would determine the proper assessment of the merits of the exception. In interpreting the terms of the will, it was not permissible to speculate about the intentions of the testator if those terms were expressed plainly in the words of the will, as they were in the present case.

Dr Jowell's will described the subject matter of the trust as the shares in Glencordale. The subject matter of the trust was this asset and not the assets which underlay the shares. Glencordale did not hold the shares in Trencor as nominee of the testator, but as owner of them in its own right. Therefore, whatever attitude Dr Jowell had had toward the shares in Trencor—whether he considered them to be his property or, strictly, the property of another person, Glencordale—he had no power to divest them of Glencordale and vest them in a trust.

Evidence of the circumstances surrounding the execution of Dr Jowell's will, which would suggest that he considered the Trencor shares his own and held merely as a conduit by Glencordale, was inadmissible, because the plain meaning of the words he had used, 'the shares held by me' unambiguously stated that the shares he was disposing of were the only ones he held, ie those in Glencordale and no other company. Those words could not be extended to mean the property of the company whose shares he held.

The fact that the Glencordale shares could not be sold if Mrs Jowell survived Dr Jowell, but could be sold if she did not, indicated that what the testator intended to dispose of in his will was not the property which the shares represented, but the shares themselves. As trustee and beneficiary, Mrs Jowell's inability to dispose of the Glencordale shares ensured that she would retain control of that company, but if she had predeceased Dr Jowell there would have been no need for ensuring the continuation of that control. The testator's apparent intention was to ensure this and not the preservation of the Trencor shares for the benefit of the ultimate beneficiaries.

The exception was upheld.

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* The plaintiff considered the exception to include an attack on the allegation that the rights of the capital beneficiaries vested in them on the death of Dr Jowell. The judge held that their rights did vest in them at that time, Mrs Jowell's rights in the Glencordale shares being purely fiduciary.

GEANEY v PORTION 117 KALKHEUWEL PROPERTIES CC

A JUDGMENT BY KIRK-COHEN J
TRANSVAAL PROVINCIAL DIVISION
12 JUNE 1997

1998 (1) SA 622 (T)

Where a close corporation is conducted as a partnership, ie with the active participation of members between whom a relationship of mutual confidence is necessary for the continuation of the business of the close corporation, the close corporation may be placed in liquidation where there has been a breakdown of that relationship. A court will not make an order for the cessation of a member's interest in terms of section 36(1)(d) of the Close Corporations Act (no 69 of 1984) unless sufficient facts are placed before the court to enable it to make such an order and make further orders as to the acquisition of such interest.

THE FACTS

Geaney brought an application for the liquidation of Portion 117 Kalkheuwel Properties CC, alleging that she was a member of the close corporation holding a 50% interest in it, and that as a result of a breakdown in the relationship between her and the other member, it was just and equitable that the close corporation should be wound up.

The other member, the second respondent, alleged that Geaney had purchased her 50% interest in the close corporation from him but had failed to pay the purchase price of R170 000. He claimed that he had cancelled the sale and in a separate action, claimed retransfer of the member's interest. He responded to Geaney's application with a counter-application in which he sought an order that Geaney cease to be a member of the close corporation and that the court make an order in regard to the acquisition of her interest.

Between Geaney and the second respondent, there were ongoing disputes regarding many aspects of the business of the close corporation. Their relationship was characterised by continuing mistrust and suspicion.

THE DECISION

The business of the close corporation was being conducted as a partnership between Geaney and the second respondent. In these circumstances, its affairs required a personal relationship of confidence and trust between them. Given the breakdown in this relationship, it was just and equitable that the close corporation should be wound up, subject to the merits of the counter-application.

In terms of section 36(1)(d) of the Close Corporations Act (no 69 of 1984) a court may order that any member of a close corporation shall cease to be a member on the grounds that circumstances have arisen which render it just and equitable that the member should cease to be a member and the court may make further orders in regard to the acquisition of the member's interest and the amounts to be paid in respect thereof.

In the present circumstances, the second respondent had not placed sufficient evidence before court to enable it to make an order in terms of this section. There was insufficient evidence to determine what a fair valuation of Geaney's interest was. The evidence that there was was confused and contradictory. The financial affairs of the close corporation might have been uncertain, but greater particularity was required before the court could make an order in terms of section 36(1)(d). A liquidator, being in a position to investigate the financial position of the corporation, could unravel the complexities and bring the liquidation to finality.

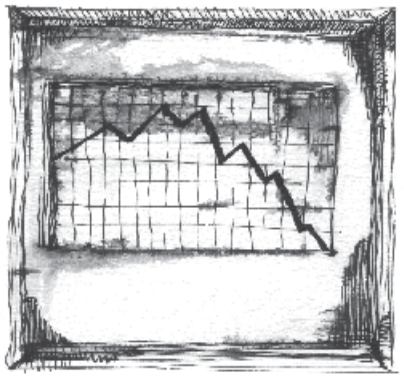
The application for liquidation was granted and the counter-application dismissed.

JEEVA v TUCK N.O.

A JUDGMENT BY LIEBENBERG J
SOUTH EASTERN CAPE LOCAL DIVISION
5 MARCH 1997

1998 (1) SA 785 (SEC)

Insolvency



A party contesting the admission to proof of a claim by a creditor in an insolvent estate has no locus standi to bring a review of such admission to proof merely on the grounds that the admission to proof entitles the creditor to interrogate that party at an enquiry which may be ordered in terms of section 417 of the Companies Act (no 61 of 1973).

THE FACTS

Spirvin Bottling (Pty) Ltd was placed under final liquidation in January 1994. At the second meeting of creditors in June 1996, the second respondent proved a claim of some R11½m against the company, the magistrate presiding at the meeting, Tuck, allowing the claim. The joint liquidators were granted leave to hold an enquiry in terms of section 417 and 418 of the Companies Act (no 61 of 1973) into the affairs of Spirvin.

Jeeva and the second applicant were directors of Spirvin. They objected to Tuck's decision to allow the second respondent's claim and brought an application to review the decision and expunge the claim. They alleged that the second respondent's claim had prescribed by the time it was allowed at the second meeting of creditors. They also alleged that the effect of allowing the second respondent's claim, was to expose them to interrogation by the second respondent at the enquiry, thereby creating the possibility of information so elicited being conveyed to the Attorney General who might institute a criminal charge against them. They alleged that the second respondent was not legally entitled to interrogate them and that if it were given this opportunity, they would be subject to the risk of criminal sanction or personal liability for the debts of the company.

The second respondent and the joint liquidators opposed the application on the grounds that the directors had no locus standi, or right in law, to bring the application.

THE DECISION

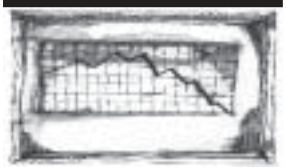
If no enquiry had been ordered, the grounds upon which Jeeva and the second applicant brought the application would have fallen away completely. The relief claimed by the applicants was the review and expungement of a claim brought by the second respondent, but the act complained of, ie admitting the second respondent's claim, had not been a pre-condition to the event which the applicant cited as the basis of its complaint, ie the prejudicial effects of the enquiry. In other words, there was no necessary connection between the admission of the second respondent's claim and the ordering of the enquiry: the applicants could not attack the admission of the claim by referring to the unrelated event of the enquiry. It followed that they lacked locus standi to review the decision to admit the second respondent's claim.

That this was so was also evident from the fact that the applicants had cause for complaint only after the enquiry was ordered. The admission of the second respondent's claim did not, when it was allowed, affect their rights. They were therefore not persons 'aggrieved' by any decision of the presiding officer at the second meeting of creditors.

The applicants had no locus standi to bring the application. The application was dismissed.

DE LANGE v SMUTS N.O.

Insolvency



A JUDGMENT BY CONRADIE J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
29 AUGUST 1997

1998 (1) SA 736 (C)

Section 66(3) of the Insolvency Act (no 24 of 1936) is constitutionally invalid in that it purports to deprive a person of his liberty without recourse a court of law.

THE FACTS

De Lange was the only member of three close corporations which had been wound up. At a meeting of creditors, an application was made for his committal to prison on the grounds that he had failed to produce books and documents which he had been ordered to produce, and that he had failed to answer fully and satisfactorily questions which had been lawfully put to him.

The provision under which it was contended he had been obliged to do these things was section 66(3) of the Insolvency Act (no 24 of 1936). The section provides that if a person summoned to an interrogation under the Act fails to produce any book or document which he was ordered to produce or refuses to answer any question lawfully put to him, the presiding officer at the enquiry may issue a warrant committing the person to prison where he shall be detained until he has undertaken to do what is required of him.

The presiding officer granted the application. De Lange undertook to do what was required of him, and the warrant for his arrest and detention was suspended. De Lange then brought an application reviewing the decision to commit him to prison and seeking an order that section 66(3) of the Insolvency Act was unconstitutional.

THE DECISION

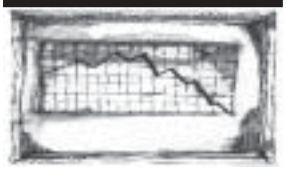
Section 12 of the Constitution of the Republic of South Africa Act (no 108 of 1996) provides that every person has the right to freedom and security of the person, including the right not to be detained without trial. The effect of this section is to declare that only a court of law may deprive a person of liberty.

Section 66 of the Insolvency Act empowers the presiding officer of an enquiry conducted in terms of the Act to commit a recalcitrant witness to prison. The presiding officer fulfils an administrative function, even when he is a magistrate, and as such cannot be considered to constitute a 'court of law'.

The section therefore conflicts with section 12 of the Constitution in that it purports to deprive a person of his liberty without the intervention of a court of law. This in itself might not be unacceptable, given that section 36(1) of the Constitution allows for the limitation of the fundamental rights given in the Constitution by a law of general application, to the extent that the limitation is reasonable and justifiable in an open and democractic society based on human dignity, equality and freedom. However, there was no compelling reason why the coercive steps provided for in section 66 should not be controlled by a court.

Section 66 was inconsistent with the Constitution and invalid. The court's order declaring the the section consequently invalid was referred to the Constitutional Court for confirmation.

DELANGE v PRESIDING OFFICER, PAARL MAGISTRATES' COURT



A JUDGMENT BY SELIKOWITZ J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
FEBRUARY 1998

1998 CLR 129 (C)

A person wishing to enforce the constitutional right to procedurally fair administrative action where any of his or her rights or legitmate expectations is affected or threatened and basing such a claim on an attack on the constitutionality of a particular statute must enforce that right by attacking the constitutionality of the statute. Where the right to information and documents held by parties interested in an enquiry convened in terms of sections 415 and 416 of the Companies Act (no 61 of 1973) is asserted upon the basis that the rights encroached upon in those sections infringe a person's constitutional rights, the appropriate means of enforcing that right is to attack the constitutionality of those provisions.

THE FACTS

In response to a request from the liquidators of three close corporations to subpoena Delange to testify and produce documents at an enquiry held in terms of sections 415 and 416 of the Companies Act (no 61 of 1973), the Presiding Officer, Paarl Magistrates' Court Delange issued a subpoena requiring her to produce documents at the enquiry. His intention was that she would give evidence at the enquiry and produce the documents relevant to the enquiry.

At the enquiry, Delange contended that she was entitled to be informed in advance of the topics in respect of which questions would be put, and to be given in advance copies of all the documents upon which she might be required to testify. The Presiding Officer ruled against her. Delange applied for a review of his decision.

THE DECISION

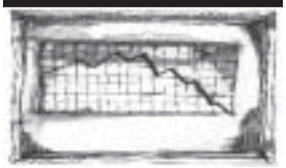
Although the subpoena was limited to the production of documents, the Presiding Officer had nevertheless reached the conclusion when he issued the subpoena that Delange should be called to testify. He considered her to be a person who could appropriately testify, and therefore intended the subpoena to require her testimony as well.

Delange's application for review was based on section 24(b) of the Republic of South Africa Constitution Act (no 200 of 1993) which provides that every person shall have the right to procedurally fair administrative action where any of his or her rights or legitmate expectations is affected or threatened. Delange argued that this section was applicable because section 66(3) of the Insolvency Act (no 24 of 1936) threatened a committal to prison in the event of an interrogee refusing to answer questions put at an enquiry.

The reason for the review being an objection to section 66(3), there was no necessary connection between this and the right to procedurally fair administrative action. In these circumstances, Delange's appropriate remedy was to attack the constitutionality of section 66. The remedy sought by Delange was, in any event, inappropriate because it was impractical to furnish the interrogee with a list of 'topics' to be covered in the enquiry. The purpose of the enquiry was to ascertain facts and report on them to the Master, rather than traverse a series of topics. While in certain instances, those interested in the enquiry would have information concerning the affairs of the insolvent estate, the presiding officer would be able to exercise a discretion as to whether, in the interests of fairness, such information should be imparted to the interrogee before testifying.

The application was dismissed.

LEECH v FARBER N.O.



A JUDGMENT BY NUGENT J
WITWATERSRAND LOCAL DIVISION
26 FEBRUARY 1998

UNREPORTED

A person who is the subject of an enquiry in terms of sections 417 and 418 of the Companies Act (no 61 of 1973) is not entitled to obtain all the information held by a creditor which might be used in the enquiry as the basis for questions to be put to that person, nor is that person entitled to all the documentation held by a creditor in such an enquiry. Proceedings in which such a person is denied such information would not be unfair, nor would they constitute a denial of his enjoyment of his rights as provided for in the Constitution.

THE FACTS

After Needwood (Pty) Ltd had been placed in liquidation, Absa Bank Ltd, which had lent the company R54m, applied to the Master of the High Court for an enquiry to be held into the affairs of the company in terms of sections 417 and 418 of the Companies Act (no 61 of 1973).

The Master authorised the holding of an enquiry, and appointed a commissioner for that purpose. The commissioner summoned Leech and the other applicants to attend the enquiry for examination, and to produce documents relating to the affairs of the company.

At the commencement of the enquiry, Leech's attorney requested the commissioner to rule that the representatives of Absa produce at the enquiry, all the documentation, statements, affidavits and other information held by Absa relating to its auditors, forensic accountants, valuers and other professional advisers, as well as all of Absa's internal and departmental reports and memoranda regarding Needwood which Absa intended to use for the purpose of the enquiry, and state the allegations that Absa would be making at the enquiry.

The commissioner refused to make this ruling. Leech then applied for an order that the court review and set aside the decision of the Master to convene the enquiry, and the commissioner's refusal to make the ruling, and that the court set aside the subpoenas.

THE DECISION

The ground upon which it was contended the court should set aside the decision of the Master to convene the enquiry was that the application to the Master for the convening of the enquiry was insufficiently substantiated. However, the Master has a discretion to authorise the holding of an enquiry and he was entitled to do so where there was fair ground for suspicion, and the person proposed to be examined could probably give information about what was suspected. Unless it was shown that the Master had exercised his discretion improperly, the court should not set aside his decision to convene an enquiry.

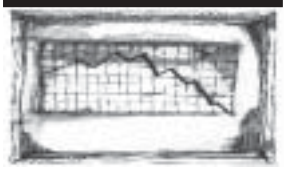
The decision to convene the enquiry could not be disturbed.

As far as the commissioner's ruling was concerned, Leech argued that the commissioner had been bound to rule in her favour, in view of her right to procedurally fair administrative action as provided for in section 33 of the Constitution of the Republic of South Africa Act (no ... of 1996). This raised the question whether the proceedings would be 'unfair', and hence a violation of her constitutional rights, if witnesses were required to be examined without first being given access to the information held by Absa.

The enquiry was essentially an interrogation, the purpose of which was to gather information to enable the affairs of the company to be properly wound up. Interested persons, such as creditors and members of the company, were entitled to question witnesses at such an enquiry. It would be inconsistent with the nature and purpose of the enquiry were such persons to be required to disclose all the information already in his or her possession as a precondition to questioning the witness.

Were the information sought by Leech to be withheld from her, there would be no substantial prejudice to her, if answers to the questions to be put at the enquiry were still required of her.

There was therefore no ground



upon which Leech was entitled to the information held by Absa concerning Needwood.

As far as the documentation was concerned, what was said with regard to the information sought by Leech was equally applicable to this. With regard to the documentation, Leech had referred to section 32 of the Constitution, which assures every person the right of access to all information held by the State or any of its organs, in so far as that information is required for the exercise or protection of any right.

Assuming that the commissioner could be considered an organ of the state, the documentation sought was not in his possession but in the possession of Absa. In such circumstances, it was more appropriate to deal with the interrogee's right to documentation on an ad hoc basis, in the course of the enquiry being conducted by the commissioner. This would mean that documentation could be supplied to Leech as and when this might be necessitated by the questions being put to her. There was however, no reason to supply her with all of the documentation in advance, as sought in the order applied for.

The application was dismissed.

NBS BANK LTD v WIETSCHE JACOBS ONTWIKKELAARS BK

A JUDGMENT BY GOLDSTEIN J (BORUCHOWITZ J and WUNSH J concurring)
WITWATERSRAND LOCAL DIVISION
8 DECEMBER 1997

1998 CLR 141 (W)

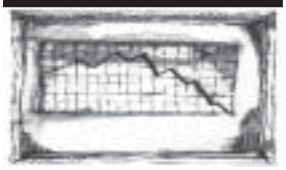
Upon proof that a company or close corporation is factually or commercially insolvent, a party to which that company or close corporation is indebted is entitled to wind up its debtor, notwithstanding the existence of any counterclaim the debtor may have against that party. If however, because one of the parties successfully obtains leave to appeal against the court's order granted following an application to wind up, the debtor discharges its indebtedness before the determination of the appeal, an appeal court will not grant or confirm an order winding up the debtor.

THE FACTS

NBS Bank Ltd brought an application for the winding up of Wietsche Jacobs Ontwikkelaars BK. In asserting its right to bring the application (its locus standi) NBS alleged that Wietsche owed it a total of some R13m arising from three loans made to Wietsche, and that it had suffered damages as a result of Wietsche having participated in a large scale scheme which was fraudulent and had negatively affected NBS's good name and reputation. Wietsche brought a counter-application against NBS designed to enforce the release of its funds under NBS's control in order to allow it to continue its business operations. It denied having participated in a fraudulent scheme as alleged by the NBS.

At the time of NBS's application, Wietsche's liabilities exceeded its assets by R18 436 964. Its last known annual profit was R4 409 644. It owed R48 584 843.52 which had to be paid within 12 months.

NBS's application failed and the counter-application substantially succeeded. NBS appealed. Pending the determination of the appeal, Wietsche applied to enforce compliance with the orders obtained in its counter-application. That application was settled with an order that NBS was to consent to the cancellation of the bonds securing Wietsche's indebtedness to it, upon discharge of the indebtedness. Before the determination of the appeal, this was done, and Wietsche's indebtedness was discharged.



THE DECISION

By the time of the determination of the appeal, Wietsche had discharged its indebtedness to NBS. NBS therefore did not have the right to wind up Wietsche at that stage, and no order that Wietsche should be wound up could therefore be granted. Because Wietsche denied that it had participated in the fraudulent scheme as alleged by NBS, this could not form the basis of any claim that Wietsche was in fact indebted to NBS on that ground.

As far as the merits of the application to wind up Wietsche were concerned, as at the date of the application, in the light of the profit figure of R4 409 644 made by Wietsche in 1995, Wietsche would have had to trade for three to four years just to eliminate its excess of liabilities over assets. However, it also had to pay R48 584 843,52 within 6 to 12 months. It was therefore factually and commercially insolvent, and it ought to have been wound up. Had this happened, Wietsche's counter-application would have been suspended in terms of section 359(1) of the Companies Act (no 61 of 1973) read with section 66 of the Close Corporations Act (no 69 of 1984). The fact that this was not done, and the relief sought by Wietsche had been substantially achieved, relief which merely enforced contractual obligations, meant that despite the fact that the appeal should have been successful, that relief could not be undone. However, because this should have been the result of the litigation, NBS was entitled to the costs of its application and of its appeal.

Where, as in the present case, a corporation is shown to be insolvent to a substantial degree, its assets are practically all mortgaged, it has relatively insignificant free assets and it has overwhelming liabilities that have to be paid in the short term, the position not only does not dictate the exercise of a discretion to avoid a winding-up order; it calls for liquidation to ensue.

VAN HEERDEN v BASSON

A JUDGMENT BY
HARTZENBERG J
TRANSVAAL PROVINCIAL
DIVISION
9 OCTOBER 1997

1998 (1) SA 715 (T)

Contract

Where a contract provides that a third party will in the future determine a price to which both parties must adhere, it is open to one of the parties to apply to court for the correction of a price incorrectly determined by the third party.

THE FACTS

Van Heerden and Basson were the shareholders in InKukuwe Kuikens (Edms) Bpk. They entered into an agreement in terms of which in the event of one party wishing to sell his shares, they were to be sold to the other party at a price determined by the auditor of the company.

Van Heerden resigned as director of the company and signed a share transfer form in blank for the transfer of his shares to Basson. The shares were not valued as provided for in the agreement, and a value of R80 000 was unilaterally placed on the shares. Basson attempted to pay Van Heerden this amount.

Van Heerden brought an action for re-transfer of the shares to himself, alternatively the placing of a value on the shares as provided for in the agreement. In an amendment to his summons, Van Heerden sought an order that he was not subject to the valuation on the shares as provided for in the agreement and that the court should determine their value, and on the basis of that valuation, Basson should be compelled to purchase the shares or re-transfer them to himself.

Basson opposed the amendment on the grounds that the relief sought was not based on any principle of law supporting such relief.

THE DECISION

When two parties agree on the determination of a price by a third party, they have done so because they are unsure of the appropriate price of the item which is to be sold. They therefore depend on the ability, competence and integrity of the third party nominated by them to determine the price. If the determination of the price is done incorrectly, then practically speaking, there has been no price determination and one of the essentials of the agreement is lacking. In such an event, the court has the power to correct the price determination. This is so because price is objectively determined and if it is determined unreasonably, the court may substitute this with a reasonable determination.

Contracting parties which have agreed to a determination of price by a third party have done so in order to reach a speedy and relatively inexpensive method of arriving at such a price. Where a correction has been obtained, because the determination was unreasonable, the parties should be given the choice of deciding whether or not they still wish to abide by the contract.

There was a basis in law for the relief which Van Heerden sought.

ALEX CARRIERS (PTY) LTD v KEMPSTON INVESTMENTS (PTY) LTD

Contract

A JUDGMENT BY MPATI J
EASTERN CAPE DIVISION
23 APRIL 1997

1998 (1) SA 662 (E)

In a claim for breach of a contract of carriage in which it is alleged that the carrier failed to deliver goods in the same condition in which they were received, the onus of proving that the contract was performed without negligence or intention to cause damage rests on the carrier. However, the consignor is still required to prove that the goods were in fact delivered in a damaged condition.

THE FACTS

Alex Carriers (Pty) Ltd contracted with Kempston Investments (Pty) Ltd that Kempston transport 60 reels of paper from Port Elizabeth to George. Kempston subcontracted the carriage to the second defendant.

When the reels of paper reached their destination, the consignee refused to accept delivery because the paper had become damaged by water. Alex claimed that Kempston had breached a term of the contract of carriage under which Kempston had been obliged to deliver the paper in same condition in which it was received. It claimed alternatively that Kempston had failed in its duty of care to take reasonable steps to ensure that the paper did not become damaged.

Kempston defended the action on the grounds that it had not breached the term as alleged nor failed in its duty of care, in that the paper had been delivered in the same condition in which it had been received, ie damaged by water, which damage had occurred during the loading process.

Witnesses for each party gave evidence, those for Alex Carriers testifying that it had not rained when the paper was loaded on Kempston's truck, those for Kempston testifying the opposite.

THE DECISION

In an action based on a contract of carriage the carrier bears the onus of proving that it exercised reasonable care in conducting the carriage and where damages have been incurred in the performance of the contract, acted without negligence (culpa) or intention (dolus) to cause the damage. The fact that the carrier bears this onus does not however, excuse the plaintiff from having to prove that the damage occurred, ie that the value of the goods was upon delivery, less than it had been when the carriage started.

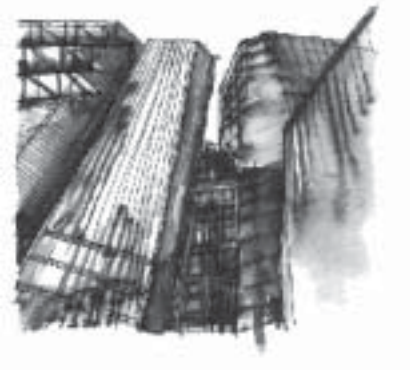
Alex Carriers had presented evidence that the paper was given to Kempston in an undamaged condition. However, the evidence presented by Kempston, that it was raining during the loading process, was more probable than that given by the witnesses for Alex Carriers. Having discharged the onus of proving that it had acted without negligence or intention, Kempston was entitled to judgment in its favour.

BODY CORPORATE OF BRENTON PARK BUILDING NO 44/1987 v BRENTON PARK CC

A JUDGMENT BY McCLARTY AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
4 APRIL 1997

1998 (1) SA 441 (C)

Property



Notification of an intention to adopt rules in substitution of the existing rules of a body corporate under the Sectional Titles Act (no 66 of 1971) by a unanimous resolution at a general meeting of a body corporate may validly precede a unanimous resolution directing the body corporate to let common property, where the effect of the substitution of the rules is to empower the body corporate to enter into such a lease.

THE FACTS

All the owners of sectional title units of Brenton Park were given notice of the inaugral general meeting of the Body Corporate of the Brenton Park Building. In the notice, it was stated that it was proposed that a resolution would be adopted substituting the rules submitted to the Registrar of Deeds in terms of the Sectional Titles Act (no 66 of 1971).

At the meeting, a unanimous resolution was passed adopting the Rules for the Control and Management of the Building and Body Corporate known as Brenton Park in substitution of the rules submitted to the Registrar of Deeds. The Rules so adopted included Rule 63. Rule 63 provided that Brenton Holiday Resort, which was adjacent to the property controlled by the Body Corporate, would be entitled to use a sewerage plant on the property, subject to it being liable for the pro rata share of the costs of maintaining and repairing the plant from time to time. The Rule further provided that the body corporate would enter into an agreement of lease with the owners of the Brenton Holiday Resort regularising the use of the sewerage plant in terms of a draft lease agreement attached to the Rules.

A lease agreement was then signed on behalf of the Body Corporate and on behalf of the Brenton Holiday Resort CC.

The Body Corporate later disputed the validity of the lease, contending that there had not been compliance with section 13(1) of the Sectional Titles Act. That section provides that the owners under a sectional title scheme may by unanimous resolution direct the body corporate on their behalf to let common property under a lease, and thereupon the body corporate shall have the power to deal with such common property in the manner directed and execute any deed for the purpose. A unanimous resolution was defined in the Act as a resolution preceded by a notice specifying the proposed unanimous resolution.

THE DECISION

The Body Corporate contended that there had not been strict compliance with section 13(1) in that the resolution had been that the Rules be adopted—albeit Rules which incorporated a provision that the Body Corporate enter into a lease with Brenton Holiday Resort—and not that the lease be entered into with the Brenton Holiday Resort. The question was whether this constituted a failure to comply with section 13(1) read with the definition of a unanimous resolution as given in the Act.

It was clear at least that Rule 63 was validly adopted by unanimous resolution: here, there had been strict compliance with section 13(1). All of the owners were given notice of the intention to adopt this resolution, and hence notice of a resolution directing the Body Corporate to conclude the lease. There had therefore been proper compliance with section 13(1) in respect of the lease.

The lease had been validly concluded.

HUISAMEN v PORT ELIZABETH MUNICIPALITY

Property

A JUDGMENT BY LEACH J (KROON J and MPATI J concurring)
EASTERN CAPE DIVISION
21 FEBRUARY 1997

1998 (1) SA 477 (E)

A zoning scheme created under powers conferred by a law the administration of which is assigned to functionaries other than those who created the first zoning scheme remains effective and enforceable against the owner of property subject to such a zoning scheme even after the assignment thereof to such new functionaries.

THE FACTS

The Huisamen Family Trust owned fixed property in Port Elizabeth. The property was zoned 'Residential 1' in terms of a zoning scheme for the city established under the Land Use and Town Planning Ordinance (no 15 of 1985). The ordinance specifically excluded property zoned Residential 1 from being used for business purposes.

The trust applied for the rezoning of the property to allow use for business purposes. This application remained pending when the trust let the property to a company which used the buildings on the property as its offices, in violation of the zoning scheme. The Port Elizabeth Municipality then obtained an order interdicting the trust from using or permitting the use of the property for any purposes in contravention of the zoning scheme.

The trust appealed against the grant of the interdict, one of the grounds of appeal being that the power of the local authority to administer and deal with zoning matters could not have survived the termination of the office of Administrator which had taken place when the Constitution of the Republic of South Africa (no 200 of 1993) assigned the ordinance to the province of the Eastern Cape. Without the new functionaries vested with the authority to act under the ordinance acting to approve or re-establish previously existing schemes, the zoning schemes established under the authority of the Administrator were to be regarded as having lapsed and become unenforceable.

The trust also contended that the court should exercise its discretion against granting the interdict, or should postpone the matter, in view of the fact that it had applied for the rezoning of the property.

THE DECISION

There was no reason why a zoning scheme created under the authority of certain functionaries should cease to exist merely because the provisions under which it was created was assigned to other functionaries. Even if there was some reason why such a scheme could be rendered ineffective by the assignment of the empowering provisions to other functionaries, section 10(5)(d) of the Interpretation Act (no 33 of 1957) provided the complete answer to the trust's contentions.

This section provides that any action taken under a law prior to the date on which the administration thereof was assigned shall remain in full force and effect as if it had been taken by the person who was, by virtue of that law, competent to take such action.

This provision, known as a 'savings clause' meant that the zoning scheme had not lapsed or become unenforceable.

As far as the argument that the court ought to exercise its discretion in favour of the trust was concerned, the municipality had shown that all of the requirements for an interdict had been met, and there was no room for the court exercising its discretion in favour of the trust, especially in view of the fact that the continuation of use of the property in violation of the municipal regulations constituted a criminal offence.

The fact that the trust had applied for the rezoning of the property was insufficient reason to postpone the granting of the interdict.

The appeal failed.

MICHAEL v CAROLINE'S FROZEN YOGHURT PARLOUR (PTY) LTD

A JUDGMENT BY MARCUS AJ
WITWATERSRAND LOCAL DIVISION
3 OCTOBER 1997

1998 CLR (W)

A lease providing for the nomination of a close corporation as tenant by the person entering into the lease as nominee for a close corporation to be formed does not necessarily require that the close corporation be in existence at the time when the close corporation is nominated as tenant. Such as lease is ambiguous as to whether the close corporation need be in existence at that time or at a later stage.

THE FACTS

On 30 July 1993, Caroline's Frozen Yoghurt Parlour (Pty) Ltd let to Ms Michael in her capacity as nominee for a close corporation to be formed, Shop 112, Fisherman's Village, Bruma Lake. The agreement was recorded in an agreement of sub-lease in terms of which the provisions of the lease between Caroline's and its landlord (the main lease) were deemed to be included in the sub-lease. In the event of any inconsistency between the main lease and the sub-lease, the terms of the main lease were to prevail. The sub-lease was deemed to have commenced on 1 August 1993.

In terms of clause 13 of the sub-lease, Michael was to nominate the full names and details of the close corporation for whom she was a nominee by 31 August 1993. Should she fail to do so, she would be deemed to have entered into the contract in her personal capacity. In terms of clause 10.9 of the main lease, where the agreement was entered into by a trustee on behalf of a close corporation to be formed, the trustee warranted that the close corporation would be formed within 60 days of the date of the agreement, and until the close corporation became the lessee, the trustee would be liable personally for all obligations imposed on the lessee.

Caroline's brought an action for damages against Michael, alleging that she had failed to pay arrear rental and ancillary charges. It alleged that Michael had failed to nominate the name of the close corporation for which she entered into the sub-lease, alternatively had failed to comply with the provisions of clause 10.9 of the main lease.

Michael admitted that she had not paid the arrear rental and ancillary charges, but pleaded that a close corporation had been nominated in a notification to Caroline's on 19 August 1993, and it was liable for these claims. She also pleaded that in the event of the word 'nominate' as used in clause 13 being understood to mean 'duly formed and incorporated' then clause 13 was inconsistent with the terms of the main lease. The terms of that lease were then to prevail and she had complied with them in that a close corporation had been formed within 60 days of the date of the agreement, ie El Greco Take Aways CC, formed on 8 September 1993.

Caroline's excepted to the plea on the grounds that Michael (i) failed to allege that the close corporation was formed before 31 August 1993, as required by clause 13 of the sub-lease, and (ii) alleged she had complied with clause 13 of the sub-lease by nominating a close corporation not yet in existence as at the date of nomination.

THE DECISION

When an exception is based upon an interpretation of a contract, the excipient must show that the contract is unambiguous.

In the present case, clause 13 of the sub-lease was not unambiguous. It did not expressly state that the close corporation was to have been incorporated by 31 August 1993. It therefore posited two possibilities: that the close corporation nominated by Michael might be a close corporation still to be formed at the time of such nomination, or that that close corporation had to exist at that time. In the face of such ambiguity, Caroline's could not rely on the latter possibility as the only possible interpretation of the clause. Caroline's reliance on this interpretation was crucial to the success of its exception to Michael's plea.

There was some force in the argument that it was impossible to transfer rights by nominating an entity not yet in existence—as was the case in respect of El Greco Take Aways CC as at 19 August 1993. It had to be remembered however, that while this was the position under the common law, both the Companies Act (no 61 of 1973) and the Close Corporations Act (no 69 of 1984) had changed this. The word 'nominate' itself was, according to the dictionary, capable of a number of different meanings.

In view of the uncertainty, the exception had to be rejected.

DEEDAT v THE MASTER

A JUDGMENT BY THIRION J
NATAL PROVINCIAL DIVISION
4 JUNE 1997

1998 (1) SA 544 (N)

The Master is entitled, and sometimes obliged, to exercise a discretion in authorising the appointment of a trustee who has been duly elected as a trustee of a trust. Whether or not the appointment should be authorised is a matter for decision of the Master in the light of the circumstances surrounding the trust and the appointment of the trustees.

THE FACTS

Deedat and the second applicant were trustees of the Islamic Propagation Centre International, as were the second and third respondents. The applicants constituted a faction which held continuing differences with the second and third respondents and there was no co-operation between these two factions.

On 5 February 1993, by a compromise agreement between them, the trustees elected two further trustees, each of them supporting one of the two factions. Neither elected trustee took office because they were unable to furnish security to the satisfaction of the Master. A further appointment of three trustees for the purposes of ensuring the end to deadlock then took place, but none of these took office because none was willing to furnish security to the Master. Three years later, one of these elected trustees, the fourth respondent, furnished security to the Master and applied to the Master for authorisation to act as trustee in terms of section 6 of the Trust Property Control Act (no 57 of 1988). The Master granted the authorisation requested.

Deedat and the second applicant then applied for an order setting aside the Master's authorisation. They contended that the appointment of the fourth respondent would result in the failure of an impartial judgment being brought to bear on matters relating to the affairs of the trust, the fourth respondent being sympathetic to the opinions and views of the second and third respondents.

THE DECISION

Ordinarily, the Master does not need to call for representation before authorising a person to act as trustee of a trust.

However, the present circumstances were not ordinary. The fourth respondent had been elected as a trustee as a result of a compromise entered into between the two opposing factions. That compromise envisaged the appointment of two trustees whose appointment was intended to bring about an equilibrium between the two factions. The later attempt to introduce three new trustees was a further measure introduced to bring about an end to this dispute. This object could not have been achieved by the appointment of trustees whose position would have brought about an imbalance.

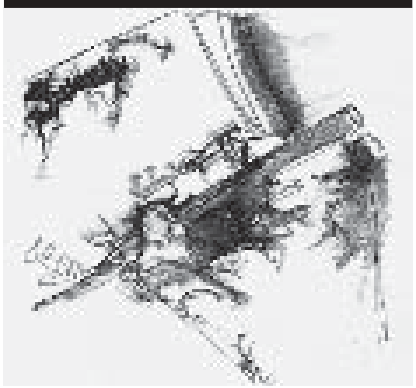
The Master was obliged to have regard to these factors in authorising a new trustee to act for the trust. Since the Master had taken the view that he had no discretion to refuse the authorisation of the newly appointed trustee, he had not acted correctly and the decision to authorise the appointment of the fourth respondent was therefore to be set aside.

ROOMER v WEDGE STEEL (PTY) LTD

A JUDGMENT BY PAGE J
(McCALL J concurring)
NATAL PROVINCIAL DIVISION
24 MARCH 1997

1998 (1) SA 538 (N)

Suretyship



A suretyship provision incorporated in an Application for Credit Facilities form which indicates in its heading that the document incorporates a suretyship provision which itself is printed in bold type adequately notifies the signatory of the application that he is bound as surety by signing as representative of the party applying for credit facilities. Such a signatory bears of the onus of showing that he signed without the intention of undertaking the suretyship obligations if he alleges that he agreed to those terms by mistake.

THE FACTS

Wishing to purchase goods on credit from Wedge Steel (Pty) Ltd, Morningside Light Engineering (Pty) Ltd applied for credit facilities with Wedge Steel using a form headed Application for Credit Facilities. On the reverse side of the form, under the heading Terms and conditions of agreement of sale and deed of suretyship were printed the terms and conditions of the facility. Clause 13 recorded that the party who appended his signature thereto on behalf of the purchaser bound himself as surety and co-principal debtor in favour of the seller in respect of all the obligations of the purchaser.

Roomer signed the form for Wedge Steel. He did not notice the suretyship provision when he did so, but admitted that he was aware of the practice of inserting such provisions when extending credit to small private companies. He did not intend to be bound by the suretyship provision.

Morningside Light Engineering was placed in liquidation and Wedge Steel brought an action against Roomer as surety, depending on the suretyship provision in the Application for Credit Facilities form. Roomer defended the action on the grounds that he did not intend to be bound as surety.

THE DECISION

By putting his signature to the Application form, Roomer indicated his intention to be bound by the suretyship provision. On the basis of that indication, Wedge Steel entered into the contract so that, whatever Roomer's real intention might have been, the parties concluded the agreement with provisions as reflected in the application form, including the suretyship provision. If Roomer was to show that the real agreement was different from this, the onus would be on him to show that he had made a mistake and the mistake was justified (justus).

When Roomer entered into the contract with Wedge Steel, he was not activated by a justified mistake. The fact that Roomer knew that suretyship provisions such as the one he had signed were incorporated in agreements such as the one he signed showed that the possibility of such a suretyship provision being there would have been present in the mind of a reasonable man in the position of Roomer. It was true that a suretyship agreement is normally made the subject of a separate agreement, but the application form did state in its heading that it included a suretyship provision and gave that provision in bold type to draw the attention of the signatory to it. The form could therefore not be said to be a trap and there was no obligation on Wedge Steel to take any further steps to guard against the signatory overlooking the suretyship clause in it.

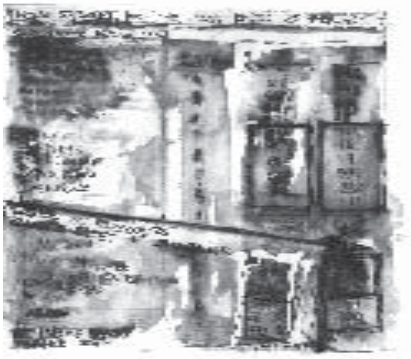
The action succeeded.

NPC ELECTRONICS LTD v S TAITZ KAPLAN & CO

A JUDGMENT BY MACARTHUR J
WITWATERSRAND LOCAL DIVISION
12 MARCH 1997

[1998] 1 All SA 390 (W)

Auditors



An auditor of a company which prepares financial statements for the company cannot be liable to a third party which alleges that it relied on the information contained in the financial statements to extend credit to the company, thereby suffering loss, where the auditor does not reasonably foresee that the third party will rely on the financial statements for that purpose, or does not know that the third party will rely on them.

THE FACTS

S Taitz Kaplan & Co was the sole auditor of a group of four companies known as the Stan Group, for the financial years ending February 1990, 1991 and 1992. It was aware that the results of the Stan Group would be consolidated with those of other companies controlled by Milstan Holdings Ltd, an investment holding company listed on the Johannesburg Stock Exchange. It added no qualified opinions to the financial statements of the companies in the Stan Group.

In the audit conducted by S Taitz for the annual financial year ending February 1991, S Taitz failed to detect an understatement of creditors in the Stan Group amounting to some R2m. This omission was carried forward into the audited results of Milstan Holdings for the year ended February 1991. An over-valuation of the stock of Miltons (1987) (Pty) Ltd, a subsidiary of Milstan Holdings, was also carried forward into the audited results of Milstan Holdings for this year and remained undetected.

In June 1992, S Taitz and Kessel Feinstein, the joint auditors of Milstan Holdings, published the audited results for that company for the year ended February 1992. The financial statements for the company had not then been completed, and the publication erroneously recorded that Milstan's results had been audited. In November 1992, revised financial statements for the company were published. They showed the company to be in an extremely poor financial position. The understatement of creditors remained undetected at this stage, and it was only when doing the audit for the financial year ended February 1993, that the omission came to light.

NPC Electronics Ltd supplied goods to the four companies of the Stan Group of companies on credit. In September 1992, it made available to them additional credit facilities of R5,7m. It alleged that it extended credit facilities after relying on the unqualified reports in the financial statements published by S Taitz. The Stan Group of companies went into liquidation. NPC alleged that as a result of this, and having relied on the financial statements produced by S Taitz, which were false and misleading, it suffered damages. It claimed payment of these damages from S Taitz.

THE DECISION

S Taitz did not conduct a proper auditing procedure. It knew that the Stan Group did not have proper accounting records and it did not carry out its duties as prescribed in section 300 of the Companies Act (no 61 of 1973). The inaccuracies and errors were significant and material and they gave a false and misleading impression of the financial position of Milstan.

There was no evidence to suggest however, that S Taitz had been fraudulent. If NPC wished to depend on alleged negligence on the part of S Taitz, it would have to show that it was close enough to S Taitz to be within the ambit of those to whom S Taitz could be liable in delict (the proximity test) and that S Taitz knew that NPC would rely on the financial statements in giving credit to the Stan Group companies. NPC had not shown this. Prior to 1992, NPC had been willing to give credit without seeing the financial statements of these companies. It had therefore not relied on them. S Taitz could not, in any event, have reasonably foreseen that NPC would rely on the financial statements. It was not liable to NPC in delict.

NPC had also attempted to show that S Taitz was liable to it on the

grounds that section 20(9) of the Public Accountants' and Auditors' Act (no 80 of 1991) applied. The section provides however, that an auditor incurs no liability toward third parties in respect of any opinion expressed or certificate given or report made in the course of the auditor's duties, unless such opinion or report is given maliciously or pursuant to a negligent performance of duties. It had not been shown that S Taitz fell within the terms of this section.

NPC had also not shown that there was any causal link between the financial statements prepared by S Taitz and the loss they had incurred.

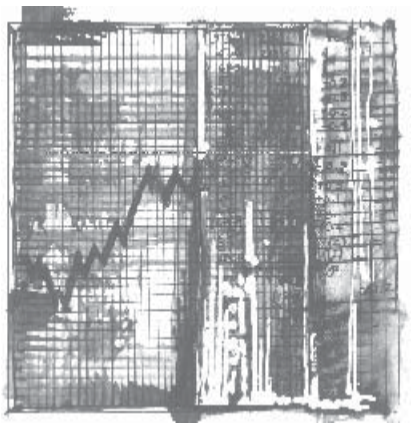
The claim was dismissed.

NBS BANK BPK v DIRMA BK

A JUDGMENT BY DANIELS J
TRANSVAAL PROVINCIAL DIVISION
9 OCTOBER 1997

1998 (1) SA 556 (T)

Real Security



A bond holder may not, without foreclosing in terms of the foreclosure provisions of a bond, take possession of the secured property which is subject to a builder's lien, even after the bond holder has secured a Waiver of Builder's Lien in its favour.

THE FACTS

NBS Bank Bpk lent money to the second respondent for the purposes of the development of a sectional title scheme on property owned by the second respondent. In terms of clauses 5 and 9 of the loan, if in the opinion of NBS, building work was not being proceeded with in a satisfactory manner, or there was undue delay in carrying out the work, or inferior workmanship or material was put into the work, or workmen, contractors or suppliers were not regularly paid, the borrower would be deemed to have committed a breach of the terms of the loan, and the NBS could in its discretion, refuse to disburse further money and remedy defective work in such manner as it might think fit, utilising funds available in terms of the loan. The loan also provided that the borrower would secure the renunciation of rights of retention by any contractors and builders in respect of the property.

The loan was secured by a mortgage bond passed over the property in favour of NBS. Clauses 5 and 9 of the terms of the loan were not repeated in the bond. The terms of the bond did however, record that the capital sum of the loan would immediately become due and repayable in the event of default in paying sums due in terms of the bond and in other circumstances, in which event, the NBS would be entitled to have the property declared executable and eject any occupier from the property.

The second respondent entered into a building contract with Dirma BK in terms of which Dirma was to attend to building work on the property. A day after the passing of the mortgage bond, Dirma signed a Waiver of Builder's Lien in terms of which it agreed that the bond would take priority to any lien or right of retention available to it as building contractor, would not enforce any such right against the NBS and would surrender possession of the property to NBS when requested by the NBS to do so.

Dirma and the second respondent became involved in a dispute between themselves in connection with the building operations at the property. Dirma refused to continue with the work until paid for work it alleged it had done, and the second respondent refused to pay for work which it alleged had not been done properly.

The NBS applied for Dirma's ejectment from the property, basing its claim on its rights in terms of the bond.

THE DECISION

Clauses 5 and 9 of the loan agreement were not part of the terms of the bond and were therefore irrelevant to Dirma. The terms of the Waiver of Builder's Lien did not constitute a general abandonment of the builder's rights in favour of the rights of the NBS, but constituted a waiver of the builder's rights as against the rights of the NBS as recorded in the bond, coupled with an undertaking not to enforce the builder's rights against the NBS to its detriment. The rights of the NBS to possession of the property could therefore follow only from the exercise by the NBS of its rights in terms of the bond, specifically by the NBS calling for repayment of its loan and having the property declared executable.

It was clear that if the NBS were to have foreclosed on the bond in this manner, it would have been entitled to take possession of the property, and in such circumstances, Dirma's right of retention as builder would have fallen away in terms of the Waiver of Builder's Lien. This abandonment of rights by the builder would also operate only in the event of NBS asserting its rights in this way, since the builder's right of retention stands in priority to that of the bond holder and therefore subsists until superseded by the exercise of a right specifically excluding it.

The application was dismissed.

LIEBENBERG v ABSA BANK LTD

A JUDGMENT BY TRAVERSO J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
24 MARCH 1997

[1988] 1 All SA 303 (C)

Banking

When a bank's customer alleges that a bank has paid a cheque drawn on its account without proper authority, its claim against the bank is not appropriately framed as a claim for delictual damages, but a claim for breach of the contract of mandate subsisting between bank and customer.

THE FACTS

Liebenberg brought an action against Absa Bank Ltd, alleging that in terms of an agreement between the parties, he operated a banking account with Absa and that the bank would pay out cheques properly drawn on the account. He alleged that he drew a cheque, stating the amount in words as 'one hundred and fifty rand' and in figures 'R150 000', and that the bank paid the sum of R150 000 upon presentment of the cheque.

Liebenberg alleged that whereas he had intended to pay R150 000, the bank acted wrongly in paying the cheque as it was under a duty to exercise reasonable care toward him in his capacity as a customer of the bank. In breach of this duty, and in disregard of section 7(2) of the Bills of Exchange Act (no 34 of 1964), the bank had paid the cheque without first seeking clarification from him. Had the bank done so, Liebenberg would have countermanded payment of the cheque because by then, the fact that Fundstrust, the payee, was facing imminent liquidation, would have been known to him.

The bank excepted to the claim on the grounds that it was not clear whether Liebenberg claimed in contract or in delict. Assuming contract, no allegation was made of any term breached by the bank. Assuming delict, there was no basis in law for delictual liability.

THE DECISION

Liebenberg's allegations rested on the allegation that the bank's obligation arose out of a contract between him and the bank. This confined his claim to an action of debt arising out of the banker-customer relationship.

As the bank's creditor—since the bank held funds belonging to Liebenberg—Liebenberg's appropriate form of relief was to bring an action against the bank for payment of the debt due to him. If the funds were not there, because the bank had paid them in terms of the contract of mandate subsisting between itself and Liebenberg, this course however, would not be open to him, and the bank would have a sufficient reason for not paying such a debt. In the present context, having paid the money to Fundstrust, the bank did have a sufficient reason for not paying the alleged debt, and Liebenberg could not insist on payment of a debt which was not due.

Were Liebenberg to proceed against the bank in contract, he would have had to allege that payment had been made by the bank contrary to the terms of the mandate between him and the bank. This Liebenberg could not allege, because in paying the cheque, the bank had acted according to the terms of its mandate, and not contrary to them.

TELEFUND RAISERS CC v ISAACS

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
28 JULY 1997

1998 (1) SA 521 (C)

Competition

A customer list which contains confidential information may be protected from use by a competitor since the information contained therein is considered to belong to the party which compiled it. Whether or not it contains confidential information will depend inter alia on whether the belief that it does contain such information is reasonable and whether or not the use of it by the competitor will give it an advantage which it gains from the information compiled in it, even if such information is obtainable from public sources such as a telephone directory. The fact that a person formerly engaged with the person asserting the right to such confidential information was engaged on a commission basis and as an agent does not preclude that person from obtaining an interdict preventing its use by the competitor to whom the agent has changed its allegiance.

THE FACTS

Isaacs and two other respondents were employed by Telefund Raisers CC. While so employed, they signed acknowledgements that during the course of their work, they came into contact with trade secrets, client lists and other confidential information used by Telefund. The confidential information they in fact came into contract with consisted in, inter alia, client lists being lists of names and telephone numbers of Telefund's customers, together with such information as the customer's contact person and details of sales concluded with them.

Telefund's business consisted in selling presentation baskets containing beverages, fruit and other foodstuffs and allocating part of the proceeds to charity. It built up a clientele of 4000 customers over the years of its operations and acquired a certain amount of goodwill in the form of repeat business from its customers.

Isaacs and the other two respondents left Telefund's employment and began work for the fourth respondent, which was engaged in a similar business to that of Telefund and competed with it. They took with them Telefund's client lists, and used them for promoting the business of the fourth respondent, taking the view that because they had been engaged with Telefund on a commission basis and as independent contractors or agents, they were entitled to keep the client lists and use them in their employment with the fourth respondent.

Telefund then obtained an *Anton Piller* order entitling the sheriff and a supervising attorney to enter the fourth respondent's premises in order to search for documents belonging to Telefund as well as certain relevant documents of the fourth respondent. Telefund also sought further relief, ie that Isaacs and the other two respondents be restrained from using or disposing or disclosing to any person any of Telefund's confidential information, including the identity of Telefund's customers, and from holding themselves out as being employed by or representative of Telefund. After the *Anton Piller* order was executed, Telefund applied for confirmation of the relief it sought.

THE DECISION

Whether or not what the respondents did was lawful depended on the question whether the information they took with them was confidential information. If it was, Telefund was entitled to interdict them from using it in the manner in which they did.

Telefund always regarded its customer lists as confidential—so much was clear from the fact that it required its employees to sign an acknowledgement that this was so. Although it would not be confidential information merely because Telefund stated that it was, it was clear that the information did have 'the necessary quality of confidence about it', ie was not something which was public property or public knowledge. The court was entitled to apply this definition, in the light of the principles (as established in previous judgments) for determining whether or not information would be considered confidential information.

Telefund's belief that the information it considered confidential was confidential was not unreasonable. Its release to a competitor would be injurious to it and advantageous to the competitor. The customer list took time and effort to compile. The customers were likely to want to place

further orders for products Telefund had sold them. They therefore represented a potential market for those products.

The fact that the names of the customers could be obtained from other sources, such as the telephone directory did not make the customer list any the less confidential, since the information contained in that source was useless until it was known who the customers were. The fact that Telefund had extracted that information in its own list constituted a valuable resource which would save the person wanting such information much time and effort in its compilation. Allowing the competitor the use of it would allow it a springboard from which to compete with Telefund. In any event, the customer list also contained other information which could not be extracted from a public source such as a telephone directory.

The information the respondents had taken with them was not the kind of information that could have been taken as a mere incident of the benefits of their employment. It was information that could be useful to the fourth respondent. It was confidential information and to the advantage of the fourth respondent.

As far as the contention that the respondents were entitled to the information because they had been engaged with Telefund as agents and not employees was concerned, this was no answer to Telefund's claim. It was entitled to protection of its confidential information in respect of agents as much as in respect of employees. The customer list still belonged to Telefund and the customers recorded on it were still Telefund's customers, even if the respondents had been its agents and not its employees.

The interdict sought by Telefund was granted.

JOUBERT v IMPALA PLATINUM LTD

WADDINGTON AJP
BOPHUTATSWANA HIGH COURT
12 JUNE 1997

1998 (1) SA 463 (B)

In proving that one is covered by the terms of an insurance policy which qualifies the person entitled to claim under the policy as an employee of a certain type, it is not essential to allege that the claimant is such a person, provided that it is sufficiently clear what the claimant is suing for and the claimant has given sufficient particularity for it to be seen that he is an employee as qualified in the policy. A claim based on a failure to perform obligations imposed in a contract may establish delictual liability, even if the establishment of such liability depends on the allegation that the defendant failed to perform contractual its obligations.

THE FACTS

Joubert was employed by Impala Platinum Ltd. When so employed, Impala had entered into a policy of insurance with the Rand Mutual Assurance Co Ltd in terms of which Rand Mutual undertook to pay certain benefits to an employee of Impala in the event of the employee meeting with an accident in the course of his employment.

In terms of the insurance policy, benefits claimable under the policy were restricted to employees who had entered into an employment contract incorporating an agreement that benefits payable under the policy would represent the total and entire claim of the employee, and that any claim for compensation other than those payable under the policy would be waived. The policy also provided that notice of any accident likely to involve a claim for compensation was to be given by Impala to Rand Mutual as soon as reasonably possible after the accident.

Joubert met with an accident in the course of his employment. He brought an action against Impala for payment of damages of R513 277, alleging that he was employee who was covered by the insurance policy, that he had timeously reported the accident to Impala and had furnished it with the documentation necessary for bringing a claim under the insurance policy. The insurance policy was annexed to the particulars of claim. Joubert alleged that despite Impala's obligation to give notice of the accident to Rand Mutual and transmit relevant documentation to it without delay, Impala failed to do so. He alleged that as a result of Impala's negligence in failing to perform as required in terms of the policy, his claim under the policy had prescribed and he had suffered damages in the sum claimed.

Impala excepted to the claim on the grounds that the particulars failed to aver that Joubert had been an employee who had been employed with Impala in the manner required by the insurance policy, ie incorporating an agreement that benefits payable under the policy would represent the total and entire claim of the employee, and that any claim for compensation other than those payable under the policy would be waived. It also excepted to the claim on the grounds that the claim failed to make out a case that Impala had breached a duty of care giving rise to delictual liability, because the claim was based on Impala's failure to comply with its contractual obligations. Its third exception was that Joubert had not set out any basis for recovery of economic loss.

THE DECISION

The point of the first exception was that Joubert had to make allegations that, if proved, would show that he was at least covered by the insurance policy. He had to allege that the risk insured against had eventuated.

Construing the policy as a whole, the restriction on the persons to whom the benefits of the policy could be conferred as provided for in the policy, ie those employees whose contract of employment incorporated the agreement regarding claims, was a qualification of the promise by Rand Mutual to pay, rather than an exception to its obligation to pay. The onus of proving that the qualification applied rested on Joubert. The question was whether the allegations made in his particulars of claim properly placed Joubert in a position to discharge this onus.

It was reasonably clear what Joubert was suing for. The insurance policy had been annexed to the particulars of claim, and this together with the averments made in the particulars of claim, made it clear to Impala why the claim was being brought. On the basis of these averments, Joubert would be able to lead evidence to prove that he had been covered by the insurance policy.

The first exception to the particulars of claim was dismissed.

As far as the second exception was concerned, the question was whether the claim as formulated, adequately contained all of the essential elements for a delictual action, ie that Impala's omission was wrongful, that Joubert's interest was worthy of legal protection, that the loss he sustained was foreseeable and that Impala owed Joubert a duty of care.

The fact that the claim referred to the terms of the contract between Joubert and Impala as the source of certain obligations arising between these two parties, was no bar to establishing a delictual claim by Joubert against Impala. It was necessary to refer to the terms of this contract in order to do so. Having established the existence of these obligations, Joubert was able to further allege that Impala had negligently failed to honour those obligations and make out a case that Impala was under a duty of care to have done so. Any delictual liability so established would not be inconsistent with any contractual liability which Joubert might also establish.

The second exception was dismissed.

As far as the third exception was concerned, it had already been established as a matter of principle, that delictual liability could give rise to a claim for economic loss only. The loss alleged by Joubert was not indeterminate, its amount having been set out in the particulars of claim.

This exception was dismissed.

BERZACK v NEDCOR BANK LTD

A JUDGMENT BY LOUW J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
1 APRIL 1998

1998 CLR 169 (C)

Banking

A bank which negligently fails to comply with statutory requirements laid down in exchange control regulations by not retaining custody of certificates reflecting a non-resident customer's holdings in South African securities, is not liable to the customer for losses arising from the dishonesty of the customer's agent in whose custody the certificates have been left, merely because the bank has failed to comply with those statutory requirements.

THE FACTS

Berzack emigrated from South Africa in 1981. In terms of regulation 2(2)(a) promulgated under section 9 of the Currency and Exchange Act (no 9 of 1933), he left in South Africa the balance of his assets after taking out of the country an amount as a settling-in allowance. His cash assets were placed in a blocked account held with Nedcor Bank Ltd and his other assets were placed under its control. The regulations provided that all securities held in this manner were to be endorsed with the words 'non-resident'.

In 1990, Berzack entered into a share portfolio management agreement with Table Mountain Trust Co Ltd (TMT) in terms of which he authorised TMT to manage and administer his portfolio of securities. Pursuant thereto, TMT purchased Escom stock with a nominal value of R2m through its stock brokers. Payment of R1 525 354,80 was made from Berzack's blocked account and a certificate was issued by Escom reflecting the name of the registered owner, Table Mountain Trust Nominees (Pty) Ltd, TMT's nominee shareholding company.

TMT received the certificate but failed to submit it to Nedcor, as it was obliged to in terms of the regulations and in terms of a general undertaking earlier given to the Reserve Bank. Nedcor failed to comply with standard banking practice in that it did not insist on delivery of the certificate in order to endorse it and take it into its custody.

After Berzack entered into the share portfolio management agreement, TMT furnished Nedcor with a General Power of Attorney given in its favour by Berzack and proof of its authority to act as nominee for non-residents. It confirmed that it expected that future assets acquired by blocked funds would be registered in the name of Berzack and held at Nedcor. In subsequent transactions, in which Nedcor sought and obtained Reserve Bank permission for the adjustment of Berzack's assets, the Reserve Bank ruled that Nedcor was to retain control over Berzack's blocked account.

From time to time, TMT remitted interest on the Escom stock to Nedcor, informing it that its nominee company held the certificate for the stock, and requesting that the interest be deposited in Berzack's account, then transferred to Berzack. In breach of the regulations promulgated under section 9 of the Currency and Exchange Act (no 9 of 1933), which provided that only the authorised dealer under whose physical control a former South African resident's assets were held could allow the remittance of current income earned in the Republic.

Alleging that an employee of TMT sold his Escom stock and stole the proceeds, Berzack brought an action against Nedcor, claiming the loss he had thereby suffered. He founded his claim in contract and in delict.

THE DECISION

Contract

Assuming (without deciding) that it was a term of the contract between Berzack and Nedcor that Nedcor was obliged to comply with all the conditions laid down in the regulations, it was clear that TMT and Nedcor had acted in breach of their contractual obligations. However, the loss suffered by Berzack as a result of this breach was too remote for Nedcor to be held accountable for it. It did not flow naturally and generally from the breach, and the loss was not foreseeable at the time when the contract was entered into. The parties did not actually, or as a

matter of presumption, contemplate that the loss would probably result from the breach.

The claim in contract could therefore not succeed.

Delict

Berzack alleged that Nedcor owed him a duty to act in accordance with exchange control legislation, and having negligently failed to comply by failing to obtain custody of the Escom stock, he had suffered loss when the proceeds of the stock were stolen by TMT's employee.

Nedcor did not however, owe Berzack a legal duty to comply with the exchange control legislation. Mere infringement of the statutory provision could not be considered unlawful in the sense that there had been an infringement of Berzack's interests, where the alleged infringement was alleged to be in respect of economic interests, as opposed to physical damage to property or the person.

The requisites for proving that the breach of a statutory duty gives rise to a claim for damages are that the statute was intended to give an action and that the damage was of the kind contemplated by the statute. The object of the exchange control legislation is to regulate the flow of capital in and from the Republic in order to protect the country's foreign exchange reserves. It is not to protect the assets of a person which are subject to that legislation, against the unauthorised conduct of the agent of that person. Nedcor's failure to comply with the legislation was therefore not unlawful in respect of Berzack.

Assuming that the loss was caused by Nedcor, in the sense that it was reasonably foreseeable that its negligence could have resulted in the loss which did occur, policy considerations and considerations of fairness and justice did not require that Nedcor should be responsible for the dishonesty of Berzack's own agent.

Berzack's claim was dismissed.

ESS KAY ELECTRONICS v FIRST NATIONAL BANK

A JUDGMENT BY
BORUCHOWITZ J
WITWATERSRAND LOCAL DIVISION
11 FEBRUARY 1998

1998 CLR 244 (W)

A bank is not responsible for the actions of its employee when that employee acts purely for his own gain and beyond the scope of his authority as employee

THE FACTS

A departmental head at First National Bank who was authorised to deal and issue foreign bank drafts, unauthorisedly took two blank bank drafts from a strongroom at the bank and made them out in favour of Ess Kay Electronics Pte Ltd and Sugnomal Holdings Pte Ltd, for US$130 000 and US$120 000 respectively. He added his signature to the drafts, then handed them to a certain Mr J Clack who gave him R10 000 for the drafts. The forged drafts were then forwarded to their payees who delivered goods to South African customers on the strength of them. The forgeries were discovered and Ess Kay and Sugnomal suffered damages in the amounts of the drafts. They brought an action against the bank, claiming that because of the employment relationship between itself and the departmental head, it was vicariously liable for itslosses.

THE DECISION

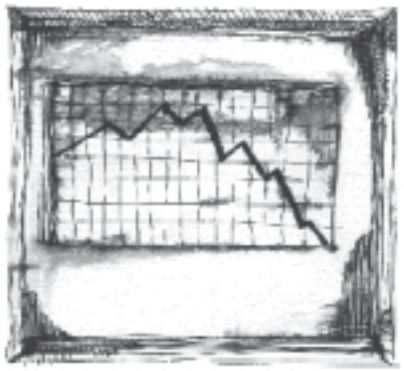
The bank as employer would be vicariously liable for the wrongs done by its employee if the employee was engaged in the affairs of his employer when the wrong was done. However, the bank would not be so liable if in doing the wrong, the employee had exclusively promoted his own interests and had completely disengaged himself from the duties of his contract of employment. The departmental head had done just this: he had committed theft and fraud solely for his own financial benefit. He acted outside his authority, had not complied with internal procedures prescribed by the bank, did not advance the interests of the bank and he had been aware that the forged documents were valueless and would not be honoured on presentation. The bank could not be held vicariously liable for the wrongs done by the departmental head. The action was dismissed.

VAN ZYL N.O. v TURNER N.O.

A JUDGMENT BY BRAND J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
27 OCTOBER 1997

1998 (2) SA 236 (C)

Insolvency



Money deposited into a banking account is the property of the account holder, but it may also be property, in a wide sense of the term, of one who has ultimate control over the money. It may therefore be considered property in respect of which a disposition is made which has the effect of preferring one creditor above another, within the meaning of section 29(1) of the Insolvency Act (no 24 of 1936). Such property extracted from an insolvent person by unorthodox demand may be considered to have been disposed of by means other than in the ordinary course of business.

THE FACTS

Mr H Sommerfeld invested R600 000 in a 31-day call account with Mr M Felthun. Sommerfeld gave notice for repayment of the R600 000. Felthun was unable to repay the money but, upon demand having been made on him by Sommerfeld's attorney, Felthun obtained a loan for R600 000 which he arranged to have disbursed by means of a deposit to the account of Citiprop CC, a real estate agency.

The money was so disbursed, and Citicorp then arranged for the issue of a bank cheque for R600 000 by Citiprop's bank in favour of Sommerfeld. Sommerfeld received payment. At this time, Felthun's liabilities exceeded his assets.

A little more than two months later, Felthun's estate was sequestrated. His trustee brought an action against the deceased estate of Sommerfeld, claiming that the payment of R600 000 to Sommerfeld was a voidable preference within the meaning of section 29(1) of the Insolvency Act (no 24 of 1936).

Section 29(1) provides that every disposition of property made by a debtor not more than six months before the sequestration of his estate which has had the effect of preferring one creditor above another, may be set aside by the court if immediately after making the disposition, the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

THE DECISION

In establishing its case based on section 29(1), Felthun's trustees had to prove that the payment made to Sommerfeld was a disposition of Felthun's property.

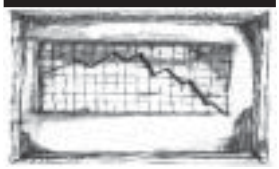
The money deposited into Citiprop's bank account was Felthun's property in the wide sense of the term. Although the money was strictly the property of Citiprop, in effect it held the money as Felthun's agent, and therefore Felthun held the right of disposal over it. The arrangements by which the money was given to Sommerfeld showed that this property had been transferred to Sommerfeld and constituted a disposition of the property within the meaning of section 29(1). It was therefore clear that there had been a disposition of property by Felthun in favour of Sommerfeld.

Sommerfeld's executor contended that the disposition had not been made with the intention to prefer one creditor above another. Felthun's intention had been to protect himself against the demands made by Sommerfeld's attorney. His primary motive was therefore not to prefer any creditor above another.

However, Sommerfeld's executor's second contention, that payment was made to Sommerfeld in the ordinary course of business, could not be accepted. The demand made on Felthun by Sommerfeld's attorney was made at a time when it was known that Felthun could not pay the sum owing to Sommerfeld. The inference that could be drawn from this was that the demand was made with the possible foresight that Felthun could only obtain the money by dishonest means. The payment that followed such a demand could not be considered to have been effected in the ordinary course of business. The method of payment was also unbusinesslike and suggested that the payment was not made in the ordinary course of business.

The action succeeded.

GORE N.O. v ROMA AGENCIES CC



A JUDGMENT BY COMRIE J
(BRAND J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
5 NOVEMBER 1997

1998 (2) SA 518 (C)

When a liquidator decides to complete a contract for a company in liquidation the decision does not automatically involve a decision to complete an associated contract, such as an agency agreement in terms of which a commission becomes payable upon completion of the principle contract. A claim for such commission in those circumstances does not arise as a cost in the administration of the insolvent estate.

THE FACTS

Roma Agencies CC agreed with a company known as Sechic that it would introduce orders from customers which Sechic would then be at liberty to fulfil. If it did fulfil the order, Roma would be entitled to a commission payable 30 days after delivery of the goods by Sechic to the customer.

Sechic was placed in liquidation. At that time, Roma had obtained unfulfilled orders to the value of at least R155 378,57. Sechic executed the orders and Roma claimed the full amount of the commission of R6 732,21 which then became due. The liquidator, Gore, disputed the claim.

THE DECISION

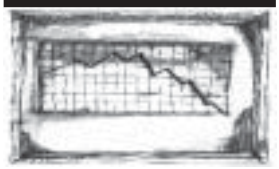
When a party to an executory (uncompleted) contract is placed in liquidation, performance under the contract cannot be enforced against the liquidator until the liquidator decides whether or not to continue with the contract. Only if the liquidator decides to continue with the contract, must he perform all the obligations of the contract.

In the present case, the liquidator decided to continue with the contract for the supply of the goods, but that decision did not necessarily include a decision to continue with the agency agreement. The two contracts were separate and it could not be said that by deciding to fulfil the order obtained by Roma the liquidator had decided to complete the agency agreement. Roma's commission was therefore not payable on the grounds that the liquidator had decided to complete the agency contract.

It could also not be said that by the nature of the agency agreement, Roma would not obtain any claim against Sechic until an order was fulfilled and that upon fulfilment, its claim would arise as a cost of administration in the insolvent estate. No such claim could arise without there having been a prior contingent claim, which Roma could not assert that it had.

The claim was dismissed.

BANK OF LISBON INTERNATIONAL LTD v WESTERN PROVINCE CELLARS LTD



A JUDGMENT BY GOLDSTEIN J (GOLDBLATT JA and FEVRIER J concurring)
WITWATERSRAND LOCAL DIVISION
15 OCTOBER 1997

1998 CLR 27 (W)

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.

PATERSON N.O. v KELVIN PARK PROPERTIES CC

Insolvency

A JUDGMENT BY LEACH J
EASTERN CAPE DIVISION
10 JULY 1997

1998 (2) SA 89 (E)

A person will be considered a 'trader' within the meaning of the term in section 34(1) of the Insolvency Act (no 24 of 1936) even if he ceases to carry on business, provided that he continues to trade in the broad sense of the term.

THE FACTS

Schutte owned fixed property and ran a butchery business on the property. A portion of the property was also used as a residence and for the running of a general dealership. In March 1994, following a fire at the property, Schutte ceased to trade as a butcher. On 26 April 1994, he sold the property for R96 420, and various items of equipment used in the butchery to Kelvin Park Properties CC. Transfer of the fixed property took place on 9 May 1994 and the moveable items in the same month.

On 9 June 1994, Schutte's estate was provisionally sequestrated. His trustee, Paterson, then brought an action against Kelvin based on section 34 of the Insolvency Act (no 24 of 1936) claiming retransfer of the fixed property and the value of the moveable assets. In January 1995, Kelvin had sold the moveable assets to a certain Mr Krause. The value of these assets then was R46 400.

Section 34 provides that if a trader transfers any business belonging to him or any goods forming a part of it, and the trader has not published notices of intended transfer within a specified period before date of transfer, the transfer will be void as against creditors for a period of six months after transfer and void against the trustee of his estate, if his estate is sequestrated at any time within the said period.

Paterson alleged that at the time of the sales, Schutte had been a trader within the meaning of this section, and that the fixed property and butchery equipment had formed part of Schutte's business. Kelvin denied that Schutte had been a trader within the meaning of the section, since he had ceased to carry on business as a trader from the time of the fire.

THE DECISION

Carrying on business is not the same as actively continuing to trade: it is possible for a trader to cease active trading while continuing to carry on business. This might happen where, for example, a trader temporarily stops trading in order to take a holiday, while continuing with other aspects of the business, such as the collection of debts and the payment of creditors. Section 34(1) however, is not restricted to a trader who actively continues to trade. It also applies to the trader who carries on business in the wider sense, ie engages in activities including, but going beyond, those of normal daily trade.

This interpretation of section 34(1) is in keeping with the purpose of the section, ie to protect creditors and prevent traders who are in financial difficulties from disposing of their business assets to third parties who cannot be held liable for business debts.

In the present case, Schutte had trade creditors at the time he sold the fixed property and the business assets. He also had business debtors. These were facts indicating that he did continue to trade in the broad sense, and was therefore a 'trader' as envisaged in section 34(1).

Kelvin was obliged to pay Paterson the value of the goods as it was when they were sold to Krause. This was the date on which the wrong had been done of which Paterson complained. On this date, Kelvin had known of Paterson's claim.

As far as the sale of the fixed property was concerned, the fixed property itself was, properly considered, an asset of the business. Although a part of it was used for non-business purposes, it had to be considered as whole. Given the use to which it was put, it could be considered a business asset, and one to which section 34(1) applied.

The sale of the fixed property was set aside and Kelvin ordered to pay the value of the moveable assets as at the date of their sale.

HÜLSE-REUTTER v HEG CONSULTING ENTERPRISES (PTY) LTD

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
15 AUGUST 1997

1998 (2) SA 208 (C)

Opposition to an application for winding-up of a company should succeed where the opposition is shown to be both bona fides and based on reasonable grounds for disputing the application.

THE FACTS

Hülse-Reutter brought an application for the winding up of HEG Consulting Enterprises (Pty) Ltd. HEG owned property in Cape Town, as well as shares in a property-owning company. Its director was a person resident abroad. Prior to the application, a certain J Harksen was declared to be the sole beneficial owner of all the company's shares.

Hülse-Reutter alleged that he had lent some DM3m to HEG, and had disbursed funds on behalf of the company, and that its resulting claim against the company amounted to R3 323 857,10.

The trustees of Harksen's insolvent estate intervened in the application. They disputed the claims made by Hülse-Reutter and set out the undisputed evidence in the application declaring Harksen to be the sole beneficial owner of HEG's shares. This indicated the transactions by which HEG became the owner of certain property in Cape Town and Harksen's beneficial occupation of the property from November 1993. It also incorporated the allegation that Hülse-Reutter had paid the money alleged to be loans to the company, to Harksen, and this had constituted an investment with him.

Hülse-Reutter contended that the trustees had failed to discharge the onus of showing that there were reasonable grounds for disputing the existence of his claims against HEG.

THE DECISION

The question was whether or not the trustees had established that they had reasonable grounds for disputing the existence of Hülse-Reutter's alleged claims against the company. In other words, to succeed in their opposition to the application, the trustees had only to show that their grounds of opposition were reasonable.

Given this relatively easy test, it was not necessary for the trustees to set out fully the evidence on which they would rely in order to oppose the application. Provided that they were bona fides in their opposition, they had merely to set out facts which, if proved, would constitute a good defence if proved at a trial.

The facts set out by the trustees contained hearsay evidence, being references to matters alleged in other proceedings, however this evidence could be admitted since it was intended merely to show that the trustees' grounds for disputing Hülse-Reutter's application was reasonable.

The facts as set out by the trustees gave reasonable grounds for disputing Hülse-Reutter's claims against HEG. The inference that could be drawn from the trustees' allegations was that the money paid by Hülse-Reutter was not paid to HEG but to Harksen—this, if proved, would show that Hülse-Reutter had no claim against HEG. As far as the alleged payments on behalf of HEG were concerned, there would be doubt about this if it were shown that Hülse-Reutter had invested in the Harksen and not in the company. This would be a matter for decision at trial.

The trustees' dispute was bona fide and reasonable. The winding-up procedure was therefore not the appropriate mechanism to use in order to enforce the alleged claims by Hülse-Reutter. The application for winding-up was refused.

MARAIS v ENGLER EARTHWORKS (PTY) LTD

Insolvency

A JUDGMENT BY ERASMUS J
EASTERN CAPE DIVISION
7 NOVEMBER 1997

1998 (2) SA 450 (E)

An unrehabilitated insolvent is entitled to enforce rights of possession in respect of property of which he has been dispossessed, in spite of his status as an unrehabilitated insolvent.

THE FACTS

Marais possessed a motor vehicle and a light delivery vehicle. Engler Earthworks (Pty) Ltd asserted that it had the right to possess the vehicles and demanded return of them. Marais failed to return them. Consequently, Engler employed a firm specialising in repossession of vehicles to obtain the vehicles from Marais. The firm did so, the circumstances thereof being in dispute between the parties. Marais alleged that the vehicles were taken from him under threat of the use of force. The firm alleged that he was dispossessed of the vehicles with his consent.

Marais brought an application for an order that Engler restore to him possession of the vehicles. Engler opposed confirmation of the order on the grounds that since Marais was an unrehabilitated insolvent, he did not have the right to bring the application, and had in any event, returned the vehicles to it willingly.

THE DECISION

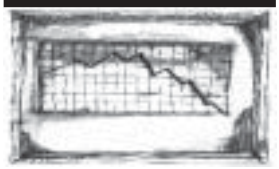
Prior to the sequestration of his estate, Marais had full capacity to sue. That was only affected by his sequestration to the extent provided for by the Insolvency Act (no 24 of 1936). This Act however, does not directly limit the insolvent's ability to sue. It does so only to the extent that it vests the insolvent's estate in a trustee, who has exclusive authority to exercise all rights in respect of the property comprising the estate.

The extent to which that limitation goes did not have to be decided in the present case, because the remedy upon which Marais based his claim was that of one who had been spoliated while in peaceful and undisturbed possession of his property. Being a remedy which purely protects possession, it made no difference whether the property sought to be protected was that of Marais or that of his trustee. Marais need only assert that he had possession of the vehicles, not that he had any right to possession. Since he could do this, he had the right to claim return of the vehicles.

As far as the dispute regarding the circumstances of the removal of the vehicle were concerned, it was unlikely that Marais would have parted with the vehicles willingly, given the history of the attempts to obtain the vehicle. The only explanation for his having given the vehicles to Engler was that he had been threatened to surrender possession of them.

Marais was therefore entitled to return of the vehicles.

SANDDUNE CC v CATT



A JUDGMENT BY NEPGEN J
SOUTH EASTERN CAPE LOCAL DIVISION
14 NOVEMBER 1997

1998 (2) SA 461 (SECLD)

A landlord may not bring an action against a tenant for future rentals payable to it, notwithstanding any anticipated breach by the tenant, since the rentals will not be due and payable at that point. Where the tenant has sold its business and has failed to give proper notice of the sale in terms of section 34 of the Insolvency Act (no 24 of 1936) the landlord may not contend that the future rentals have become liquidated claims in terms of that section.

THE FACTS

Sanddune CC leased certain premises to Catt for a period of three years. Catt conducted a security business from the premises.

During the currency of the lease, Catt sold his security business to Simon Edwards Security CC. He made arrangements to relocate to England. Some six weeks after the sale and trasnfer of the business, Catt published a notice of sale of the business in a locally circulating newspaper. Sanddune then notified Catt that it had a claim against him for payment of R27 120,60 in respect of future rentals, that this amount had become due and payable forthwith and it demanded payment.

Sanddune contended that it had a liquidated claim of R27 120,60 against Catt because of the provisions of section 34(2) of the Insolvency Act (no 24 of 1936). That sub-section provides that as soon as a notice of intended transfer of a business is published as required by sub-section 1, every liquidated liability of the trader publishing the notice shall fall due forthwith, if the creditor demands payment of such liability. Sub-section 1 provides that the transfer of a business without prior notice of transfer will be void as against creditors for a period of six months after such transfer.

Sanddune applied for the sequestration of Catt's estate and his arrest pending the making of satisfactory arrangements for his compliance with his obligations under the Insolvency Act.

THE DECISION

It was clear that no notice of transfer of Catt's business had been given as required by section 34(1). That section requires prior notice of the transfer of the business. However, the notice was given after the transfer of the business had taken place. Sanddune could therefore not rely on section 34(2), which assumed that a proper notice in terms of sub-section 1 had been given.

Sanddune contended that even if section 34(2) did not apply, section 9(2) of the Act did. That section provides that a liquidated claim which has accrued but which is not yet due on the date of hearing the petition for sequestration, shall be reckoned as a liquidated claim.

Assuming that this section could apply to the present situation, it could not be said that Sanddune held a claim against Catt which had accrued. Its claim for rentals was dependent on it providing Catt with occupation of the premises. If it did not do so, through for example, a refusal to do so or an inability to do so, Catt would not be obliged to pay the rent. Those future contingencies meant that Sanddune did not yet have an accrued claim in respect of the rentals. It therefore could not depend on section 9(2).

It followed that Sanddune did not have any right upon which it could base its application for sequestration: it lacked locus standi to bring the application.

As far as the application for Catt's arrest was concerned, there was no evidence that Catt intended to leave the country in order to avoid paying his debts.

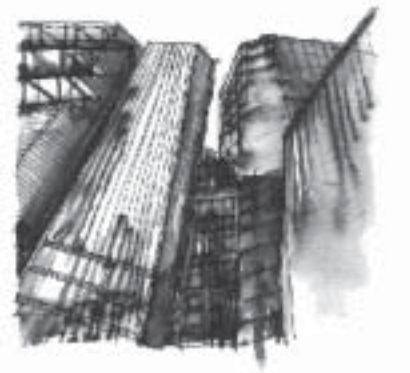
The application failed.

JONES v WYKLAND PROPERTIES

A JUDGMENT BY KNOLL AJ
(FRIEDMAN JP concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
22 OCTOBER 1997

1998 (2) SA 355 (C)

Property



A sale of fixed property which fails to record fully the terms of agreement concluded between the parties is void, where the parties to that agreeement considered the terms as imperfectly recorded in that agreement, to be material to the agreement and form part of it.

THE FACTS

Jones and another party signed a deed of sale in respect of the sale of certain fixed property. In terms of the deed of sale, Jones was obliged to pay estate agent's commission to Wykland Properties.

Clause 4 of the deed of sale provided that 'possession occupation' was to be given and taken on 'as agreed' when the risk of ownership would pass to the purchaser and from which date the purchaser would receive all benefits of the property and be liable for payment of all rates and other levies thereon.

Clause 5 provided that should transfer not be registered after date of occupation the purchaser would pay occupational interest to the seller in the sum of 'R N/A' per month from date of occupation to date of registration of transfer.

Clause 6 provided that transfer would be effected by the seller's attorneys as close to date of occpuation/soon as possible. The parties did not delete one of these options.

Jones paid the estate agent's commission as required in the deed of sale. After having done so, she claimed repayment of the estate agent's commission, contending that the deed of sale was void because of a failure to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981). The section 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. Jones contended that clause 4 inadequately recorded a material term of the agreement, that relating to possession and occupation, and that this represented a failure to comply with section 2(1) of the Alienation of Land Act.

THE DECISION

Section 2(1) requires that all material terms to a sale of fixed property should be recorded in writing. The first question was therefore whether or not the provision for possession and occupation as referred to in clause 4 was a material term of the sale.

Clause 4 itself was intended by the parties to record that the date of possession and occupation had been agreed between them, not that it was still to be agreed between them. The fact that it recorded a matter already agreed upon was, however, not an indication that its terms were not material to the agreement as set out in the deed of sale. Every indication was that the terms of possession and occupation were material to that agreement, and it was therefore necessary that those terms were recorded in full in that agreement.

That the terms of possession and occupation were material to the parties was clear from the fact that they had already reached agreement on them, and had inserted the words 'as agreed' in clause 4. The further detail provided for in clause 5 regarding the payment of occupational interest also indicated that the terms of possession and occupation were important to the parties.

The fact that one of the options provided for in clause 6 was not deleted was no indication that the parties did not consider that the date of possession and occupation were important. It meant only that they both thought that transfer would take place within a reasonable time.

The parties therefore did intend clause 4 to contain terms material to their agreement. They agreed that the term should form part of their contract and that it should be binding on them. Since it failed to achieve this, because it omitted essential terms, there had been a failure to comply with section 2(1) of the Act and the sale agreement was accordingly void. The estate agent's commission was accordingly repayable.

WILLIAMS v HARRIS

A JUDGMENT BY MARAIS J (SMALBERGER JA, NIENABER JA, SCOTT JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
29 MAY 1998

UNREPORTED

A property owner is obliged to allow the flow of water from a neighbour's property to the extent that the water flows naturally as a result of the location of the one property in relation to the other.

THE FACTS

Harris and Williams owned property adjacent to each other in an urban area of Johannesburg. Harris' property was subject to a servitude in favour of Williams, under which Harris was obliged to accept drainage of storm and spring water from Williams' property. The servitude was limited to a strip of ground two feet wide running along and parallel to the whole length of the southern boundary of Harris' property. Williams was entitled to enter Harris' premises in order to build, maintain and repair the drain which was to exist upon the defined area and lead to the municipal drain in an adjoining public road.

Harris alleged that as a result of the change of natural contours of Williams' property through the construction thereon of certain improvements, a certain amount of storm water flowed onto her property.

Harris applied for an interdict restraining Williams from allowing stormwater to flow from his property onto her property, directing him to build a suitable drain in the servitude area and cut back certain foliage encroaching onto Harris' property.

THE DECISION

Under the common law, the owner of property is obliged to allow the flow of water from his neighbour's property where the water flows naturally by reason of the respective situations of the properties in relation to each other. This obligation does not continue to apply where the water has been artificially diverted from its natural course, or its volume or velocity increased.

From the facts as given by the parties, it was not, however, clear whether water was flowing from Williams' property onto Harris' property. It was also not clear whether the water was flowing beyond the area of the servitude, and if so, whether the volume of it was greater than would have to be tolerated under the common law. These were questions which would have to be determined in order to decide whether Harris was entitled to an interdict preventing Williams from allowing the flow of stormwater from his property onto Harris' property. Even if this was decided against Harris, the question whether Williams was obliged to construct a drain which would have prevented the flow of water onto Harris' property would have to be decided. All of these question were themselves subject to a determination whether the respective rights and obligations of the parties were fully provided for in the servitude and not in the common law at all.

In view of the uncertainties, the matter was remitted to the court a quo for the hearing of oral evidence in relation to all relevant disputes of fact.

HENRY v R E DESIGNS CC

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
30 MAY 1997

1998 (2) SA 502 (C)

Corporations

In ordering that security for costs should be furnished, it must appear to a court that there is reason to believe that the company or close corporation will be unable to pay the applicant's costs. Such an order will be given if it appears that the company has failed to give a full explanation of its financial position which shows that it is in fact able to pay the costs of an action in which it might be unsuccessful.

THE FACTS

R E Designs CC brought an action against Henry to compel transfer to it of certain fixed property sold to it by Henry. Henry applied for an order that RE provide security for costs of the action.

In earlier proceedings, RE had admitted that it was in a weak financial position and unable to satisfy a possible costs order against it, but that its assets exceeded its liabilities by R98 000. In response to Henry's present application, RE stated that its assets amounted to R220 682 and that its only liability was an amount of R52 000 which was due to Bankfin. Its assets consisted of fixed assets, cash of R24 874 in the bank and debtors, including work-in-progress, of R62 000. RE stated that it was going from strength to strength and that it enjoyed a good relationship with its bank. It held two investments amounting to R23 000.

RE did not furnish its balance sheet, profit and loss account or any other financial statements.

THE DECISION

In ordering that security for costs should be furnished, it must appear to a court that there is reason to believe that the company or close corporation will be unable to pay the applicant's costs. It is not necessary that the corporation should be found to be insolvent. Having satisfied itself that there is reason to believe that the corporation will be unable to pay the applicant's costs, the court still retains a discretion whether or not to order the furnishing of security. This discretion will be exercised on the basis that the court will lean toward ordering the furnishing of security, will not deprive the applicant of such an order unless special circumstances exist and will consider what the corporation's financial position is and will be, without necessarily enquiring fully into the merits of the action.

Henry bore the onus of establishing that there was reason to believe that RE would be unable to pay her costs. The evidence presented by her discharged that onus, particularly in that in the light of the information given in the previous proceedings, RE had been less than candid about its present financial position. The valuations given against the assets it had listed in its balance sheets were unmotivated, and the item work-in-progress represented merely a hope that payment would be made by unspecified debtors in respect of work which was not yet complete. The cash in the bank was not a factor on which reliance could be placed, since that cash which was in the bank on one day could be withdrawn on another. It was also inconceivable that RE would have no other liabilities than its debt to Bankfin. It had not indicated what its income and expenditure were, and had not been able to obtain financial assistance for the provision of security for costs from bankers with whom it said it had a good relationship. Insufficient detail was given in relation to the two investments it said it held.

There were no special circumstances to suggest that the court should not exercise its discretion against ordering that security for costs should be ordered against RE. An order was accordingly made that it provide security for costs.

SHEPSTONE & WYLIE v GEYSER N.O.

A JUDGMENT BY HEFER JA (HOWIE JA, HARMS JA, SCHUTZ JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
28 MAY 1998

UNREPORTED

A liquidator of a company may be ordered to furnish security for the costs of an action be brings as liquidator of the company, even where the liquidator acts in the execution of powers given to him under the Insolvency Act (no 24 of 1936) or any other statutory provision. In exercising its discretion whether or not to order the liquidator to furnish such security, a court may have regard to the public interest in the litigation instituted by the liquidator.

THE FACTS

The liquidator of Shepway Management Company (Pty) Ltd, Geyser, brought an action against Shepstone & Wylie and the other appellants based on various causes of action. The causes of action were based on allegations of breach of contract, negligence, breach of fiduciary duties and reckless trading as referred to in section 424(1) of the Companies Act (no 61 of 1973). The main allegation was that the appellants mismanaged Shepway in such a way that those given control of the company's operations had been able to defraud the company.

The appellants applied for an order that the liquidator furnish security for their costs in terms of section 13 of the Companies Act. The section provides that where a company or body corporate is the plaintiff in any legal proceedings, the court may require sufficient security to be given for the costs of the proceedings, if it appears that there is reason to believe that the company or its liquidator will be unable to pay the costs of the defendant if successful in the defence.

The application was unsuccessful and the appellants appealed.

THE DECISION

Three preliminary questions had to be decided before determining the merits of the application:

1. Was the dismissal of the application appealable?

An application for security for costs is not necessarily a preparatory or procedural step in the proceedings to which it relates. The refusal of such an application could inure to the irremediable prejudice of the applicant. The effect would then be final. Because of this possibility, it is not correct to consider the application as merely preparatory or procedural. The dismissal of such an application, if not the grant of it, is therefore appealable.

2. Does section 13 apply to claims brought under statutory provisions?

There is no reason why liquidators should be exempt from the provisions of section 13 of the Companies Act. Even where the liquidator exercises powers vested in him as liquidator, and not merely the rights of the company in liquidation, he may be ordered to furnish security for the costs of such an action.

3. May an appeal court interfere with the exercise of the first court's discretion?

Whether or not the first court has a discretion, an appeal court is entitled to decide the matter according to its own views of the merits of the matter.

In the present case, the fact that ordering the furnishing of security for costs might result in an end to the litigation was insufficient reason for refusing to give such an order. The public interest might be relevant in deciding whether or not to make such an order, but no such interest was discernible in the action the liquidator wished to bring against the appellants in this case. His action was based on negligence, not fraud, and had been brought against those who were not even alleged to have been the immediate cause of Shepway's demise. The allegation that they contributed to the demise of the company was relevant, but not decisive enough to justify exempting the liquidator from furnishing security for the costs of the action he brought against them.

The liquidator was ordered to furnish security for costs of the action.

JOHNSON v BLAIKIE & CO (PTY) LTD

Corporations

A JUDGMENT BY BOOYSEN J
(PAGE J concurring)
NATAL PROVINCIAL DIVISION
14 NOVEMBER 1997

[1998] 2 All SA 38 (N)

A magistrates' court has jurisdiction to make a declaration in terms of sections 64 and 65 of the Close Corporations Act (no 69 of 1984) that a person is personally liable for the debts of a close corporation.

THE FACTS

Blaikie & Co (Pty) Ltd sold and delivered goods to Roofking Building Supplies CC. The close corporation failed to pay the purchase price for the goods, and Blaikie brought an action against it for payment. It obtained judgment against the close corporation for payment of R33 165,70. The close corporation was put into liquidation.

Blaikie then brought an action against Johnson, a member of the close corporation, to declare him personally liable for the debts of the close corporation in terms of sections 64 and 65 of the Close Corporations Act (no 69 of 1984). These sections provide that a person who has carried on the business of a close corporation recklessly or has in incorporating the close corporation, grossly abused the juristic personality of the close corporation, may be declared to be personally liable for the debts of the close corporation.

Blaikie's action succeeded in the magistrate's court. Johnson appealed on a number of grounds, one of them being that the magistrate's court had no jurisdiction to make a declaration in terms of sections 64 and 65.

THE DECISION

The argument that the magistrate's court lacked jurisdiction in the action was based on an interpretation of section 29 of the Magistrates' Courts Act (no 32 of 1944) which sets out the jurisdictional limits of the magistrates' courts.

This section refers to 'actions' for which the magistrates' courts have jurisdiction. The word 'actions' is not qualified. There is therefore no reason to suggest that an action for a declaration such as is contemplated in sections 64 and 65 of the Close Corporations Act is excluded from the actions there referred to. The magistrate's court therefore did have jurisdiction in the action brought by Blaikie.

The appeal was however, upheld on other grounds.

LE'BERGO FASHIONS CC v LEE

A JUDGMENT BY HOFFMAN AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
1 APRIL 1997

1998 (2) SA 608 (C)

A restraint of trade provision limiting a party's right to engage in a business whether 'directly or indirectly' includes a limitation on that party using a company as a vehicle for engaging in such a business.

THE FACTS

Le'Bergo Fashions CC (the close corporation) bought a business from Le'Bergo Knitting Mills (Pty) Ltd (the company). In terms of the agreement, Lee undertook not to be engaged or interested, whether directly or indirectly, in any business similar to that of the purchaser anywhere in South Africa for a period of three years as from 1 October 1995. Lee was the owner of all the issued share capital of the company and its sole director. She acted for the company and carried on the business of the company, and in her business activities treated the company as identical with herself.

The parties were unable to agree on a purchase price for certain stock held by the company, with the result that the company retained the stock and disposed of it using the accounting documentation bearing the name Le'Bergo and bearing the close corporation's address.

The close corporation then applied for an interdict restraining Lee and the company from breaching the restraint term of the agreement and from using the accounting documentation in the sale of the remaining stock.

THE DECISION

The words 'directly or indirectly' in the restraint provision could be interpreted to include a restraint against Lee conducting the business through the vehicle of the company. In seeking relief against the company as well however, the close corporation was seeking to establish that it was none other than Lee, and that it should be seen as such, ie that its corporate veil should be pierced.

The company could properly be seen as none other than Lee herself. It was a façade behind which Lee engaged in business in breach of the restraint undertaking. These were circumstances in which the corporate veil could be pierced and its activities seen as being those of Lee herself, alternatively as assisting in the breach of the restraint provisions.

The sale of the stock amounted to a breach of this provision as it could be considered being engaged in 'any business' as referred to in it.

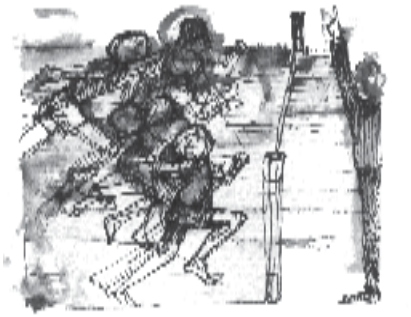
The interdict was granted.

TRUTH VERIFICATION TESTING CENTRE CC v PSE TRUTH DETECTION CC

A JUDGMENT BY CM ELOFF AJ
WITWATERSRAND LOCAL DIVISION
9 DECEMBER 1997

1998 (2) SA 689 (W)

Competition



A person which has passed itself of as conducting the business of another by inserting its telephone number as that of the other may be restrained from continuing to represent itself as conducting such business by preventing it from using that particular telephone.

THE FACTS

In October 1996, PSE Truth Detection CC expressed an interest in conducting a franchise to be given by the Truth Verification Testing Centre CC (the 'Centre'). The Centre agreed to afford PSE some experience in the lie detection business and assist it in acquiring basic skills in order to develop a potential client base. However, it would not give it any analysis skills until such time as PSE had acquired the equipment necessary to conduct the business and develop a potential client base.

In the following months, the Centre gave PSE a certain amount of training and introduced it to some of its clients. It made it clear to PSE that it was not entitled to trade under the name of the Truth Verification Centre until such time as a franchise agreement had been concluded.

In March 1997, the Centre informed PSE that no franchise agreement would be concluded and it requested return of all stationery and promotional material which had been given to PSE in the course of the training given by the Centre.

In December 1996, PSE had given instructions to Maister Directories (1981) (Pty) Ltd to insert the home telephone number of one of its members at the telephone directory entry for the Centre. Upon discovering that this had been done, the Centre applied for an interdict preventing PSE and its member from using the name 'Trust Verification Centre' and from using of having access to the member's telephone referred to in the directory entry.

PSE alleged that it had given instructions to Maister to insert the member's telephone number at the Centre's directory entry with the consent of the Centre, seeing that the intention had been that PSE would conduct a franchise to be given by the Centre. In support of this allegation, PSE produced a letter from the Centre which stated that while PSE could not trade as the Truth Verification Centre, it could insert the member's telephone numbers on its letterhead.

The Centre sought confirmation of the interdict.

THE DECISION

When the Centre consented to the insertion of PSE's after-hours telephone number on its letterhead, it did not give its consent to the insertion of that number in the telephone directory entry. There was no reason why the Centre would give its consent to such a thing being done. Every indication given by the Centre to PSE regarding its association with the name of the Centre was that it could not give the impression that there was any association, until such time as a franchise agreement had been concluded. That agreement, being dependent on PSE acquiring the necessary machines, and the machines not having been acquired, there was no basis upon which it could be said that the Centre had consented to PSE's insertion of its telephone number at its entry in the telephone directory.

Having inserted its telephone number at this entry, PSE had made an unlawful representation that its business was connected to that of the Centre. Being unauthorised and false, it constituted actionable passing off.

Even if PSE had thought that it could cancel the entry up until the point where it became clear that it would not obtain the franchise from the Centre, the telephone number still remained in the telephone directory and as such constituted a continuing representation that PSE's business was connected with that of the Centre. It being possible to cancel the telephone number, the continuing representation could be ended immediately by PSE being prevented from using the telephone relating to that number.

The interdict was confirmed.

GORDON LLOYD PAGE & ASSOCIATES v RIVERA

Competition

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
9 MARCH 1998

1998 CLR 190 (W)

A person alleging that another has wrongfully used confidential information provided to it must show that the information so given is not information which is within the public knowledge and that it has a significant element of originality, which the other could not easily have obtained by its own efforts. Where information has been imparted to another which is not confidential in this sense, the party having given it is not entitled to claim damages against a party which proceeds to complete a proposal, such as a property development, for whose purpose the alleged confidential information was given.

THE FACTS

Gordon Lloyd Page & Associates was a partnership informally formed for the purposes of developing certain property in Rivonia. The property was identified in 1990. Thereafter, the partnership became engaged in discussions and investigations, the procurement of advice, the engagement of professional services for the drawing of plans and estimates and the rezoning of the property, approaches to tenants, the preparation of feasibility studies and proposals for the earning of income from the development of the site.

In 1992, a company owned by the partnership purchased the property for R13½m. However, the sale was later cancelled when the company failed to deliver a guarantee required in terms of the sale agreement. Despite the cancellation of the sale, the partnership continued to make efforts to have the property developed, continued with a rezoning application and engaged in discussions with other parties which expressed an interest in the development of the property as well as with potential tenants, such as Pick 'n Pay.

In 1994, Page, one of the partners approached Rivera in an effort to interest him in the development. It set out what was envisaged in the development, presented a short feasibility study and set out the history of the efforts to develop the property and suggestions as to how best to achieve the development in the light of what had been learnt of this over the previous years. Page reported to his partner that Rivera did not seem to be interested in the project. Shortly thereafter, Rivera wrote to Page stating that he had considered the proposal, had not found it to be viable and was not interested in discussing it further.

The following year, Page discovered that Rivera had purchased the property through one of his companies, and had completed a shop and office complex on the property. The development was considerably larger than that which had been suggested by Page and was different in architectural style. One of the tenants was Pick 'n Pay.

The partnership alleged that there had been a tacit agreement between itself and Rivera that the development proposal was put to Rivera on a confidential basis, and had been put, together with the confidential information contained in it, for the sole purpose of enabling Rivera to determine whether a joint venture was viable. It alleged that the tacit agreement included a term that Rivera would not use the information for his own ends and would not disclose the proposal to a third party. It claimed that Rivera's action in developing the property for himself constituted a breach of this agreement or a delict, and that as a result, it had suffered damages of R11 620 910. It claimed payment from Rivera. After presenting its evidence, Rivera applied for absolution from the instance.

THE DECISION

In deciding whether or not a tacit term is part of a contract, the test is whether or not the term is 'so self-evident as to go without saying', alternatively that the term is necessary in order to give business efficacy to the contract. The partnership's allegation that such a term had been part of the contract and that Rivera had breached the terms of that contract, assumed that, in the present context, the information it had given to Rivera in its discussions with him was confidential. Its allegation that a delict had been

committed was equally based on the assertion that the information imparted to Rivera had been confidential. It was necessary to determine whether on the evidence presented, a reasonable court could find that the agreement as alleged had been proved or the delict committed.

In the present context, the confidential information would be the valuable compendium of ideas and plans, the documents and results of negotiations and discussions which the partnership had secured by the investment of its time, effort and expertise. The partnership alleged that the confidential information consisted in such features as the ideas for architectural construction, the choice of tenants, road access proposals and rezoning efforts. However, none of this could be considered confidential information. All of it could be considered information within the knowledge of any experienced property developer. It did not have any significant element of originality not already in the realm of public knowledge. Furthermore, what the partnership contributed was an incomplete rezoning application, a property to which they had no rights, minimal financial investment in the project and an uncommitted anchor tenant.

The fact that progress had been made with the rezoning of the property was not an advantage for which the partnership could make any claim against Rivera—the benefits of that work would be enjoyed by anyone who developed the property since the partnership lacked the right to acquire the property.

The effect of the partnership's contention that by concluding the alleged agreement with Rivera incorporating the tacit term, Rivera was precluded from using the information for its own advantage, was that by imparting this information to him, or to anyone, that party would be bound not to develop the property as proposed by the partnership. It was unlikely that anyone would have agreed to such a restriction merely because the partnership was presenting a proposal to it, and there was no evidence in any event, that Rivera had used its own investigation plans for the purposes of the development.

Absolution from the instance was granted.

VERMEULEN v AFRICA STEEL & TIMBER

A JUDGMENT BY HANCKE J
ORANGE FREE STATE PROVINCIAL DIVISION
6 NOVEMBER 1997

1998 (2) SA 543 (O)

An agreement to restrict competitive activity will not be enforced where the agreement does not protect the trading goodwill of the parties.

THE FACTS

In 1988, Vermeulen and his father agreed with Africa Steel & Timber and the other respondents that the respondents would not trade in competition with them. They agreed that Vermeulen would not sell steel and the respondents would not sell paint and related products in competition with each other. The agreement was concluded orally and not reduced to writing.

In 1991, Africa Steel & Timber secured a franchise from Timber City, and in 1994, it secured a franchise from Mica Hardware. Vermeulen alleged that the respondents were acting contrary to the terms of their agreement and applied for an interdict preventing them from selling paint and related products within the area specified in their agreement.

THE DECISION

In order to establish its right to an interdict against Africa Steel & Timber, Vemeulen had to prove that it held a prima facie right against it.

The agreement upon which Vermeulen depended in attempting to establish this right was nine years old. It had been entered into informally and as an arrangement to regulate matters between the

parties. It had not been entered into in an attempt to protect the trading goodwill of either party. It was therefore not a basis upon which an interdict could be granted. The right created in the agreement was also not clearly defined and being of apparently unlimited duration, and attempting to limit the choice of people who might purchase paint and related products, it would be against the public interest to enforce it.

The application was dismissed.

SNYMAN v ODENDAALSRUS PLAASLIKE OORGANGSRAAD

A JUDGMENT BY LOMBARD J
ORANGE FREE STATE PROVINCIAL DIVISION
31 OCTOBER 1997

1998 (2) SA 297 (O)

Contract

In interpreting an agreement that one party is excused from paying the other in certain circumstances, the agreement must be interpreted against the background of the normal rules applicable to the agreement.

THE FACTS

Odendaalsrus Plaaslike Oorgangsraad instructed Snyman and other attorneys to collect amounts owing to it in respect of rates and services supplied to people within its area of jurisdiction. The council expressly stated that the attorneys would not receive payment of fees in any matter in which the collection of amounts due was unsuccessful, and instructions were accepted on that basis.

As a result of difficulties experienced in enforcing judgments obtained in the process of these collections, the council instructed the attorneys to withhold further action. The attorneys then drew their accounts in respect of each of the matters for which they had been instructed to withhold further action and addressed them to the council.

The council's attitude was that it was not liable for payment of the attorneys' accounts because of the term of their agreement that fees would not be payable in any matter in which the collection of amounts due was unsuccessful.

THE DECISION

The agreement between the parties did not define what an unsuccessful action would be considered to be. This was therefore to be interpreted in the light of the agreement as a whole and the surrounding circumstances.

It was clear that the agreement had been entered into in order to minimize costs. However, it was also clear that the attorneys had undertaken the work in order to earn a fee and not merely to perform a gratuitous service. The question was how the termination of the instructions to the attorneys influenced this position.

The agreement provided for the non-payment of fees in only two cases, ie where instructions were withdrawn before the issue of summons and where the action for recovery of the debt was unsuccessful. The attorneys therefore had a mandate to proceed to enforcement of any judgment received. It would only be at the stage of enforcement that it would become clear that the action had been unsuccessful. It followed that non-payment of fees could only be allowed if it had become clear that the action had been unsuccessful.

In each case, whether or not the actions would be unsuccessful was unknown, the final enforcement procedure not having taken place at the time the instruction to withhold further action was given. The council was therefore obliged to pay the attorneys' accounts, the provision for non-payment not being applicable to the case.

UNION SHIPPING AND MANAGING CO SA v LINA MARITIME LTD

A JUDGMENT BY BOOYSEN J (HUGO J and McCALL J concurring)
NATAL PROVINCIAL DIVISION
13 AUGUST 1997

[1998] 2 All SA 254 (N)

Shipping

In order to show that parties agreed on a tacit term of their contract, it must be shown that the parties must have intended that the suggested term should exist. The misuse of information obtained in confidence may constitute a delict in the form of unlawful competition, but no such delict will be shown to have been committed, where it is clear that the information was accessible to a number of different parties.

THE FACTS

Union Shipping and Managing Co SA entered into negotiations with Lina Maritime Ltd to conclude a time charter of the MV *Lina.* The negotiations were conducted between Union's agent, Clipper Shipping Ltd, and the managers of the MV *Lina*, Minibulk Management. During the course of the negotiations, Minibulk was informed that Union Shipping desired the time charter so that it could conclude a voyage charter with Sardamag Spa for the carriage of cargo from Siracusa, Sicily, to Durban.

The negotiations culminated in a firm offer made by Minibulk to Clipper to conclude the time charter with Union Shipping, the offer to remain open for acceptance until 10am Paris time on 10 May 1995 and subject to the 'lifting of all subjects'. The 'lifting of all subjects' made the conclusion of the contract subject to the satisfaction of certain conditions imposed by one or the other party.

Clipper notified Minibulk of the lifting of all subjects at 10.01am on 10 May 1995. At 10.26am, Minibulk notified Clipper that Lina could wait no longer and had found another party for a time charter. That party was Sardamag Spa, whose identity Lina had learned of during the negotiations which had earlier taken place between the parties.

Union Shipping alleged that the contract concluded between Lina and Sardamag was a result of the use of confidential information conveyed by Clipper to Minibulk in the course of the negotiations. It alleged that there was a tacit agreement between the parties that Lina would not use information so obtained in order to conclude a contract with Sardamag, alternatively that the use thereof constituted the delict of unfair competition. It attached the MV *Lina* in order to found jurisdiction in an action to be instituted against Lina for damages.

THE DECISION

The existence of a tacit term has to be found and ascertained with reasonable precision. It must be shown that, by necessary implication, the parties must have intended that the suggested term should exist. It is not enough to show that it would have been reasonable for the parties to so agree. Union Shipping had not in this manner, shown that the tacit term contended for existed. The parties had not tacitly agreed that if Clipper did not accept the offer within the time stipulated, Minibulk would be prohibited from using the information it had obtained in order to contract directly with Sardamag.

The tacit agreement contended for had not been proved.

As far as the allegation of unfair competition was concerned, whereas it was true that unfair competition in the form of misuse of confidential information was not limited to the misuse of predetermined categories of information, the information which Lina had used was not confidential. Many other agents and other parties might have become aware of Union Shipping's interest in obtaining the time charter. There was no evidence of collusion between any of the parties and no evidence that anyone unlawfully imparted confidential information.

Union Shipping was not entitled to attach the MV Lina on the basis of the action it proposed to institute against Lina.

MV YU LONG SHAN v DRYBULK SA

A JUDGMENT BY MARAIS JA (SMALBERGER JA, EKSTEEN JA, NIENABER JA and VAN COLLER AJA concurring0
SUPREME COURT OF APPEAL
29 SEPTEMBER 1997

1998 (1) SA 646 (A)

An arbitration award resulting from a maritime claim cannot retroactively establish liability on the defendant.

THE FACTS

On 17 May 1991, Drybulk SA chartered the MV *Fei Xia Shan* from Guangzhou Zhen Hua Shipping Co under a time charter-party concluded between the two parties. 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 as it was worded when the claim arose—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. Section 3(7)(c) had been amended in 1992 to refer to any charterer or subcharterer of a ship.

THE DECISION

The claim asserted by Drybulk was founded on the arbitration award. A 'maritime claim' as defined in the Act included any claim for the enforcement of any arbitration award relating to a maritime claim. The claim which Drybulk sought to enforce was therefore a claim which had arisen after the amendment of the Act and not one which had arisen before.

If the effect of this was however, to render the *Yu Long Shan* retroactively liable in respect of an event for whose consequences it would not have been liable at the time the event occurred, the question which arose was whether or not the amendment was intended to have such retrospective effect. There was no indication that the legislature intended the amendment to have retrospective effect, and there was no justification for imputing any such retrospective effect to the amendment.

While the implication of this view of the amendment was that Dry Bulk was not seen to be enforcing a claim which had arisen before the amendment, and therefore not enforcing a new cause of action which had arisen earlier, it had to be remembered that the arbitration award gave Dry Bulk an entirely derivative cause of action, ie derived from a claim which had arisen earlier.

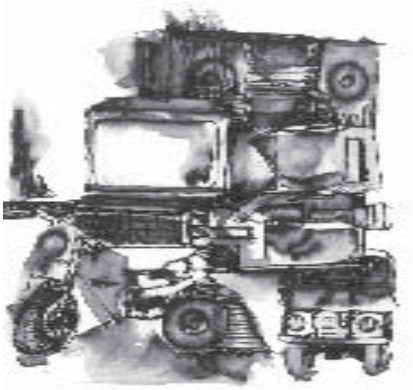
The exception was upheld.

MDAKANE v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION
8 MAY 1998

1998 CLR 255 (W)

Credit Transactions



A credit grantor which cancels a credit agreement on the grounds that the credit receiver has failed to respond to demand given to it in terms of section 11 of the Credit Agreements Act (no 75 of 1980) is entitled to repayment of any portion of the price already paid for the goods, in the absence of any indication of the value of the goods as at date of repossession.

THE FACTS

Mdakane bought a vehicle from the Standard Bank of South Africa Ltd in terms of an instalment sale transaction. The sale was subject to the provisions of the Credit Agreements Act (no 75 of 1980).

Mdakane paid R20 176,50 of the capital sum owing to the bank. He fell into arrears and the bank repossessed the vehicle. The bank then gave Mdakane 30 days notice to repay the arrears. Mdakane failed to do so and the bank considered the sale agreement cancelled.

Mdakane claimed payment of the R20 176,50 paid by him in terms of the agreement. He contended that by repossessing the vehicle, the bank had repudiated the agreement, he had accepted the repudiation and the resulting cancellation entitled him to repayment of what he had paid.

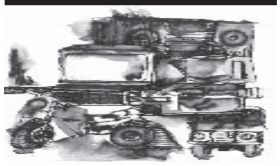
THE DECISION

Section 12(1) of the Act provides for the right of the credit receiver to return of goods repossessed by the credit grantor without an order of court. It does not however, give the credit grantor the right to repossess the goods. The credit grantor may therefore not turn to this section to show that because its repossession of the goods was lawful, such repossession was not a repudiation of the agreement.

When the bank gave notice to Mdakane to pay the arrear amounts, after the vehicle had been repossessed, it issued due demand on him in terms of section 11 of the Act. Mdakane's failure to respond resulted in cancellation of the agreement. Mdakane was then entitled to repayment of what he had paid: his right to repayment of what he had paid remained unimpaired. The fact that he had possession of the vehicle for a year before the bank repossessed it did not derogate from this right. There being no evidence of the value of the vehicle when repossessed, the bank could not argue that it was entitled to retain any portion of the amounts paid by Mdakane.

The claim succeeded.

KATZEFF v CITY CAR SALES (PTY) LTD



A JUDGMENT BY NGCOBO J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
26 SEPTEMBER 1996

1998 (2) SA 644 (C)

Unless an agent discloses the fact that he acts as an agent by informing a third party that he does so, he will be liable to the third party as if he were the principal on the basis of the doctrine of the undisclosed principal. A purchaser of a thing who is evicted from possession by the owner of the thing is not obliged to give notice of the threatened eviction to the seller before being entitled to bring an action based on breach of warranty against eviction against the seller. The purchaser who has been evicted is normally entitled to repayment of the purchase price in full, even after possessing the item for a period of time in which the item has depreciated in value.

THE FACTS

Katzeff bought a Mercedes Benz motor vehicle from City Car Sales (Pty) Ltd for R29 150, after seeing the vehicle at the premises of that company. He took delivery of the vehicle, but two and a half years later, MLS Bank Ltd repossessed the vehicle in terms of its rights of ownership of the vehicle. At that stage, the value of the vehicle was R12 000.

Prior to the sale to Katzeff, MLS Bank had entered into an instalment sale transaction with M Jedicke in terms of which the bank gave possession of a Mercedes Benz motor vehicle to Jedicke while remaining the owner of it until all amounts due to it had been paid. MLS was entitled to repossess the vehicle if Jedicke defaulted in his payments to the bank. Jedicke had defaulted, and the bank repossessed the vehicle in response.

Katzeff then brought an action against City Car Sales for repayment of the purchase price of R29 150, based on breach of warranty against eviction. City Car Sales defended the action on the grounds that when selling the vehicle it acted as agent for Jedicke, alternatively, if found that it acted as principal, that Katzeff failed to give notice of the threat to his possession of the vehicle. City Car Sales also defended the action on the grounds that Katzeff was only entitled to the value of the vehicle at the time of repossession.

THE DECISION

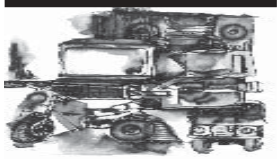
In deciding whether or not City Car Sales acted as agent in the sale of the vehicle to Katzeff, it was crucial to decide whether or not it informed Katzeff that it acted as agent. There was however, no evidence that it do so inform Katzeff. The evidence was that at no stage did City Car Sales indicate that Jedicke existed. In those circumstances, even as agent, City Car Sales would be liable to Katzeff on the basis of the doctrine of the undisclosed principal.

The evidence showed that Katzeff did not give City Car Sales notice of the threat to his possession of the vehicle. However, the evidence also showed that when MLS Bank repossessed the vehicle, it did so asserting its rights as owner. Its title to the vehicle was therefore incontestable. In those circumstances, Katzeff was not obliged to give notice of the threatened eviction.

As far as the amount payable by City Car Sales was concerned, the evicted purchaser is ordinarily entitled to repayment of the purchase price and the payment of damages, unless there are equitable reasons why the purchase price should not be restored in full. The repayment of the purchase price is normally the minimum amount of damages the purchase is entitled to, the object being restoration of the performance originally made by the purchaser. Because eviction denies the purchaser the right to use and enjoy the object purchased in the future, the purchaser is entitled to reclaim the full purchase price and claim any damages which might have been suffered. It would not be inequitable to award Katzeff less merely because he had the use of the vehicle until the date of repossession. Not only would that give City Car Sales a benefit from its own wrong, but it would also not take into account that it had the use of Katzeff's money for the same period.

The action succeeded.

NBS BOLAND BANK BPK v ONE BERG RIVER DRIVE CC



A JUDGMENT BY
SOUTHWOOD J
WITWATERSRAND LOCAL
DIVISION
8 APRIL 1998

1998 CLR 222 (W)

Where a contract incorporates a term which confers on one of the parties an unfettered discretion to vary a term without having to do so reasonably that term is unenforceable as between the parties.

THE FACTS

One Berg River Drive CC passed two mortgage bonds over its property in favour of NBS Boland Bank Bpk. In the mortgage bonds, Berg River acknowledged its indebtedness to NBS in a capital sum of R200 000 and R2 362 400 respectively, to be advanced upon registration of the bond over the property, and acknowledged the obligation to repay the loan with interest in monthly instalments. The bonds provided that the monthly repayments would be appropriated firstly to interest indebtedness, and then to the reduction of the capital sum.

The bonds then provided that interest at the specified rates of 17¼% and 19½% per annum would be calculated on the capital sums, or at such rates as the NBS might determine from time to time as provided in clause 14. Clause 14 provided that the NBS could vary the rate of interest on all amounts owing to it to the rate of interest determined by the NBS as payable for the class of bond into which the bond fell, subject to the limits imposed by any law. The NBS was also entitled to increase the monthly repayments so as to ensure ultimate payment of the whole bond within the period of the bond.

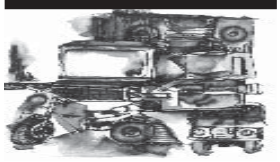
The NBS brought an action against Berg River, claiming amounts outstanding in terms of the bonds. The parties agreed that the point of difference between them was the legality and enforceability of clause 14. Subject to their respective rights of appeal, they agreed that should the clause be found to be enforceable, Berg River would pay the amount claimed. Should the clause be found to be unenforceable, Berg River would pay the capital sum claimed and interest at the rates stated in the bonds. They approached the court for a determination of the enforceability of clause 14.

THE DECISION

Berg River argued that clause 14 was void for vagueness, in that it left the determination of the interest rate completely within the discretion of one party, the NBS. The NBS argued that the provisions of the clause should not be rendered unenforceable on this ground because in interpreting any provision, an interpretation leading to enforceability rather than unenforceability should be followed; furthermore, that it could be implied that the NBS's discretion was to be exercised reasonably.

If NBS wished to rely on such an implied term, it should have pleaded that the term was to be implied. Assuming however, that it need not have pleaded the implied term, it remained a principle of our law that when a term of a contract depends entirely on the will of one of the parties to determine the extent of performance of either party, the contract is void. The term in issue in the present case was a very important one. While it was true that a contractual term should be interpreted so as to be enforceable, rather than unenforceable, the provisions of clause 14 gave the NBS an unfettered discretion to vary the interest rate. The discretion did not have to be exercised reasonably. Clause 14 was therefore unenforceable.

NORTH AMERICAN BANK LTD v GRANIT



A JUDGMENT BY HEHER J
WITWATERSRAND LOCAL DIVISION
5 DECEMBER 1997

[1998] 1 All SA 457 (W)

It is not against public policy for a South African court to enforce a foreign judgment which involves the payment of interest rates and charges which might be considered exorbitant in South Africa, where it is clear that the debtor submitted to a jurisdiction in which such interest rates and charges are legally permissible. Where a debt arose in a foreign jurisdiction before the date of the debtor's sequestration in South Africa, the foreign creditor is subject to the provisions of section 129 of the Insolvency Act (no 24 of 1936) and may not enforce its claim in a South African court in the event of the debtor having become rehabilitated before the date on which the foreign creditor brings such proceedings for enforcement.

THE FACTS

North American Bank Ltd held a judgment given against Granit by the Jerusalem District Court for payment of NIS*1 377 411, the bank's usual interest on this amount from 1 April 1989 as set out in the bank's special manager's affidavit including changes thereof until date of payment, trial costs linked to an index from date of expenditure until date of payment, legal interest and advocates' fees of 10% of the amount awarded as at date of judgment. The bank also held a judgment given against Granit by the Israeli Supreme Court for payment of trial costs of NIS4000.

The bank brought an action for provisional sentence based on the judgments it held, annexing a schedule of interest calculations, and an affidavit of the bank's special manager setting out the basis of the bank's interest charges and the trial costs linked to the index. It claimed the amounts awarded in the judgments, alternatively the South African rand equivalents of each.

Granit opposed the action on the grounds that on the grounds of public policy, enforcement of the foreign judgments should not be allowed. He also depended upon section 129 of the Insolvency Act (no 24 of 1936) which provides that the effect of rehabilitation of an insolvent is (i) to put an end to his sequestration, (ii) to discharge all of his debts which were due, or the cause of which had arisen, before the sequestration, and (iii) relieve the insolvent of every disability resulting from the sequestration.

Grant was sequestrated in July 1991, three months before the judgment of the Jerusalem District Court was given against him, and rehabilitated in August 1994, three months after the judgment of the Israeli Supreme Court was given against him.

THE DECISION

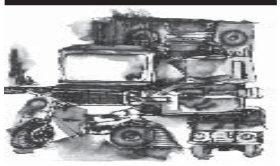
There was no basis for refusing provisional sentence on the grounds that to do so would be contrary to public policy. The interest rates and indexes acceded to by Granit, by participating in a society where such factors were a part of business life, could not be avoided simply by his relocation to a country where those factors in their particular manifestations did not exist.

The claim relating to trial costs linked to an index required proof of various relevant factors such as elements of the cost of living and 'linkage differentials'. This claim therefore, could not be considered liquid, and provisional sentence could not be granted on it. The trial costs of NIS40 000 was however, certain and did not require evidence for their proof, and provisional sentence could be granted on this portion of the claim.

As far as the defence based on section 129 of the Insolvency Act was concerned, it had to be rememberd that a foreign creditor has the right to claim in an insolvent estate. While the Insolvency Act might not have extra-territorial effect, and its provisions might not encompass the interests of foreign creditors, it was nevertheless a statute governing the claims of any creditors brought against the insolvent estate within the South African jurisdiction. Wherever a debt has been contracted or wherever it is payable, when the enforcement of it is sought in a South African court, the provisions of the Insolvency Act become applicable to which the South African court itself is bound. A foreign debt is therefore discharged in South Africa by the rehabilitation of the debtor in this country.

The fact that the judgment of the Jerusalem District Court was given after Granit's sequestration,

*** NIS = New Israeli Shekels**



gave no ground for contending that the original cause of indebtedness had become novated and therefore arose after sequestration.

The underlying cause of action upon which the judgment was based arose before sequestration took place. This made section 129 applicable. This however, did not apply to the judgment given by the Israeli Supreme Court which did not form part of the debt due at date of sequestration.

INFO PLUS v SCHEELKE

A JUDGMENT BY VAN HEERDEN DCJ
(HEFER JA, EKSTEEN JA, NIENABER JA and HOWIE JA concurring)
SUPREME COURT OF APPEAL
25 MARCH 1998

1998 (3) SA 184 (A)

Credit Transactions

A purchaser of goods may become the owner of the goods upon fulfilment of a condition reserving ownership to the seller until such fulfilment, even though the purchaser is not in possession of the goods at the time of fulfilment. Delivery of the goods to the purchaser which is necessary for the transfer of ownership, may take place before fulfilment of the condition, and there will be no need for any further agreement that the purchaser is to hold the goods as owner and not merely as purchaser in order to satisfy the requirement that delivery of the goods be made for ownership to pass. Mere delivery of one's goods to a party is not a representation that the party to whom the goods have been delivered is owner of the goods or has the right to dispose of them.

THE FACTS

Info Plus, a firm, entered into an instalment sale agreement with Wesbank for the purchase of a motor vehicle. The vehicle was registered in the name of Info Plus, but Wesbank retained ownership, as in terms of the agreement, ownership was to pass only after all amounts due to it were paid.

Some two years later, Info Plus requested Sharman Motors (Pty) Ltd to find a buyer for the vehicle willing to purchase the vehicle for R120 000. It delivered the vehicle to Sharman Motors for that purpose. An employee of Sharman Motors sold the vehicle to the second respondent for R87 000, having effected registration of the vehicle in the name of Sharman Motors by means which remained unclear. He exhibited the registration certificate to the second respondent prior to the sale. Within two weeks, the second respondent sold the vehicle to Scheelke and the vehicle was then registered in Scheelke's name.

When Info Plus discovered that the vehicle had been sold, it informed Wesbank. Wesbank undertook to repossess the vehicle, but Scheelke paid Wesbank the full amount owing to it in terms of the instalment sale agreement and Wesbank abandoned the proceedings for repossession.

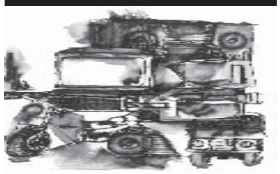
Info Plus then brought an action against Scheelke for delivery of the vehicle, claiming that it was the owner of the vehicle. Scheelke and the second respondent denied that Info Plus was the owner, and also defended the claim on the grounds that Info Plus was estopped from alleging it was the owner of the vehicle.

THE DECISION

Under our law, for ownership to pass to Info Plus, the firm would have had to have taken delivery of the vehicle. Its agreement with Wesbank provided that it would acquire ownership upon fulfilment of a condition, ie payment of all amounts due. Normally, upon fulfilment of this condition, ownership would pass, the requirement of delivery having been satisfied at the time when the vehicle was earlier delivered to Info Plus. There would have been no need for a second agreement—entered into when the final amount due was paid—that Info Plus was now to hold the vehicle as owner.

The situation was different in the present case however, since the fulfilment of the condition took place when Info Plus was no longer in possession of the vehicle. The question was whether this difference prevented the transfer of ownership at that time. There was no reason why it should. The delivery which had been conditional when Info Plus first obtained possession of the vehicle merely became unconditional when Wesbank received payment of all amounts due to it. The intention of both Info Plus and Wesbank had been that this would take place upon payment of the full amount owing to Wesbank, and there was no reason to require any second agreement reflecting this intention. Upon payment to Wesbank of the full amount due to it, Info Plus became the owner of the vehicle, delivery having been effected at the earlier stage when Info Plus took possession of the vehicle.

The fact that the second respondent, and not Info Plus, paid the full amount due to Wesbank did not mean that payment of Info Plus's debt had not taken place.



Even if the motive in paying the debt was that the second respondent should acquire the vehicle for itself, the payment still discharged the debt.

Info Plus therefore became the owner of the vehicle when the second respondent paid the amount owing to Wesbank.

As far as the defence of estoppel was concerned, in order to succeed in this defence, Scheelke and the second respondent would have to show, inter alia, that Info Plus had in some way represented to the second respondent that Sharman Motors was the owner of the vehicle or had the right of disposal of it. However, there was no evidence that any such representation had been made. Info Plus had merely delivered the vehicle to Sharman Motors, and whereas this might have assisted the Sharman Motors employee in concluding the sale with the second respondent, it did not in itself, amount to a representation that Sharman Motors was the owner of the vehicle or was entitled to dispose of it.

The appeal succeeded.

WORLDWIDE VEHICLE SUPPLIES LTD v AUTO ELEGANCE (PTY) LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
5 FEBRUARY 1998

1998 (2) SA 1075 (W)

An owner will not establish its ownership of an item where there is doubt of its ownership by for example, the record of agreement in terms of which the possessor holds the item reflects another party as owner, albeit incorrectly. An owner will be estopped from asserting its rights of ownership where it has given the impression that another party has the right to dispose of the item and a third party has acted on the strength of that impression to its prejudice.

THE FACTS

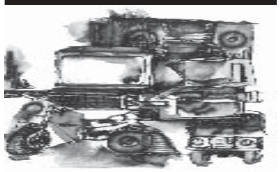
Worldwide Vehicle Supplies Ltd supplied Auto Elegance (Pty) Ltd with two vehicles in terms of an agency agreement entered into between the parties. Auto was dissatisfied with the condition of the vehicles, but being a dealer in second-hand cars, sold them to other parties, the second and third respondents. It asserted that it had a claim for damages against Worldwide arising from costs it had incurred in rectifying the condition of the vehicles.

Worldwide was a company incorporated in the United Kingdom. Its agreement with Auto was recorded in a Sales Agency Agreement which provided that a director of Worldwide was the owner of the vehicles and Auto was the proposed buyer, and that Worldwide was appointed the seller's agent to sell the vehicles.

Worldwide applied for the return of the vehicles. Its application was brought against Auto as well as the purchasers of the vehicles, who had taken delivery of them from Auto. The second respondent opposed the application on the grounds that Worldwide was not the owner of the vehicles, alternatively was estopped from asserting that it was the owner.

THE DECISION

The Sales and Agency Agreement on which Worldwide brought its claim was inappropriate to a sale on consignment, which was the real basis upon which Worldwide and Auto had contracted. The use of an agreement inappropriate to the actual arrangement under which the parties had conducted their affairs resulted in inaccuracies in the record of the Sales and Agency Agreement, for example in its description of the director of Worldwide as the owner of the vehicles. This cast doubt on Worldwide's claim to ownership of the vehicles. The actual arrangement appeared to be one in which Worldwide acted as agent in the sale of vehicles for individuals. The fact that Worldwide was constituted agent in this manner



was an indication that another person, and not it, was the owner of the vehicles. Worldwide had therefore not proved its ownership of the vehicles.

The second respondent based her defence to Worldwide's assertion of ownership on the allegation that Worldwide had given the impression that Auto was entitled to dispose of the vehicle she had purchased. By having given Auto the right to dispose of the vehicle, Worldwide had indeed given this impression, and it amounted to a representation which could reasonably have misled her into believing that Auto was entitled to transfer ownership of the vehicle to her. The fact that Worldwide terminated the agency agreement did not change this, since it should have foreseen that a third party, such as the second respondent, might have been misled to her prejudice in purchasing the vehicle, even after the termination of the agreement. Worldwide had not taken prompt action to secure return of the vehicle after the agreement was terminated and so continued to make the representation which resulted in the second respondent thinking that Auto was entitled to dispose of the vehicle with the rights of owner.

The application was dismissed.

NEDCOR BANK LTD v ABSA BANK LTD

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION
15 AUGUST 1997

1998 (2) SA 830 (W)

A pledge of an asset without delivery thereof to the pledgor is unknown in South African law and an agreement which attempts to simulate such an arrangement by providing for the transfer of ownership of the asset to a party without delivery to that party, simultaneously with an undertaking to pay that party the purchase price of the asset will not effectively confer ownership of the asset on that party.

THE FACTS

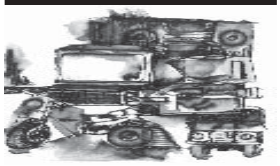
On 12 December 1994, Verwoerdburg Motorland, a motor dealer, entered into a Floorplan Agreement with Absa Bank Ltd. In terms of this agreement, Motorland would request Absa to purchase goods either from itself or from another seller, the price being the price at which Motorland had paid or would have paid for the goods. After the sale of such goods to Absa, Motorland would retain the goods but transfer ownership thereof to Absa. Motorland undertook to simultaneously purchase the same goods from Absa, the price being the same price as that paid by the bank. Absa would retain ownership of the goods until the full purchase price, and any interest thereon was paid. The full purchase price had to be paid upon delivery of the goods to a purchaser found by Motorland, or on the expiry of 180 days (in the case of new goods) or 90 days (in the case of used goods) whichever date occurred first.

On 7 December 1995, Motorland purchased a vehicle from a firm known as Car Deals. In terms of the Floorplan Agreement, Motorland requested Absa to purchase the vehicle. Absa did so and paid the purchase price of the vehicle to Motorland. Within a week, Motorland sold the vehicle to Nedcor Bank Ltd. Nedcor sold the vehicle to a Miss Bothma, the agreement of sale incorporating a term reserving ownership of the vehicle to Nedcor.

After Absa obtained possession of the vehicle, Nedcor claimed the vehicle, alleging that it was the owner. Absa resisted the claim on the grounds that it was the owner, and became so in terms of the Floorplan Agreement, delivery of the vehicle having taken place by constitutum possessorium.

THE DECISION

To show that it was the owner of the vehicle, Nedcor would have to show that Motorland had been the owner of the vehicle, and had not parted with ownership to a third



party when it delivered the vehicle to Nedcor.

The Floorplan Agreement did not show that Absa became the owner of the vehicle. This agreement was no more than an attempt to give Absa real security for the risk it accepted in lending money to Motorland. Despite the provision for the transfer of ownership to Absa, Absa did not wish to exercise any of the rights of ownership, but had provided for its ownership of the vehicle only in order to protect its investment. In this regard, it was significant that the agreement did not provide for the valuation of the vehicle—this showed that Absa was not concerned if the price was not market-related. The agreement was a simulated transaction, ie one which attempted to arrange a loan against the security of the motor vehicle, without Absa having to take possession thereof.

Although it was clear that by entering into the Floorplan Agreement, Absa desired an agreement which would give it real security in the form of a pledge, without taking possession of the vehicle, as would be required for a genuine pledge, it was not possible for a court of first instance to create such a right.

Absa did not become the owner of the vehicle in terms of the Floorplan Agreement, and therefore could not assert a right to the vehicle greater than that asserted by Nedcor. Nedcor's claim was upheld.

CHAIN v STANNIC CONTRACT HIRE (PTY) LTD

A JUDGMENT BY CAMERON J
WITWATERSRAND LOCAL DIVISION
16 SEPTEMBER 1997

1998 CLR 59 (W)

A credit grantor is entitled to repossess goods which are the subject of an instalment sale agreement without complying with section 11 of the Credit Agreements Act (no 75 of 1980) where the claim for repossession is not a claim arising from a contractual right to possession. A claim free of the restrictions of section 11 might arise where the credit receiver repossesses the goods by asserting its right of ownership and this cannot be met by spoliation proceedings because the credit receiver has given up possession of the goods.

THE FACTS

Chain entered into an instalment sale agreement with Stannic Contract Hire (Pty) Ltd, in terms of which he purchased a motor cycle. The agreement reserved ownership of the motor cycle to Stannic until Chain had paid all amounts and complied with all obligations in terms of the agreement. After he had fallen into arrears with payments to Stannic, he delivered the motor cycle to a motor cycle dealer with instructions to sell the motor cycle. Tracing agents appointed by Stannic located the motor cycle at the dealer's premises and retook possession of it.

Chain contended that Stannic's repossession of his motor cycle constituted a repudiation of their agreement in that it did not comply with section 11 of the Credit Agreements Act (no 75 of 1980). He accepted the repudiation and claimed repayment of all monies paid in terms of the agreement.

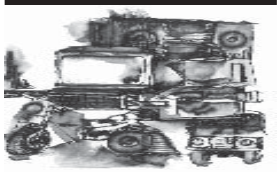
Section 11 provides that a credit grantor may not claim the return of goods to which the credit agreement relates unless the credit grantor notifies the credit receiver that he has failed to comply with his obligations in terms of the agreement and has required compliance.

THE DECISION

Section 11 limits a credit grantor's rights, but only where the credit grantor takes judicial steps to enforce a claim to possession. It was therefore inapplicable to the steps taken by Stannic to gain repossession of the motor cycle. When Stannic respossessed the motor cycle, Chain had already given up possession of the motor cycle, and Stannic was asserting its proprietary rights in terms of its agreement with Chain. As owner of the motor cycle, it was entitled to possession of it. Its claim rested on this and not any entitlement under the agreement to claim return of the goods by judicial proceedings.

Section 11 therefore did not apply and Stannic was entitled to repossess the goods without restriction. The application was dismissed.

SELBORNE CARPET WHOLESALERS CC v J & S CARPETS CC



A JUDGMENT BY SCHABORT J
WITWATERSRAND LOCAL DIVISION
14 NOVEMBER 1997

1998 CLR 65 (W)

A Credit Application Form which specifically refers to the specific reason for the credit requirement restricts future indebtedness in respect of which the terms of the Form apply, to debts arising from that reason. A surety for such debts is accordingly not a surety in respect of any debts not referred to in the Form.

THE FACTS

J & S Carpets CC applied for credit facilities with Selborne Carpet Wholesalers CC. It completed an application form* for this purpose, inserting details such as its address, telephone number and bankers. The form incorporated the field 'Credit Limit Required or Approximate Monthly Requirement', and an amount of R20 000 was inserted at that point. Under 'Trade References' was inserted 'All our purchases are paid cash. This facility is only needed for contract work, and we will still continue to pay cash for daily purchases and cash for the 30 days'.

Ms S Midgley signed the application form on behalf of J & S, and as surety for payment of that corporation's debts to Selborne. She returned the form to Selborne and J & S began using the credit facility, to the point that it eventually owed R137 686,54 to Selborne. Of this R17 800 was attributable to contract work which J & S had done for two building contractors.

Selborne obtained a judgment for payment of R137 686,54 from J & S. It claimed the same amount from Midgley as surety for this debt. Midgley paid R20 000 and refused to pay any more, contending that the insertion of the Credit Limit and the statement made under 'Trade References' limited her liability to R20 000.

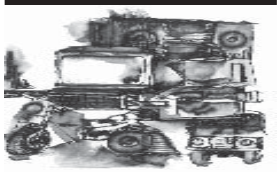
THE DECISION

The credit facilities were given on the understanding that they were subject to the terms and conditions set out in the application form. In incorporating the suretyship provision in the form, the intention was to provide security for the credit facility which was therein established, ie for 'contract work' which had been understood by the parties to refer to specific contracts.

The insertion made under 'Trade References' effectively circumscribed the extent of the liability which J & S could incurr, and therefore also limited the liability of its surety. Midgley was liable only for the R17 800 outstanding in respect of contract work. She had paid more than this and was therefore not liable to Selborne for any further payment.

The insertion of the R20 000 figure under the Credit Limit field was not decisive of this. The meaning of 'contract work' was. The action against Midgley was dismissed.

MULLER v COCA-COLA SABCO (SA) (PTY) LTD



A JUDGMENT BY MPATI J
SOUTH EASTERN CAPE LOCAL DIVISION
8 0CTOBER 1997

1998 (2) SA 824 (SECLD)

Where a deed of suretyship describes the principal debtor as one entity, such as a proprietorship, evidence of the fact that that description gave the trading name of another entity, such as a close corporation, will not be admissible because this would represent an attempt to change the identity of the contracting parties as shown in the deed of suretyship.

THE FACTS

Muller signed a deed of suretyship in favour of Coca-Cola Sabco (SA)(Pty) Ltd securing the debts of Convenient Wholesalers. Coca-Cola brought an action against Muller based on the deed of suretyship, alleging that it was owed R681 242,75 in respect of goods sold and delivered to Convenient Wholesalers CC. Muller excepted to the claim on the grounds that he had bound himself as surety to a proprietoryship, Convenient Wholesalers, and not a close corporation, Convenient Wholesalers CC.

Coca-Cola contended that 'Convenient Wholesalers' was the name under which Convenient Wholesalers CC had traded and that this could be proved at trial.

THE DECISION

The deed of suretyship itself was valid in that it complied with section 6 of the General Law Amendment Act (no 50 of 1956). Being the documentary record of a contract, evidence of its terms was to be found in that documentary record, and no extrinsic evidence would be admissible except for such purposes as the identification of parties.

Coca-Cola wished to lead evidence of the trading name of Convenient Wholesalers CC for the purpose of proving that at the time the deed of suretyship was signed, it traded as Convenient Wholesalers. However, this evidence would be inadmissible since the principal debtor was clearly and unambiguously identified as the business, Convenient Wholesalers, which was not a corporate entity. There were no grounds for drawing the inference that it enjoyed the status of corporate personality.

The issue was not what name Convenient Wholesalers CC traded under, but to which principal debtor Muller bound himself as surety. The evidence Coca-Cola wished to introduce was in fact directed at identifying a different principal debtor from that referred to in the deed of suretyship, and was not directed at demonstrating the trading name under which the close corporation happened to trade. Being evidence that would effectively change a term of the suretyship agreement, it would not be admissible, and so could not meet the exception presently raised against the claim.

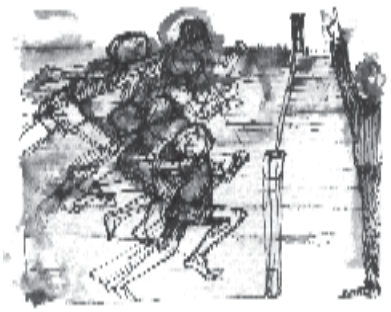
The exception was upheld.

EISER v VUNA HEALTH CARE (PTY) LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
26 SEPTEMBER 1997

1998 (3) SA 139 (W)

Competition



An Anton Piller order may allow the applicant access to the documents which are the subject of the order because this is necessary in order for the applicant to identify the documents which are relevant to the action it wishes to bring against the respondent. It is preferable for an Anton Piller order to state the cause of action which the applicant will depend on in the action to be brought against the respondent, but if this is not done, the order is not defective.

THE FACTS

Eiser applied for, and was granted, an order that Vuna Health Care (Pty) Ltd allow the sheriff, a supervising attorney and Eiser's attorneys, to enter its premises for the purpose of searching for and delivering to the sheriff, certain documents and articles listed in the order. The order required the supervising attorney to make a list of all the items removed by the sheriff and hand a copy to Eiser and Vuna. Paragraph 6 of the order authorised Eiser and its attorneys to inspect the items taken into possession by the sheriff, and copy those necessary for attachment to any summons or founding papers in legal proceedings to be instituted against Vuna. Paragraph 7 of the order required Eiser to institute such legal proceedings against Vuna in which the listed items were concerned, within 30 days of date of the order.

After the order had been executed, and prior to the date of confirmation of the order that the sheriff retain possession of the items, Vuna raised preliminary objections to the confirmation of the order. The first preliminary objection was that the order had been used to search for information rather than to preserve evidence, and that Eiser should not have been allowed access to the documents. The second was that the cause of action of the legal proceedings referred to in paragraph 7 was not defined.

Vuna asked that in view of these objections, the order not be confirmed.

THE DECISION

An *Anton Piller* order (essentially the kind of order obtained by Eiser in the present case) may be granted where the plaintiff has a prima facie cause of action and it is shown that evidence required to establish an action may disappear. In order to control the possible abuse of this procedure, the order is granted subject to the condition that the applicant will not use any of the information obtained under it except for the purpose of bringing the legal proceedings contemplated by it.

In the present case, the purpose of allowing Eiser access to the information obtained in the execution of the order, as provided for in paragraph 6, was to ensure compliance with this stricture. It was also necessary for the applicant to view the documents which were the object of the order in order to identify them as those relevant to the action to be instituted. Since these were the express purposes of the order, it could not be said that the order had been granted merely in order to allow Eiser to search for information which might assist the action he intended to institute. Whether or not this included the right to copy the items to be used in the proposed attachment to the summons was a matter which could be decided more appropriately when the merits of the application were to be considered.

As far as the definition of the cause of action was concerned, it would have been better if this had been specified, but the fact that it was not specified did not make the order unacceptable—the documents which had to be attached to the summons in the action which was to be commenced would have to be relevant to that action.

The preliminary objections were dismissed.

SUN WORLD INTERNATIONAL INC v UNIFRUCO LTD

A JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
18 FEBRUARY 1998

1998 (3) SA 151 (C)

In applying for an* Anton Piller *order, the applicant must disclose all facts which may be relevant to the application, its duty in this regard being one of the utmost good faith. The applicant must show that it has a well-founded apprehension that the respondent will destroy vital evidence before the trial and it will not be sufficient for the applicant to show only that it requires the evidence for the purposes of calculating the quantum of its claim.

THE FACTS

Sun World International Inc, a United States company, held a plant breeder's right in respect of a white seedless table grape variety known as 'Sugraone' in terms of the Plant Breeders's Rights Act (no 15 of 1976). The effect of this registration was that it held the exclusive right in South Africa to import and export propagating material relating to Sugraone until 20 October 2000. In 1996, the Act was amended to include harvested material as the subject of the plant breeder's right.

Sun World alleged that Unifruco Ltd had infringed its plant breeder's right by exporting and selling grapes, which were indistinguishable from Sugraone, under brand names which would not attract the royalties it was obliged to pay Sun World in respect of the sale of Sugraone grapes. Believing that Unifruco would not discover the true exports of its grapes, it obtained an order that Unifruco allow the sheriff, a supervising attorney and its attorneys, to enter its premises for the purpose of searching for and delivering to the sheriff, certain documents and articles listed in the order. The order required the supervising attorney to make a list of all the items removed by the sheriff and hand a copy to Sun World and Unifruco. Paragraph 6 of the order authorised Sun World and its attorneys to inspect the items taken into possession by the sheriff in order to ensure that the list made by the supervising attorney correctly reflected the items seized, and in order to calculate the correct quantities of grapes of the Sugraone variety exported by Unifruco. Paragraph 7 of the order required Sun World to institute legal proceedings against Unifruco in which the listed items were concerned, within 10 days of date of the order.

Sun World supported its allegation that Unifruco would not reveal the true exports of its grapes because it had published export figures which were demonstrably false, had denied that one of its exported brands was a variety of Sugraone and had cooperated with nurseries to hide infringements of its rights.

After the order had been executed, Sun World applied for confirmation of the order. Unifruco opposed this on the grounds that (i) in applying for the order, Sun World ought to have stated that prior to 1996 its rights pertained to propagating material only; (ii) Sun World had failed to show the existence of a real and well-founded apprehension that Unifruco would hide or destroy vital evidence; (iii) the order was more widely framed than was necessary to protect Sun World's interests.

THE DECISION

The effect of the amendment of 1996 was to extend the protection given to plant breeders to include rights in respect of harvested material. Until then, their rights pertained only to propagating material. Sun World therefore did not have a cause of action in respect of the import and export of harvested grapes of the Sugraone variety prior to 1996. At the time it applied for and obtained the order, Sun World, being under a duty of the utmost good faith, should have disclosed this as a material fact.

The essence of Sun World's motivation for the application was that Unifruco had engaged in dishonest or untrustworthy conduct, and that this suggested it would also have acted in this manner in regard to the information required for the royalties it

had to pay Sun World. It would however, be permissible to draw this inference only if it was consistent with all the proved facts. The facts as alleged by Sun World were that Unifruco was still in possession of the documentation which would show its infringement of Sun World's rights, but no facts were alleged which would show why Unifruco would now destroy the documents. The inference was also countered by the fact that Unifruco was a company of long standing. Anticipated recalcitrance on the part of Unifruco when asked to discover the relevant documents was no reason to secure the order, nor could the order be given merely to assist Sun World in computing the quantum of its claim. Calculation of the quantum of Sun World's claim might not be exact in any action it might bring, but this would not be a reason for the failure of such action since the court would not require mathematical precision in the calculation of a damages claim.

As far as the ambit of the order was concerned, assuming that it was necessary for Sun World to have had access to the documents obtained in the execution of the order in order to compute its claim, there was no reason why Unifruco should not have been given notice of this prior to the order having been obtained. Granting access to the documents by Sun World was however, contrary to the practice of the court division and should not have been allowed. The documents listed in the order were more than were required by Sun World.

The application for confirmation of the order was dismissed.

LOURENCO v FERELA (PTY) LTD

A JUDGMENT BY
SOUTHWOOD J
TRANSVAAL PROVINCIAL
DIVISION
10 NOVEMBER 1997

1998 (3) SA 281 (T)

An Anton Piller order will not be granted when the applicant fails to show that it has a prima facie cause of action against the respondents or that the respondent hold documents which constitute vital evidence in the substantiation of the applicant's case and might be hidden or destroyed before an intended action against the respondents comes to trial.

THE FACTS

Lourenco and the other applicants obtained an order authorising the sheriff to enter the premises of Ferela (Pty) Ltd and the other respondents and search for and seize financial records pertaining to those parties. The order required the applicants to institute an action against the respondents within 120 days. In their application for the order, the applicants stated that they wished to bring about liquidation proceedings against Ferela and the other respondents, as well as other proceedings in terms of various sections of the Companies Act (no 61 of 1973) including section 252. They alleged that they were the beneficial shareholders of the respondent companies, being entitled to the shares in them by virtue of their claim to them as heirs, but not by virtue of their existing ownership of them, and that the sixteenth respondent had mismanaged the respondent companies and misappropriated money owing to them.

When the order was put into operation, the respondents informed their attorneys who instructed counsel to urgently apply for the setting aside of the order. This application was made on the grounds that the applicants had had no grounds on which to obtain the order earlier granted, having established no prima facie cause of action against the respondents.

THE DECISION

The applicants were not shareholders in the respondents. As such they had no rights in terms of section 252 of the Companies

Act. That section provides for remedies to members of a company where they complain of unfairly prejudicial conduct by a company. For action to be brought in terms of it, the section requires that the relevant company has committed an act which is unfairly prejudicial, unjust or inequitable to the members of the company, or that the affairs of the company are being managed in a manner which is unfairly prejudicial, unjust or inequitable.

The applicants had not established any prima facie right in terms of section 252. Their allegations were extremely vague and it was clear they had not formulated any relief which they would be seeking in any later proceedings. The applicants had shown that their object was to obtain evidence for a claim which had not yet been properly formulated rather than for the purpose of preserving vital evidence for an existing cause of action. The fact that the forensic auditors needed further information in order to complete their report on the companies provided no reason to grant the order.

The applicants had also not shown that any of the respondents had a document which constituted vital evidence in the substantiation of their case. No attempt had been made to identify such documents or show why they were relevant to the action. Furthermore, the applicants had not alleged that whatever documents were in the possession of the respondents would be hidden or destroyed before the matter came to trial.

The order should not have been granted and it was set aside.

CTP LTD v INDEPENDENT NEWSPAPERS HOLDINGS LTD

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION

UNREPORTED

Where a court order interdicts a respondent from publishing a newspaper substantially similar in nature and circulation to another newspaper, the similarity referred to may be determined by ascertaining the court's purpose in making the order.

THE FACTS

CTP Ltd and others brought interdict proceedings against Argus Holdings Ltd and associated companies, to enforce an agreement restraining Argus from publishing a separate free local newspaper anywhere in South Africa. Those proceedings resulted in an order by the Appellate Division restraining Argus and its associated companies (one of which was Independent Newspapers Holdings Ltd) from publishing certain specified newspapers, or any newspaper substantially similar in nature and circulation, in competition with CTP and its associated companies. The order also gave leave to Argus to approach the court for a further order amending or rescinding that order at a later date.

Two days after the order was granted, Independent Newspapers applied for an order rescinding the order. The Appellate Division refused to rescind the order, holding that changes which had taken place in the ownership of Argus Holdings and its associated companies, and Argus Holdings' relinquishment of ownership of Argus Newspapers, had not rendered the continued operation of the restraint unenforceable on the grounds that it was contrary to public policy. The Appellate Division held that the interdict had been directed at preventing the publication of local newspapers, and that even if it were shown that the newspapers were not free (because part of the payment made by a recipient of the regional newspaper with which these newspapers were distributed was attributable to the newspaper) the fact that they were local newspapers was

sufficient reason to consider them affected by the order. It however, declined to define what was meant, in the context of the proceedings, by a 'local newspaper'.

Independent Newspapers then published newspapers in the Western Cape. CTP alleged that they were newspapers against which the restraint operated. It brought an application for an interdict to prevent Independent Newspapers from doing so. Independent Newspapers contended that because the newspapers it was publishing were not free, and were distributed together with its regional newspapers, they were not newspapers referred to in the order made against it by the Appellate Division.

THE DECISION

The essential problem was what was meant by 'or any newspaper substantially similar in nature and circulation' in the order first granted by the Appellate Division. Independent Newspapers argued that this was not a reference to a newspaper for which the recipient had to pay, nor to a newspaper distributed with a regional newspaper. Both of these were, it argued, features of the newspapers it had published and which had given rise to CTP's interdict proceedings against it.

These arguments could not be accepted. The Appellate Division had intended to interdict the publication of local newspapers, and had sought to give effect to this by referring to them as newspapers substantially similar in nature and circulation to newspapers which clearly were local newspapers. So much was clear from the fact that it had subsequently explained that the interdict was not directed at the publication of free newspapers, but at the publication of local newspapers.

The fact that the newspapers so referred to by the Appellate Division circulated in the Witwatersrand, as opposed to the Western Cape, gave no ground for contending that the order was restricted to newspapers circulating in the Witwatersand and did not affect those circulating in the Western Cape. The order was intended to apply throughout South Africa, including the Western Cape.

The interdict was granted.

GHN OFFICE AUTOMATION CC v PROVINCIAL TENDER BOARD, EASTERN CAPE

A JUDGMENT BY SMALBERGER JA
(EKSTEEN JA, OLIVIER JA, STREICHER JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 1998

1998 (2) SA 45 (A)

Contract

A provincial tender board may not suspend a contract validly entered into without ensuring that it acts within the provisions of regulation 3(2)(a) of the regulations promulgated under the Provincial Tender Board Act (no 2 of 1994). A power to cancel a contract in circumstances other than those provided for in those regulations will not be implied.

THE FACTS

GHN Office Automation CC tendered for the supply of typewriters, desks and chairs to the Eastern Cape Department of Education. The Provincial Tender Board accepted the tender, but later notified GHN that it had suspended the approval of its tender. It purported to do so in terms of section 4(1) of the Provincial Tender Board Act (no 2 of 1994).

GHN applied for an interdict restraining the Board from unlawfully purporting to suspend the contract.

THE DECISION

Section 4(1)(f) of the Provincial Tender Board Act provides that the Board may, on behalf of the province, resile from any agreement concluded under the section and, in appropriate cases, claim damages.

It is clear from the provisions of the Act that the Board acts as an agent for the Province. Section 4(1)(f) however, does not confer the power to suspend an agreement once entered into. The right to resile does not always include the right to suspend.

The power of the Board to suspend a contract are defined in section 4(1)(f) read with regulation 3(2)(a) of the regulations promulgated in terms of the Act. Regulation 3(2)(a) provides that the Board may suspend a contract where the other contracting party has performed unsatisfactorily in terms of the contract, or has acted in some improper manner in connection with the contract. It was clear that the Board had not formed any opinion regarding the matters referred to in the regulation. It therefore followed that it could not have acted in terms of the regulation when cancelling the contract. The cancellation was accordingly ineffective.

The purported suspension of the contract was set aside.

MIDWAY TWO ENGINEERING & CONSTRUCTION SERVICES v TRANSNET LTD

A JUDGMENT BY NIENABER JA (HARMS JA, MARAIS JA, SCHUTZ JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
20 MARCH 1998

1998 (3) SA 17 (A)

In deciding whether or not a party is (vicariously) responsible for the actions of another, the fact that that party formally employed the other party is not decisive of the question. Whether or not that party is vicariously responsible will depend on such questions as whether the party could exercise control over the other and the extent of that control.

THE FACTS

Midway Engineering & Construction Services provided Transnet Ltd with forty lorry drivers for the purposes of conveying goods in the course of Transnet's business as a transport contractor. The lorry drivers had been required because of strikes being experienced by Transnet.

In terms of clause 3.5.5 of the agreement then entered into between Midway and Transnet, the drivers were to be under the control, authority and supervision of Transnet. Clause 3.5.1 provided that the drivers were to begin and end their daily tasks as instructed by Transnet supervisors. In terms of clause 8.2 of the agreement, Midway retained supervision over the service given to Transnet, but in terms of clause 3.2, although Midway retained such supervision, the drivers were obliged to observe and perform within Spoornet's regulations, rules and procedures. Clause 3.4 provided that the drivers were to perform their services under the control and authority of Transnet and in terms of its operating methods, but that they were not employees of Transnet.

While performing services provided for in the agreement, one of the drivers caused damage to a building, the amount of the damages being assessed at R29 850. Transnet settled the claim then arising from the building owner and took cession of the claimant's rights. It brought an action against Midway for payment of the damages, claiming that Midway was vicariously responsible for the driver's actions.

THE DECISION

The question was whether the lorry driver was acting within the scope of his employment and in the exercise of his duties with regard to Midway, when he caused the damages. The legal test for whether a servant will be considered to have been acting within the course and scope of his duties as servant has not been precisely defined, but in the circumstances where one party hires the services of an employee from another party, and that employee causes damage, the emphasis is placed on whether or not the hirer had the power to exercise control over how the employee was to perform the service.

Since Transnet was suing as cessionary of the claim arising by the owner of the damaged building, its position had to be assessed as would the position of the claimant. The contract entered into between Transnet and Midway was therefore relevant because it provided evidence of the driver's status as employee, not because it provided evidence of the relationship between Transnet and Midway.

When looking at the substance of the contract entered into by the parties, it was clear that Midway had intended to provide the services of qualified drivers, but not the actual transportation which the drivers would perform. Midway had no control over what the drivers would do when performing these services, and Transnet itself expected them to do precisely what its other drivers had done before going on strike.

The terms of the agreement entered into between Midway and Transnet showed that Transnet was to have control over the drivers once they began their duties under it. Midway might have been the formal employer, but it was Transnet which exercised the control over the driver which made it responsible for the driver's actions.

Transnet's claim was dismissed.

TWEEDIE v PARK TRAVEL AGENCY (PTY) LTD

Contract

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION
5 APRIL 1998

[1998] 3 All SA 57 (W)

A party to a contract will not be entitled to depend on supervening impossibility of performance when faced with a claim on a contract in respect of which that party has failed to perform due to its breach of contract when the breach occurred before the supervening impossibility of performance. A party claiming restitution as a result of the cancellation of a contract due to breach may claim repayment of what that party has given in terms of the contract, as well as repayment of all expenses incurred in performing its side of the contract, taking into account however, the economic advantages of the contract as a whole.

THE FACTS

Tweedie and Park Travel Agency (Pty) Ltd entered into an agreement in terms of which Park Travel undertook to transport Tweedie from Johannesburg to Twickenham, England, and provide Tweedie with tickets to see the Springbok rugby team play England on 18 November 1995. Clause 9 of the agreement provided that Park Travel acted on the condition that it would not be liable for any injury or damage occasioned by an Act of God, or for carrying out the arrangementsof the tour. Tweedie paid the tour price of R5 066 as well as the expenses of insurance, airport tax and a visa.

In terms of the agreement, Tweedie flew to England but, despite demand having been made on it, Park Travel failed to supply the tickets for the rugby game. Park Travel was unable to do so because it had been unable to obtain them from its usual source of supply.

Tweedie claimed repayment of the tour price as well as the expenses incurred in travelling to England. Park Travel contended that the agreement had been terminated due to supervening impossibility and that in any event, Tweedie could not claim more than the cost of a ticket to the rugby game.

THE DECISION

Park Travel was in breach of contract when it failed to respond positively to the demand made on it. Being then under an obligation to perform in terms of the agreement, supervening impossibility would not release it from that obligation. The result of its breach was that Tweedie was entitled to cancellation of the agreement and restitution of what had been given in terms of the agreement.

The restitution which Park Travel was obliged to make was refund of the price of the tour and reimbursement of the expenditure incurred in connection with it. The fact that Tweedie had received the transportation to England and the benefits of the expenditure in connection therewith did not disentitle him from receiving repayment in respect thereof. Tweedie received no value for what he had paid and was therefore entitled to a full refund of the tour price. As far as the expenditure was concerned, Tweedie was entitled to this since it was expenditure incurred in reliance on an expected performance which had never materialised.

As far as clause 9 was concerned, it could not be interpreted as exonerating Park Travel from liability and entitling it to retain the tour price despite a fundamental breach of contract. The parties could not have intended so improbable a consequence.

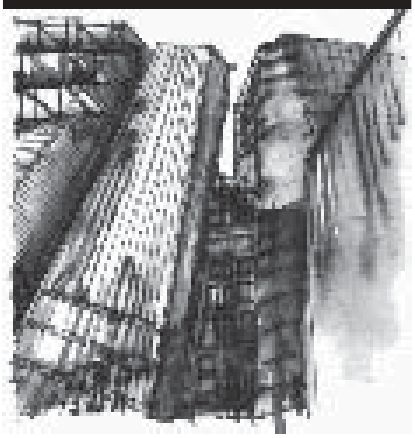
Tweedie's claim was granted.

HATTRICK PROPERTIES v NORTH CENTRAL LOCAL COUNCIL OF THE CITY COUNCIL OF DURBAN

A JUDGMENT BY ALEXANDER J
DURBAN AND COAST LOCAL DIVISION
16 MARCH 1998

[1998] 2 All SA 629 (D)

Property



A local authority is bound to act reasonably, with due regard to changes which might take place in the future and which might affect its present decision to proceed with some action. Should the local authority change its decision to proceed in a particular manner, it is not however, the prerogative of the court to interfere with that variation merely because it is of the opinion that a better decision might have been made.

THE FACTS

On 17 March 1994, the City Council of Durban issued a notice in terms of section 47(bis) of the Town Planning Ordinance (no 27 of 1949) (Natal) the effect of which would be to develop the Point area of the city. The development involved the partial acquisition of Hattrick Properties' property which adjoined a street which was to be upgraded and extended.

As a result of this notice, Hattrick did not proceed with the conclusion of leases in respect of its property since it expected negotiations with the council to conclude with the council acquiring its property for the purpose of the development.

The City Council issued the notice after considerable examination of the technical and financial feasibility of the development project. It was however, issued just before political elections which were expected to result almost certainly in a newly constituted City Council with priorities different from those held by the existing Council. Officials of the City Council who caused the notice to be issued considered that the development was sufficiently desireable that any newly constituted City Council.

On 12 October 1995, the City Council issued a notice that it was not proceeding further with the development of the area. Had it done so, Hattrick would have received compensation.

Hattrick alleged that it had suffered damages as a result of the City Council's negligence in having issued the first notice prematurely and in having withdrawn the notice later. It claimed payment of its damages.

THE DECISION

A City Council is expected to have reasonable foresight in regard to matters falling within its jurisdiction. With regard to people likely to be affected by its decisions, it has a duty to act reasonably and with an awareness of what might eventuate in the future. If it knows that legislation is proposed which would affect its decision to proceed with a project, it might be considered precipitous, and therefore unreasonable, for it to proceed with the implementation thereof.

In the present case, there were no indications that the project proposed by the City Council could not proceed as a result of the different priorities adopted by the new City Council. It was not unreasonable to assume that what had been decided about the development would have later been accepted by the new City Council as a worthwhile contribution to the public as a whole.

The notice issued on 17 March 1994 was therefore not prematurely issued.

As far as the notice of 12 October 1995 was concerned, the question was whether or not the Council acted irresponsibly or unreasonably, thereby exceeding the limit of its powers.

The Council had decided not to proceed with the development project as a result of a recognition of the different priorities it had to accept following the election. That decision was reasonably made, and whether right or wrong, it was not for the court to substitute it with a decision of its own. The decision had been lawfully made and had to be accepted.

Hattrick's action was dismissed.

SOUTHERN LIFE ASSOCIATION LTD v KHAYZIF AMUSEMENT MACHINES CC

Property

A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
12 MARCH 1998

1998 CLR 212 (W)

A provision in a lease requiring the tenant to continue paying amounts due in terms of the lease after cancellation, if the parties are in dispute as to the right to cancel, prevents the lessor from cancelling the lease on grounds different from those originally depended upon for cancellation while the dispute remains undetermined.

THE FACTS

Southern Life Association Ltd leased certain premises to Khayzif Amusement Machines CC. Southern Life alleged that Khayzif had breached certain provisions of the lease, and brought an action for its ejectment from the premises.

Khayzif entered an appearance to defend. Southern Life applied for summary judgment, but the application was refused and Khyazif was granted leave to defend the action. Some two weeks later, on the 18th August 1997, Southern Life delivered a notice of bar on Khayzif's attorneys. They failed to react to the notice, and on 28th August, Southern Life's attorneys applied for and obtained default judgment against Khayzif. Upon execution of the writ, Khayzif applied for an order interdicting its ejectment from the premises pending an application for an order setting aside the notice of bar as an irregular proceeding. It alleged that the application for summary judgment had the effect of interrupting the period within which it had to deliver its plea. That period is 20 days after the date of delivery of a declaration or combined summons.

Southern Life brought a counter-application to Khayzif's application. In the counter-application, it sought ejectment of Khayzif from the premises, basing this counter-application on a letter of cancellation sent to Khayzif on 26 August 1997. In the letter, Southern Life cited Khayzif's failure to pay rentals due in terms of the lease as the reason for its cancellation of the lease and required immediate vacation of the premises.

Clause 30.3 of the lease provided that in the event of Southern Life cancelling the lease and Khayzif disputing the right to cancel, and remaining in occupation of the premises, Khayzif would be obliged to continue paying the rent and other sums payable in terms of the lease which would have been due but for the cancellation, and Southern Life would be entitled to accept an recover such payments without prejudice to its cancellation of the lease.

THE DECISION

Summary judgment proceedings place a moratorium on the delivery of a plea pending the court's decision as to whether leave to defend should be granted. The notice of bar was therefore premature and default judgment should not have been granted against Khayzif. In any event, good cause existed to rescind the judgment which had been granted. The reasons for Khayzif's defence had been set out in its opposition to the summary judgment application, and these had been accepted by Southern Life as sufficient to allow a rejection of that application.

As far as the counter-application was concerned, Southern Life had purported to engineer a second cancellation of the lease agreement, now based on a failure to pay rent. The first cancellation had not been withdrawn. Southern Life therefore continued to depend on that while seeking to achieve Khayzif's ejectment from the premises by other means. In the light of clause 30.3, this was not permissible. That clause provided for the continuation of payments after cancellation of the lease in circumstances where the cancellation of the lease was in dispute. These were the circumstances of the present case. The result was that Southern Life was required to abide by the provisions of clause 30.3 and for ejectment of Khayzif from the premises, would have to depend on its earlier cancellation of the lease.

The appication was granted and the counter-application dismissed.

JACANA EDUCATION (PTY) LTD v FRANDSEN PUBLISHERS (PTY) LTD

A JUDGMENT BY SCHUTZ JA (HARMS JA, SCOTT JA, PLEWMAN JA and ZULMAN JA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1997

1998 (2) SA 965 (A)

Copyright

Proof of anonymity of authorship, as required when depending on the presumptions contained in section 26 of the Copyright Act (no 98 of 1978) requires proof that the work does not attribute authorship to a particular person, as would be done where the work is said to be created by a particular person or records the identity of the possible copyright holder by means of a © followed by the name of an author.

THE FACTS

Jacana Education (Pty) Ltd created a map of the Kruger National Park. The map included a grid setting out the camps situated in the Park, and the services and facilities provided at each of them. It recorded that it was 'created' by 'Jacana Education and the Kruger National Park'. Jacana also created a leaflet showing gate opening and closing times, the trading hours of shops and restaurants, and the Rules of the Kruger National Park. The leaflet recorded '© Jacana Education'.

Frandsen Publishers (Pty) Ltd also created a map of the Kruger National Park. It exhibited a number of differences when compared to Jacana's map. It incorporated the details included in Jacana's leaflet. It also incorporated a grid showing the details given in Jacana's grid, but unlike Jacana's, its grid was not divided into two parts. The classification of camps given in Jacana's grid was repeated in Frandsen's grid.

Jacana claimed that it held copyright in the map as an artistic work and in the grid and Rules as literary works. It alleged that Frandsen's work infringed its copyright, and it applied for a final interdict preventing Frandsen from continuing the infringement. Frandsen defended the action on the ground that the subsistence of copyright had not been proved because Jacana's work was not original, and on the ground that it had not copied Jacana's work. For proof of its copyright, Jacana depended on the presumptions contained in section 26 of the Copyright Act (no 98 of 1978).

THE DECISION

Section 26(3) of the Copyright Act provides that where, in relation to an anonymous or pseudonymous work, it is established that the work was first published in the Republic within fifty years of the bringing of an action for infringement of copyright in the work, and the name of the publisher appeared on copies of the work as first published, copyright shall be presumed to subsist in the work, and to vest in the publisher whose name so appeared on copies of the work. Section 26(5) of the Act provides that where a work has been published anonymously or under a name alleged to be a pseudonym, and has not been shown to have been published under the true name of the author, the work shall be presumed to be original unless the contrary is proved.

The presumptions contained in these sub-sections depend on it being shown that the author is anonymous. However, the map created by Jacana was stated to be created by 'Jacana and the Kruger National Park'. The author was named, and whether or not a company can be the author of a copyright work, the anonymity sought by Jacana did not exist. As far as the leaflet was concerned, the words '© Jacana Education' could refer to its author. This meant that in this case too, the author was not anonymous. Jacana was therefore not entitled to rely on the presumptions contained in section 26.

Even if Jacana had attempted to prove originality without depending on these presumptions, this attempt would have failed, given the fact that visually, it could never be said that the one map had been copied from the other. The overall impact of both maps, as well as the particular dissimilarities between them left the impression that the one map was not a reproduction of the other. The same could be said of the grid and the Rules.

The appeal was dismissed.

KNYSNA HOTEL CC v COETZEE N.O.

A JUDGMENT BY EKSTEEN JA (FH GROSSKOPF JA, NIENABER JA, OLIVIER JA and VAN COLLER AJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 1997

1998 (2) SA 743 (A)

Prescription

When the registration of transfer of property is effected formally correctly in terms of the Deeds Registries Act (no 47 of 1937) prescription in respect of any claim then subsisting in favour of one of the parties to that transaction begins to run as against the other party from date of transfer. This will be so even where the transfer itself is fatally defective as at date of transfer.

THE FACTS

Coetzee, the trustee in the insolvent estate of Mr P C Barnard, sold fixed property which formed part of the insolvent estate, to Knysna Hotel CC. Barnard was then divorced, having been married in community of property. The property was however, transferred to Knysna Hotel after Coetzee averred that he was also the trustee of Barnard's wife's insolvent estate and that that marriage continued to subsist. The sale took place in August 1990, and the transfer was effected in September 1990. Clause 8 of the sale agreement provided that with effect from registration of transfer, all the benefits and risks of ownership of the property would pass to the purchaser.

The trustee of Barnard's wife's insolvent estate brought an action against Coetzee for rectification of the registration of transfer of the property. This action was settled in May 1993 with an undertaking by Coetzee to pay the net value of Mrs Barnard's half share in the property.

In August 1994, Coetzee claimed from Knysna Hotel payment of the balance outstanding of the purchase price, an amount of R80 163,71. Knysna Hotel raised the special plea that the claim had prescribed in terms of the Prescription Act (no 68 of 1969) three years after September 1990, when the debt had become due upon transfer of the property. Coetzee contended that because the trustee of Mrs Barnard's insolvent estate had not consented to the transfer, the transfer had been fatally defective at that date, and had only become effective in May 1993 when Mrs Barnard's trustee had ratified it. He contended that prescription began to run from this date and not September 1990.

THE DECISION

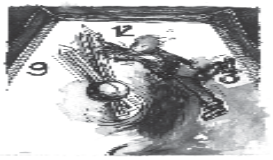
Formally, the transfer to Knysna Hotel was in order. Coetzee had done everything which was required of him in terms of the agreement of sale, his obligation being merely to register the property in the name of Knsyna Hotel. In terms of our system of property law, such a registration of transfer could be contested on grounds such as prescription, and did not constitute irrebutable proof that the transferor was the property owner. Coetzee was required to do no more than he had undertaken to do in the agreement of sale, ie register transfer of the property in the name of Knysna Hotel, not transfer ownership of the property to it, and had done so. It could not be said that clause 8 imposed the obligation to transfer ownership of the property to Knysna Hotel.

Section 20 of the Deeds Registries Act (no 47 of 1937) provides that deeds of transfer shall be executed by the owner of the land described therein or a conveyancer authorised to act on behalf of the owner. This provision however, does not mean that the only person who can confer the power to register transfer of the proeprty is the registered owner of the property. Section 102(1) of the Act includes in the definition of 'owner' the trustee in an insolvent estate. The effect of section 20 is therefore that in the execution of a deed of transfer, only the owner's participation is required. It could not be said that the section had not been complied with, thereby rendering the transfer defective.

All of the formalities for transfer had been complied with and accepted by the Registrar of Deeds, and transfer was thereafter effected by the Registrar. While that transfer might have been contestable, it remained a valid registration until set aside by an order of court. That transfer had taken place in September 1990. Coetzee's claim had prescribed.

LAVERS v HEIN & FAR BK

Prescription



A JUDGMENT BY HEFER JA (EKSTEEN JA, HOWIE JA, SCHUTZ J and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 1998

1998 (3) SA 195 (A)

Prescription begins to run in respect of a debt when the creditor knows that the debt exists and knows the identity of its debtor, even if the identity of a party holding rights to an item relevant to the debt, such as the owner of the item, is not known to the creditor at that point.

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

After the police took the vehicle into their custody, they were obliged (in terms of the Criminal Procedure Act) to return it to the person from who they removed it if that person was lawfully entitled to possession of the vehicle. Because no-on is lawfully entitled to possession of stolen goods, Hein & Far could not contend that the police were obliged to return the vehicle to them after it had been taken into their custody. Prescription would therefore begin to run not from the date on which Hein & Far was dispossessed, but from the date on which it became clear that the vehicle would not be returned to it.

In November 1988, the police informed Hein & Far that the vehicle would not be returned to it. In the light of the fact that the vehicle had been stolen and would not be returned to Hein & Far, it followed that prescription began to run against the corporation from that point. The period of prescription had run before Hein & Far brought its action against Lavers. The action was therefore dismissed.

WARD v SMIT

A JUDGMENT BY SCOTT JA (MAHOMED CJ, EKSTEEN JA, ZULMAN JA and STREICHER JA concurring)
SUPREME COURT OF APPEAL
23 MARCH 1998

1998 (3) SA 175 (A)

Companies

A South African can may order that an external company be wound up locally and appoint a liquidator to wind up the company, when that company has been placed in liquidation in its country of incorporation.

THE FACTS

Zambia Airways Corporation Ltd was incorporated in Zambia and registered in South Africa as an external company. The company was voluntarily wound up in Zambia, and Ward and the second appellant were appointed the liquidators.

The following month, an application for the winding up of the company was brought in Johannesburg in terms of section 344(g) of the Companies Act (no 61 of 1973). The application was granted, and Smit and the second respondent were appointed liquidators.

Six months later, Ward and the second appellant applied for an order recognising the appellant's appointment as liquidators of the company and declaring them empowered to administer the South African estate of the company in accordance with the Insolvency Act (no 24 of 1936) and the Companies Act. They also sought an order authorising them to transfer any surplus assets from South Africa with the consent of the Master and setting aside the orders of liquidation of the company granted in South Africa.

The application was dismissed. Ward and the second appellant appealed.

THE DECISION

The appointment of a liquidator to an external company in its country of incorporation does not empower the liquidator to deal with the assets of the company outside of that country. However, as a matter of comity and convenience, such a liquidator's appointment may be recognised outside of that country upon an order to that effect being granted by a court in its discretion.

In the present case, Ward might have been entitled to such an order had he acted timeously. However, by the time the local application for liquidation was launched, six weeks had passed, and the company had ceased to do business in this country. The final order was granted without opposition, despite the provisional order having been served on the appellants.

The appellants sought to depend on section 354(1) of the Companies Act which provides that a court may on the application of the liquidator, make an order staying or setting aside the continuance of a voluntary winding up. The section requires that it be shown that there are special or exceptional circumstances which justify the setting aside of the winding up order, and that there be a satisfactory explanation of why there was no opposition to the granting of the final order or appeal against it. The appellants had shown no special or exceptional circumstances and had given no explanation.

The appellants contended that section 344(g) did not apply to an external company which is subject to winding up in its country of incorporation. Section 344(g) provides that an external company may be wound up if the company is dissolved in the company in which it was incorporated. Assuming that 'dissolved' meant 'existence terminated', a South African court had jurisdiction to order the liquidation of the company in terms of this section. The court a quo had so exercised its discretion and there were no grounds to overturn its order.

The appeal failed.

STANDARD BANK OF SA LTD v ONEANATE INVESTMENTS (PTY) LTD

A JUDGMENT BY ZULMAN JA (MAHOMED CJ, VAN HEERDEN DCJ, HARMS JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
14 NOVEMBER 1997

1998 CLR 85 (A)

Banking

Where a bank makes a mistake in its entries to a customer's account, it is entitled to reverse the entries where the reversal more accurately accords with the underlying transactions. Prescription in respect of a debt due to a creditor is interrupted by the issue of a summons in which the creditor sets out its cause of action; a later amendment to the summons in which further details of how the debt arose are set out does not nullify the interruption. A bank is entitled to capitalise interest charged against to a loan, but this does not mean that the interest so added to the capital sum loses its identity as interest.

THE FACTS

In February 1988, Standard Bank of SA Ltd agreed to lend Oneanate Investments (Pty) Ltd R1,2m by way of an overdraft facility. In that month, the bank advanced R1,2m to Oneanate in two payments, debiting its account in that sum.

In the same month, Onenante and another party sold to JH and KI Lurie shares in Agserv Ltd. Oneanate's controller, G Lubner, introduced the Luries to the bank, and informed the bank of the share-sale agreement. The bank opened an account in the name of Mooi River Vally Farm (Pty) Ltd for the Luries, and afforded it an overdraft facility of R600 000.

In May 1988, Lubner instructed the manager of the bank's branch where Oneanate kept its account to debit the Mooi River account, and credit Oneanate's account with R600 000. The bank did so. In July 1988, it reversed the transfer, on the grounds that it had had no authority to make the initial transfer.

Between January 1989 and April 1990, the bank passed three further debits to Oneanate's account, being three further advances to Oneanate. While Oneanate continued its account with the bank, it calculated interest on the daily balance of the account, and added the amount so calculated to be due at monthly intervals to the balance of the account. Deposits made to the account were deducted from the balance as and when the deposits were made.

In November 1990, the bank issued summons against Onenate for payment of R1 011 010,65 being the balance due in consequence of the R1,2m advanced in February 1988. In June 1993, the summons was amended by alleging that pursuant to the parties' agreement of February 1988, the bank had lent to Onenanate on different dates, different amounts.

Oneanate defended the action on the grounds that even if the R600 000 credit which had been passed to its account in May 1988 had been done in error, the bank was not entitled to reverse the transfer, but was obliged to bring an action against Oneanate for recovery based on a claim of unjustified enrichment. Oneanate also raised the special plea that in respect of the three advances made between January 1989 and April 1990, prescription had run before the bank's claim for repayment of them—as set out in its amendment of June 1993—was instituted. Oneanate also contended that in any event, the bank had not been entitled to capitalise the interest which had been charged against the principal debt, and should have appropriated payments made into the account firstly to the earliest debts arising in the account, howsoever arising.

THE DECISION

Reversal of the Credit Entry

Even if it could be said that the bank's manager had made a mistake in crediting Oneanate's account and debiting Mooi River's account in May 1988, it was obvious from the conduct of the parties that the credit to the Oneanate account was conditional upon a recognition of the corresponding debit to the Mooi River account. Once it became clear that Mooi River did not recognise the debit from its account, there could have been no payment by it to Oneanate, and consequently no payment by Oneanate to the bank.

The entries in the bank's books of account were in themselves merely prima facie evidence of the transactions which they recorded, but it was still possible that those

underlying transactions were not what those entries might have suggested. The fact that the entries in the bank's accounts showed that Oneanate's account had been credited with R600 000 therefore did not prove uncontrovertibly that it had extinguished its overdraft with the bank to that extent.

In the light of the underlying transactions, the bank had been entitled to reverse the credit it had made to Oneanate's account in May 1988.

Prescription

The summons which commenced the bank's action set out the bank's cause of action—a claim for an amount due and payable in respect of monies lent and advanced by way of overdraft. This set out sufficient particularity for Oneanate to be aware of what was being claimed, and it was sufficiently clear for a court to have decided whether or not to grant judgment on it. There was no inconsistency between what the bank claimed in its amendment of June 1993 and what it claimed in its initial summons. It followed that the claim as formulated in June 1993 had been made when the summons was first issued in November 1990, in spite of the fact that it had been made insufficiently or imperfectly at that stage. Prescription in respect of the three claims made pursuant to the debts arising between January 1989 and April 1990 had therefore been interrupted by the issue of the summons in November 1990. The bank's claim had not become prescribed.

Capitalisation

The bank was under no duty to apply payments made into the Oneanate account to the earliest debts arising in the account. Payments made into the account were to be appropriated firstly to interest charged by the bank on sums advanced by it, even if such interest arose later than another debt becoming due from Oneanate to the bank, such as a loan made by way of an advance from the account. Provided that the bank abided this rule, its practice of adding interest to Onenanate's capital indebtedness was unexceptional.

These conclusions did not imply that the practice of adding interest to the capital indebtedness had the effect of destroying the identity of the interest so added. Capitalisation of interest meant simply that the bank was entitled to charge interest on the sum of the capital and interest earlier incurred, but it did not mean that the interest earlier incurred lost its character as interest. To allow such an implication to be drawn would be to allow the bank to avoid the in duplum rule, as well as the provisions of the Prescription Act (no 68 of 1969) and the Usury Act (no 73 of 1968).

Date from which interest was to run

A question that had to be decided was whether interest on Oneanate's debt ceased to run if, during the course of the litigation, it reached the same amount as the capital sum, ie whether the in duplum rule was to be applied during this period. Although there was authority to the effect that this should happen, it was out of keeping with modern conceptions of the financial significance of interest. The creditor can exercise a certain control over the progress of its litigation against a debtor, but cannot control delays which might become a part of such litigation. The in duplum rule is therefore suspended during the course of litigation by the creditor against the debtor. After judgment is granted however, the in duplum applies and interest cannot exceed the capital sum outstanding in terms of a judgment.

The bank was entitled to the amount outstanding as at the date of issue of summons (R987 612,03) plus interest thereon at the interest rate agreed between the parties.

ABSA BANK LTD v DE KLERK

Banking

A JUDGMENT BY LEVESON J
WITWATERSRAND LOCAL DIVISION
22 MAY 1998

1998 CLR 337 (W)

When a bank allows a withdrawal from an account in the common but mistaken belief that there are funds in the account to meet the withdrawal, the withdrawal cannot be considered a loan, even if it later transpires that the funds in the account were not available due to a deposited cheque having been dishonoured. The bank may however, claim repayment of money so withdrawn on the basis of unjustified enrichment arising from a mistake, common to the parties, that the deposited cheque had been cleared.

THE FACTS

On 29 November 1996, R376 178,70 was credited to De Klerk's account with Absa Bank Ltd as a result of a deposit of a cheque drawn by a foreign bank in favour of De Klerk. De Klerk inquired on two occasions in December as to whether he could draw on the strength of the cheque. On the first occasion, the branch manager of the bank informed De Klerk that he could not do so; on the second occasion, he informed De Klerk that he could do so. De Klerk then drew a cheque for R376 178 and withdrew this amount in cash. He paid the money so obtained to a creditor.

It later transpired that the foreign cheque had not been met. The bank then claimed payment of R376 178 on the grounds that at the time of the payment of this money, it had mistakenly thought that the foreign cheque had been met and there were funds to cover the withdrawal. An alternative basis for its claim was that in terms of the contract between the parties, the bank was entitled to debit De Klerk's account whenever a cheque was dishonoured, and recover any outstanding amount from him.

De Klerk defended the bank's action to enforce its claim on the grounds that the bank was estopped from making its claim because De Klerk had relied on the bank's advice that the foreign cheque had been cleared when withdrawing the funds and paying them to a third party.

THE DECISION

When De Klerk drew the money from his account, he did so in the belief that there were sufficient funds to enable the withdrawal. He was therefore not requesting a loan, nor did the bank consider the withdrawal as, in effect, a loan. The basis of the bank's claim could therefore not be that it claimed repayment of a loan.

The only possible basis of its claim was that it sought repayment of an amount paid by mistake, ie unjustified enrichment as formulated in the condictio indebiti. The evidence showed that the bank had indeed paid the money to De Klerk by mistake, both it and he mistakenly thinking that the foreign cheque had been met. That claim therefore had to succeed, unless the defence of estoppel was good.

The defence of estoppel, depended on showing that the bank had been negligent in informing De Klerk that he could withdraw from his account. However, there was no evidence that the bank had been negligent. This defence therefore could not prevail against the bank's claim. De Klerk had, in any event, not shown that he had relied on the bank's advice to his prejudice. De Klerk had used the money to pay a debt. Having extinguished one debt and raised another in the same amount, he had lost nothing.

The claim succeeded.

OWNERS OF THE CARGO LATELY LADEN ON BOARD THE MT CAPE SPIRIT *v MT* CAPE SPIRIT

A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
28 NOVEMBER 1997

1998 (2) SA 952 (D)

Shipping

An action may lapse in terms of section 3(10)(a)(ii) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) within one year of the commencement of action, where property has actually been arrested in order to begin the action.

THE FACTS

On 18 January 1995, MT *Cape Spirit* was arrested following the issue of a warrant at the instance of the plaintiffs. Letters of undertaking were furnished and security was established for the release of the ship. The ship sailed to Richards Bay, and in February 1995, it was released.

In February 1997, the plaintiffs began an action in rem against the ship. The defendant objected to the continuation of proceedings on the grounds that the security put up and the issue of the action in rem had lapsed in terms of section 3(10)(a)(ii) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983). The section provides that an admiralty action shall lapse if process is not served within 12 months of issue thereof, or if property deemed to have been arrested and attached is released and discharged because no further step in the proceedings has been taken within one year of the giving of the security or undertaking.

The defendant contended that the reference to property being deemed to have been arrested was not a reference to circumstances where property had in fact been arrested and attached, but a reference to circumstances where property had not been arrested and attached. Since in the present case, the ship had in fact been arrested, the deeming provision was not applicable and the admiralty action therefore had not lapsed.

THE DECISION

The words ‘deemed to have been arrested’ in section 3(10)(a)(ii) cover the situation where security has been given to prevent the arrest of property or to obtain the release of property. In either case, property is deemed to have been arrested and the consequences are the same as if the property has actually been arrested. There is therefore no reason to distinguish between the situation where property has actually been arrested and the situation where it is deemed to have been arrested.

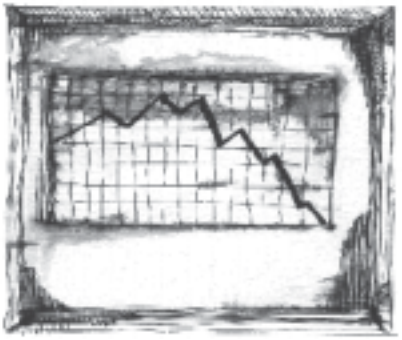
There being no reason to distinguish the actual arrest of property from the deemed arrest of property, the action commenced by the plaintiff lapsed one year after the furnishing of security in 1995, as had the security furnished by it.

TERBLANCHE N.O. v BAXTRANS CC

A JUDGMENT BY SELIKOWITZ J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
3 FEBRUARY 1998

1998 (3) SA 912 (C)

Insolvency



An action under section 26 of the Insolvency Act (no 24 of 1936) may allege that value was received in respect of a disposition referred to in that section but should allege that such value was so nominal or illusory as to amount to no value at all.

THE FACTS

Malo Transport CC was placed under a final liquidation order in May 1994. Terblanche was appointed the liquidator. He brought an action against Baxtrans CC alleging that in November 1993, Baxtrans had agreed with Malo that it would take delivery of certain tractors and trailers in return for payment of a purchase price equal to the amount owing to two hire-purchase creditors, Boland Bank Ltd and Nedfin Bank Ltd, and an amount allocated to another party. The banks had financed the assets for Malo, reserving ownership to themselves in terms of the hire-purchase agreements. The agreement between Malo and Baxtrans provided that ownership of the assets would be transferred to the second defendant against payment of the purchase price.

Terblanche further alleged that the assets were transferred to Baxtrans and that Baxtrans entered into a financing agreement with the second defendant in terms of which the second defendant paid the balances outstanding to the two banks, then totalling R383 539, and R116 460 allocated to the other party. It then took transfer of ownership of the assets.

Terblanche alleged that at the time of the transfer of the assets, their value was not less than R1 276 000 and that the only value received for them was the payment made in settlement of the balances outstanding to the two banks. He alleged that the transfer of ownership constituted a disposition without value within the meaning of section 26 of the Insolvency Act (no 24 of 1936) and that the second defendant colluded with Malo in regard to the alleged disposition of Malo's assets. He brought an action for an order setting aside the alleged disposition.

Baxtrans and the second defendant excepted to the claim on the grounds that whereas section 26 requires that the disposition be 'not made for value', Terblanche had alleged that some value had been received. A second ground of exception was that the allegations made by Terblanche did not specify to whom the purchase price of the assets was to be paid.

THE DECISION

The 'value' referred to in section 26 need not be a monetary or tangible asset but can be equivalent to some benefit. In applying the section, the test is whether or not any value at all has been given. The section could apply where no value has been given, or where inadequate value has been given in the sense that what was given was either illusory or nominal. It would not however, apply merely because what was given was less than the true value of the asset. Nor would it apply only when there is a total absence of value.

The section would apply where what was given was given was illusory or nominal and therefore amounted to no value at all. There was however, no allegation in the present case that this was so, nor that the value received was to be treated as equivalent to no value at all.

The first exception was upheld.

As far as the second exception was concerned, because the allegation that payment of the purchase price had omitted to state to whom the payment would be made, it was unclear how Malo was to obtain ownership of the assets prior to the second defendant acquiring ownership. The second exception was also upheld.

BEINASH & CO v NATHAN (STANDARD BANK OF SA LTD INTERVENING)

Insolvency

A JUDGMENT BY FLEMMING DJP
WITWATERSRAND LOCAL DIVISION
14 NOVEMBER 1997

1998 (3) SA 540 (W)

Whereas a court may be circumspect in assessing the evidence adduced in support of an application for sequestration where the application is a 'friendly' sequestration, it cannot infer that there is collusion between applicant and respondent without evidence of collusion and must grant the application where the requirements for the application have been satisfied.

THE FACTS

Beinash & Co brought an application for the provisional sequestration of Nathan's estate. It alleged that Nathan was indebted to it in the sum of R6 000 arising from accounting services having been rendered to him, and that Nathan had stated in a letter that he was unable to pay the firm or any of his creditors.

The Standard Bank of SA Ltd was also a creditor of Nathan. It contended that the application was a 'friendly' sequestration and had to be assessed with circumspection. When so assessed, the bank contended that it was significant that a balance sheet furnished in support of the application failed to disclose assets—three motor vehicles—which formed part of Nathan's estate. The balance sheet was given by Nathan in response to a request for it from Beinash & Co but the existence of the assets was brought to light in the course of the application proceedings.

The bank also contended that because its claim and that of another creditor represented the greater portion of Nathan's debts, the advantage to creditors would be better served by the enforcement procedures of the magistrates' court.

The bank opposed the application.

THE DECISION

The mere fact that an applicant in sequestration proceedings wishes to assist the respondent is not a reason to conclude that there is collusion between the applicant and the respondent. When faced with a 'friendly' sequestration, a court may be circumspect because of the risk of collusion, but it cannot simply dismiss the application on the grounds that the application is nothing other than an application for voluntary surrender.

A court may consider whether or not the claim alleged by the creditor in a 'friendly' sequestration is real, and may require further evidence of the claim. It may refuse an extension of the return day where there is inadequate evidence that this should be granted. And it may scrutinise the allegation that there is advantage to creditors in granting the application.

In the present case, the failure to disclose the relevant assets in Nathan's balance sheet was not brought about by the applicant. Proper disclosure had eventually been made, in any event. The bank's contention that there were insufficient assets to achieve a non-negligble dividend was a matter that could be dealt with on the return day. As far as the contention that the enforcement procedures of the magistrates' court were more appropriate was concerned, the bank was in effect asking for preferential treatment—the court however, had to look to the interests of the general body of creditors and should not allow the enforcement procedures to be chosen by majority vote.

The application was granted.

DE LANGE v SMUTS N.O.

A JUDGMENT BY ACKERMANN J (CHASKALSON P, LANGA DP, MADALA J, DIDCOTT J, KRIEGLER J, O'REGAN J and SACHS J concurring, MOKGORO J dissenting)
CONSTITUTIONAL COURT
28 MAY 1998

1998 (3) SA 785 (CC)

Section 66(3) of the Insolvency Act (no 24 of 1936) is constitutionally invalid to the extent that section it authorises a presiding officer who is not a magistrate to issue a warrant committing to prison an examinee at a creditors' meeting.

THE FACTS

De Lange was the only member of three close corporations which had been wound up. At a meeting of creditors, an application was made for his committal to prison on the grounds that he had failed to produce books and documents which he had been ordered to produce, and that he had failed to answer fully and satisfactorily questions which had been lawfully put to him.

The provision under which it was contended he had been obliged to do these things was section 66(3) of the Insolvency Act (no 24 of 1936). The section provides that if a person summoned to an interrogation under the Act fails to produce any book or document which he was ordered to produce or refuses to answer any question lawfully put to him, the presiding officer at the enquiry may issue a warrant committing the person to prison where he shall be detained until he has undertaken to do what is required of him.

The presiding officer, Smuts, granted the application. De Lange undertook to do what was required of him, and the warrant for his arrest and detention was suspended. De Lange then brought an application reviewing the decision to commit him to prison and seeking an order that section 66(3) of the Insolvency Act was unconstitutional.

In the Cape of Good Hope Provincial Division, the section was declared to be constitutionally invalid and that order was referred to the Constitutional Court for confirmation.

THE DECISION

Section 12(1) of the Constitution provides that everyone has the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. This confers on the individual the right to freedom when there has been either a deviation from procedural requirements or a denial of substantive rights. The question was whether section 66(3) deviated from this or not.

Section 66(3) was enacted in order to ensure that the legitimate goals of the insolvency laws are achieved and creditors protected. The purpose of the section is to assist in determining what assets are in an insolvent estate, what has happened to them and in recovering them. The public interest is served by compelling the furnishing of information aimed at achieving this purpose.

Section 12(1) of the Constitution was to be applied upon this understanding of the section. The section requires that there be no deprivation of freedom without a fair trial. This means that the hearing at which the order is made depriving the person of his freedom be presided over by a judicial officer in the court structure established by the Constitution. The presiding officer must possess the judicial independence required for the discharge of a judicial function in a constitutional democracy. He may therefore not be an officer in the public service answerable to higher officials in the executive branch of government. To the extent that section 66(3) allows such a person to deprive a person of his liberty, the section is unconstitutional. A person who is not a magistrate may therefore not properly order the committal of a person to prison under the authority of this section. A magistrate may do so, even if in doing so he derives his authority from the Insolvency Act itself, since when doing so he acts in a judicial capacity and not an administrative capacity.

The section is also inconsistent with the Constitution in that it had not been shown that it did not offend section 36(1) by limiting the rights conferred in the Bill of Rights in a manner which was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

To the extent that section 66(3) authorised a presiding officer who was not a magistrate to issue a warrant committing to prison an examinee at a creditors' meeting held under section 65, the section was constitutionally invalid.

ABSA BANK LTD v MASTER OF THE SUPREME COURT

JUDGMENT BY MARNEWICK AJ (NICHOLSON J and COMBRINCK J concurring)
NATAL PROVINCIAL DIVISION
28 APRIL 1998

[1998] 3 All SA 189 (N)

Whereas an incorrect claim submitted in an insolvent estate may be corrected at a later stage, the mere fact that the claim is submitted under a mistaken conception of the law is insufficient reason to hold that the claim so submitted is an incorrect claim. A secured creditor which relies solely on the mortgage bond for the satisfaction of its claim against the insolvent estate waives its right to participate in the proceeds of any asset which becomes available for distribution amongst unsecured creditors.

THE FACTS

United Bank, a division of Absa Bank Ltd, lent money to DPF Properties (Pty) Ltd. The debt amounted to R2 645 000 by 24 April 1992 when a final winding up order was granted against the company. The bank had been the petitioning creditor in the application to wind up.

The debt was secured by a mortgage bond but the bank's claim exceeded the value of the property secured by this bond. When the bank submitted an affidavit in proof of its claim to the liquidator, it stated that it relied solely on the mortgage bond for the satisfaction of its claim against the insolvent estate. The bank official who made this affirmation on behalf of othe bank did so in accordance with a standing instruction that if there was a danger of a contribution to the costs of winding up, the affidavit in proof of claim was to make it clear that the bank relied solely on its security for its claim. This instruction had been given because of section 89(2) of the Insolvency Act (no 24 of 1936) which provides that if a secured creditor (other than a secured creditor upon whose petition the estate has been sequestrated) states in its affidavit in support of its claim that it relies for the satisfaction of its claim solely on the proceeds of the property constituting its security, it will not be liable for the costs of sequestration other than certain specified costs.

After the affidavit had been prepared in accordance with a standard policy laid down by the bank and it must have been aware that implementation of that policy meant that the balance of its claim would be abandoned. If the bank thought that in return for abandoning its claim to that extent it would enjoy an immunity from the costs of winding up, it was wrong, but this did not make its claim incorrect. The intention of section 89(2) was to ensure that the burden of a contribution fell on those creditors in whose interests costs were being incurred in the administration of the estate, and not to offer the immunity thought to be available to the secured creditor who abandons its claim to payment out of unsecured assets in the estate.

The claim as submitted expressly abandoned the bank's right to participate in the residue of the estate. This might have been done as a result of an error of law—the

bank being the petitioning creditor, it could not enjoy the immunity offered by section 89(2) in any event—but a mere error of motive, as opposed to a fundamental mistake, would not be sufficient to vitiate a waiver of its rights. It appeared however, that the bank had waived its rights. Waiver, being a unilateral act, it can be effected by a deliberate intention to abandon rights whether affected by a misunderstanding or not.

Even if the bank mistakenly thought it was protecting itself from the danger of having to make a contribution to the costs of the liquidation, this did not affect its clear abandonment of its rights when it stated in its affidavit that it relied solely on its security for the satisfaction of its claim. Its mistake was one of motive and its waiver was unaffected by this mistake. Once it indicated that it had waived its rights in this manner, the other creditors decided to try to recover the asset they believed might be available to them. They might not have decided to do so, had they known that the bank might participate in the asset so obtained without having shared the risk of not obtaining it.

The application was refused.

FIRST NATIONAL BANK OF SA LTD v COOPER N.O.

A JUDGMENT BY ROUX J
WITWATERSRAND LOCAL DIVISION
14 NOVEMBER 1997

1998 (3) SA 894 (W)

A trustee of an insolvent estate's role as trustee ends when the liquidation and distribution account is confirmed by the Master. Should the trustee wish to act again after that point, he must apply to the court for leave to do so.

THE FACTS

The second respondent was finally sequestrated on 18 August 1992 and Cooper was appointed his trustee. Cooper decided that the second respondent's half-share in a certain property had no financial value and he therefore omitted it from the liquidation and distribution account. That account was confirmed by the Master. No dividend was payable to creditors, and the only creditor which proved a claim, Absa Bank Ltd, was required to pay a contribution.

In 1996, the second respondent was rehabilitated. Cooper then requested First National Bank, which was then in possession of the title deeds relating to the property, to forward them to him. Later, he obtained a search warrant requiring surrender to the title deeds.

The bank applied for the suspension of the warrant, contending that Cooper no longer had the right to act as trustee.

THE DECISION

Section 112 of the Insolvency Act (no 24 of 1936) provides that after the Master has confirmed an account, the confirmation will be final, save against a person who may have been permitted by the court before any dividend has been paid to reopen it. This means that the matters dealt with in the account are finally disposed of and the account cannot be reopened. The effect of this is that the role of the trustee is also disposed of and ended when the liquidation and distribution account is confirmed. Should he wish to act again, he must have the leave of the court to do so, as provided for in section 112.

Cooper had not applied to the court for leave to act again. He was therefore not empowered to act as trustee and require surrender of the title deeds. The application was granted.

PARUK v GLENVAAL DEWAR RAND NATAL (PTY) LTD

A JUDGMENT BY LEVINSOHN J (HOWARD JP and McLAREN J concurring)
NATAL PROVINCIAL DIVISION
23 FEBRUARY 1998

UNREPORTED

Insurance

Where an insurance broker has been negligent in failing to disclose facts which are relevant to the risk an insurer is asked to accept, the insurer's later repudiation of the policy on the grounds of a failure to disclose does not entitle the insured to claim against the broker, where the insurance cover would not have been given by any other insurer had proper disclosure been made.

THE FACTS

When Paruk had been insured by Mutual & Federal, he made several claims under that policy. On 4th October 1993, Mutual & Federal gave thirty days notice of its intention to cancel all policies issued in his favour. Paruk then attempted, through Dhooma, an employee of Glenvaal Dewar Rand Natal (Pty) Ltd, to obtain new insurances from S.A. Eagle and Protea Insurance. Both companies declined to quote.

On 9th December 1993, General Accident Insurance Co Ltd was approached. Through Dhooma's negligence, it was not told of Paruk's claims history, nor of the fact that SA Eagle and Protea Insurance had declined to quote. If General Accident had been informed of Paruk's claims history and of Mutual & Federal's cancellation of its insurance policies with Paruk, it would not have agreed to quote.

Paruk contended that if disclosure had been made to General Accident, he would have obtained insurance cover from that company and it would not have repudiated a claim he subsequently made following loss of stock-in-trade in a fire. General Accident repudiated on the grounds that Paruk had failed to make the disclosures regarding his past claims history and the fact that the other insurance companies had declined to quote. Paruk brought an action against Glenvaal alleging damages as a result of Dhooma's negligence.

Underwriters from neither of the insurance companies indicated that if they had been faced with the truth about Paruk's claims history and attempt to obtain other insurance, they would have declined to quote. Others stated that they would have examined the request for cover more closely and might have given cover once satisfied with further factors.

THE DECISION

Paruk had to discharge the onus of showing that he would have concluded an insurance contract with another insurer. The evidence however, showed that General Accident would not have accepted the insurance risk in relation to Paruk had it been informed of Paruk's insurance track record. The evidence showed that five major insurers would have refused to insure.

It followed that there was not causative nexus between the admitted negligence of Dhooma and General Accident's repudiation of the policy. If all the disclosures had been made, Paruk would not have succeeded in obtaining insurance.

The appeal was dismissed.

BARNARD v PROTEA ASSURANCE CO LTD

A JUDGMENT BY KING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
27 JUNE 1997

1998 (3) SA 1063 (C)

An ambiguous term in an insurance policy must be interpreted liberally and in favour of the insured so as not to defeat a claim to indemnity under the policy.

THE FACTS

Barnard concluded a contract of insurance with Protea Assurance Co Ltd in terms of which Protea insured Barnard's life. An accidental benefit clause provided for a benefit to be payable to the beneficiary, Barnard's wife, provided that accidental death was not caused by, inter alia, active participation in skin diving. Permanent total disablement benefit cover excluded death through scuba diving.

While the policy was in force, Barnard enrolled on a scuba-diving course. He participated in an exercise which required that he undertake a breathhold dive, ie descend below the surface of the sea, obtain a fist full of sand and resurface. He was wearing a diving suit, a weight belt and a mask, but not a snorkel or buoyancy compensator. He descended below the surface but did not resurface. It was discovered that he had died by asphyxiation as a result of drowning.

Barnard's widow claimed against Protea under the policy of insurance but Protea repudiated on the grounds that Barnard had been participating in skin diving as referred to in the policy.

THE DECISION

The policy recognised a distinction between scuba diving and skin diving. The former involves the use of air from an outside source and the latter the use of a snorkel. The use of the words 'skin diving' in the policy might have been ambiguous, but this distinction gave some indication of the intended meaning of the words.

The policy had not intended to exclude every activity involving risk. In including skin diving, it therefore did not include an activity which involved merely a breathhold dive. This was not an activity which required the use of a snorkel and so could not be considered skin diving. The use of a snorkel is necessarily involved in the activity of skin diving.

The claim succeeded.

POLVERINI v GENERAL ACCIDENT INSURANCE CO SA LTD

A JUDGMENT BY HORWITZ AJ
WITWATERSRAND LOCAL DIVISION
18 NOVEMBER 1997

1998 (3) SA 546 (W)

An insurer may not vary an insurance contract by insisting that a payment in settlement of a claim be accepted in full settlement of the claim where the insured disputes the quantum of the offer made by the insurer.

THE FACTS

General Accident Insurance Co SA Ltd insured Polverini's property against damage. The property was extensively damaged by fire and Polverini submitted a claim for the cost of repairs amounting to R120 168,40.

General Accident applied average to the claim, alleging that the property had been underinsured, and offered R101 931,53 in settlement. In making the offer, it required that Polverini sign an agreement of loss in that amount in full and final settlement of his claim.

Polverini claimed payment of the full amount of R120 168,40. He brought an application for payment of the admitted amount of R101 931,53 reserving his right to claim the balance in a separate action in the magistrates' court.

THE DECISION

Polverini could not in motion proceedings claim the full amount

which it contended was owed to it, since the dispute between the parties could not be resolved without leading evidence, a procedure inappropriate in motion proceedings. The question which remained was whether he could claim the balance. In respect of this amount, General Accident was liable to Polverini, having admitted liability in its offer of settlement.

Polverini was however, not entitled to claim payment of a portion of a debt which it was admitted was owed to him while reserving his right to claim the balance in different proceedings. General Accident's acceptance of liability did not give Polverini a cause of action against General Accdient which was independent of his cause of action against it based on the insurance contract the two parties had entered into. Any assertion of his right to payment depended on the same original cause of action and could not therefore be separated into two for the purposes of enforcement.

Since there would be disputes between the parties in any legal proceedings for such enforcement, the appropriate procedure would be to institute an action and not an application. Having done so, Polverini would be able to bring an application for immediate payment of the amount admittedly due. The matter was therefore postponed in order to afford Polverinin the opportunity to do this.

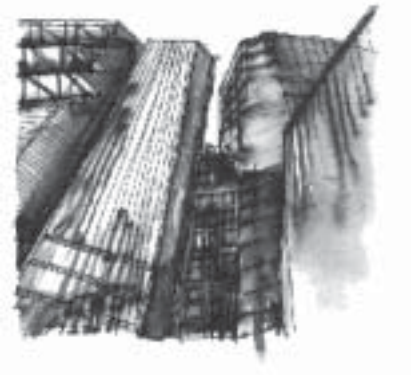
I do not know of any provision of law which entitles a party who has made an unqualified and unconditional admission of liablity toward another party to claim that the admission cannot be used against the first-mentioned party.

BECK v PREMIER, WESTERN CAPE

A JUDGMENT BY ROSE-INNES J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
12 DECEMBER 1996

1998 (3) SA 487 (C)

Property



A removal of restrictions on a title deed effected under the Removal of Restrictions Act (no 84 of 1967) will be invalid where proper notification of the removal has not been effected prior to the removal

THE FACTS

Mr E Diekmann owned erf 1483, Vredehoek, in Cape Town. The holding title contained the restrictive conditions that the property was not to be subdivided and that no more than one dwelling together with outbuildings and appurtenances was to be erected on the erf and no more than half the area of the erf was to be built upon. These restrictions had been imposed on the property in 1936 by the Administrator of the Cape Province under the Townships Ordinance (no 13 of 1927).

On 19 May 1995, Diekmann applied for the removal of the restrictions. In the application, the purpose of the removal was stated to be the erection of townhouses, and the reason for the removal that this would bring the title deed into line with the zoning (of general residential) by the local authority. Objections to the application were lodged by interested parties, after notice of the application had been given to them. The City Planner, however, supported the application and submitted a report to the Urban Planning Committee of the local authority expressing its reasons for supporting the application. The report contained inaccuracies regarding the zoning of the property and those affected by it, as well as regarding the nature of the neighbouring properties. The objectors were not given sight of the report. The Urban Planning Committee was presented with a draft plan showing a two-storey development proposed for the property. The Urban Planning Committee supported the development proposal and adopted the recommendation of the City Planner. It resolved that the Premier of the Western Cape be advised that the Council supported the removal of the title deed restrictions.

When the application was brought before the Minister of Agriculture, Planning and Tourism in the Western Cape, his Director-General requested that he be furnished with a development plan. Such a plan was submitted to him. It showed a building accommodating a parking garage at floor level, three floors of flats above that and a fourth floor of flats with dormer windows in the roof of the building. In a report, the Administrative Head of the Minister's department recommended the approval of the plan. The report referred to the objections which had been brought against the development and gave the answers to them which had been given by the applicant in its responses before the Urban Planning Committee. It repeated the inaccuracies made by the City Planner in its report to the Urban Planning Committee.

On 29 March 1996, the restrictive conditions were rescinded by a notice given in the *Provincial Gazette*, following a decision to that effect given by the Minister. This was done in terms of section 2(1) of the Removal of Restrictions Act (no 84 of 1967).

After building operations began, Beck brought an application reviewing and setting aside the removal of the restrictive conditions of title.

THE DECISION

The purpose of notification of an application such as that made by Diekmann was to inform interested persons of the application, and give them an opportunity to ascertain the extent to which their rights might be affected by the application and then protect their rights by making appropriate objections to the applicant's proposals. The question was therefore whether this purpose had been served by the notifica-

tion which was given.

It was clear that the notification that was given was of the proposal to construct townhouses with two storeys, not flats having five floors. That notification was therefore for something completely different from what was finally approved, and as such it was inadequate. It could not be accepted that the notification could merely be that an application had been made, without detail of the nature of the proposed development. The prescribed form required to be completed in terms of the Act itself provided for a statement of the purpose for which the property would be used if the application was successful. Furthermore, since the exercise of the right to remove a title deed condition might affect the rights of others, they would be entitled to proper notice of the application. A proper consideration of the removal of the restrictive conditions would require full information of the proposed usage of the property. This means that an application for the removal of such restrictions would need to furnish such information in order to inform the authorities and the public of the extent to which this would affect the neighbourhood and the persons living there.

The respondents contended that once the removal of restrictions had taken place, an applicant or his successors in title could deviate from the development proposals submitted in order to achieve the removal. However, whether or not an applicant could so deviate from the development proposals was irrelevant to the present inquiry which was whether proper notification of the application had been given. Without proper notification, the application itself would have been irregular and the very removal of restrictions improper–with the result that the restrictions would have remained effective as against the applicant and his successors in title.

Since the application approved by the Minister was different from that proposed by the applicant and considered by those to whom notification was given, the Minister's decision to remove the conditions was irregular and had to be set aside. Apart from the failure of proper notification, the effect was that the decision made by the Minister was not made after proper compliance with procedures, such as considering necessary recommendations, provided for in the Act, and this rendered the decision ultra vires the Act.

It was also clear that the Minister did not properly apply his mind to the application. He was not given sight of the application as submitted to the Urban Planning Committee, and he had approved the removal subject to the condition that the flats be erected, in spite of the fact that the Administrative Head of the Minister's department had reported to him on the townhouse development proposals which had been brought before the Urban Planning Committee.

There were also defects in the notice in the *Gazette* giving notice of the approval. This had been given incorrectly by the Premier, not the Minister, and had failed to indicate the conditions which had been attached to the removal.

The application succeeded.

NEW GARDEN CITIES INC v ADHIKARIE

A JUDGMENT BY ROSE-INNES J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
20 FEBRUARY 1998

1998 (3) SA 626 (C)

The failure by a local authority to enforce zoning regulations may not be understood as acquiescence in the contravention of such regulations. A township owner which is not permitted to insert conditions of title in respect of properties which it sells may insert conditions in the agreements of sale of such properties. Such inserted conditions may include restrictions on the use to which the property may be put where this is in the interests of all property owners in the township.

THE FACTS

New Garden Cities Inc applied for the establishment of a township in Brackenfell, Western Cape. In approving the establishment of the township, the Administrator of the province recorded that no conditions of title could be imposed by the owner in respect of the township. After approval for the establishment of the township, Garden Cities sold erf 5411, Brackenfell, to Adhikarie. Clause 13 of the sale agreement provided that the property sold would be used for residential purposes only and for the housing of not more than one family.

After building a garage on the property, Adhikarie started a general dealer's shop where he sold groceries, cigarettes and confectionary. New Garden Cities addressed a demand to Adhikarie that he stop trading from the property. In the same month, Adhikarie applied for a temporary departure from scheme regulations to enable him to operate a house shop from the property. The application was refused and Adhikarie appealed against that refusal.

Prior to the outcome of Adhikarie's application, New Garden Citites brought an application for a final interdict restraining Adhikarie from carrying on the business on his property. It based its application on the terms of clause 13 of the sale agreement. Adhikarie opposed the application on the grounds that (i) the local authority had informally approved his trading because it had not instructed him to cease trading, (ii) the terms of clause 13 were contrary to the restriction imposed on Garden Cities by the Administrator when approving the establishment of the township, and (iii) clause 13 was illegal and unenforceable since it deprived the owner of property the free right to deal with his property.

THE DECISION

Adhikarie was contravening the zoning regulations by conducting the business from his property. If unsuccessful in his appeal against his application for a temporary departure from the scheme regulations, he would not be entitled to continue conducting his business. The local authority had not permitted him to trade from the property, neither formally nor informally.

As far as the second ground of defence was concerned, the use of the property was determined by the town planning scheme regulations, which zoned the property for single residential purposes. The terms of clause 13 did not conflict with that determination. They had been inserted in the agreement of sale as a condition of the sale and this had not been translated into a condition of title when transfer of the property to Adhikarie took place. Since it was not a condition of title, it was not contrary to the restriction imposed by the Administrator when the establishment of the township was approved.

As far as the third ground was concerned, clause 13 was in the interests of all property owners in the township, ensuring that the residential nature of the area was preserved, without interference from business or industry. It was therefore not illegal.

The application was granted.

SUNMORE INVESTMENTS CC v EASTERN METROPOLITAN SUBSTRUCTURE

A JUDGMENT BY FEVRIER AJ
WITWATERSRAND LOCAL DIVISION
17 JUNE 1998

1998 CLR 382 (W)

A local authority may not impose a condition under the powers given to it in section 92(3) of the Town-planning and Townships Ordinance (no 15 of 1986) where the effect of this is to expropriate the property, or a portion thereof, of the person applying for approval of a subdivision of the property.

THE FACTS

Sunmore Investments CC applied for and obtained a rezoning of its property, which abutted the William Nichol Drive, from 'residential 1' to 'residential 2' in terms of the Sandton Town Planning Scheme, which provides for use categories for property subject to its jurisdiction. Approval of the application was given subject to the condition that before the submission of building plans, Sunmore was to submit a site development plan to the local authority for approval.

Sunmore submitted a site development plan to the local authority, the Eastern Metropolitan Substructure (EMS), complying with the conditions for such a plan as laid down in the Scheme. Sunmore was required to show on this plan, subdivisional lines in respect of any proposed subdivision and proposed access to and from the property. EMS required an area 10m long for entry parking at the access point. Sunmore complied with this condition and the EMS approved the site development plan.

Sunmore then applied for the subdivision of the property. The EMS responded that it would not consent to the subdivision 'unless the mid-block road is given off in terms of the Bryanston Mid-Block Plan'. The mid-block plan was a policy decided upon by the Sandton Town Council in 1986 in regard to subdivisions and road constructions, and held that panhandles were preferable to cul-de-sacs, and that properties abutting the William Nichol Drive should take their access from the mid-block road system and not that road. A portion of the proposed mid-block road referred to by the EMS was situated on Sunmore's property.

Sunmore objected to the introduction of this condition. It applied for an order that the condition imposed was ultra vires the powers of the EMS and of no force or effect, and that the EMS approve the subdivision under the same conditions as the approval of the site development plan.

THE DECISION

Having approved the site development plan, the EMS had no right to enforce the mid-block plan in respect of it. It could assert the right to enforce that scheme in relation to Sunmore's property some time in the future, if it proceeded in terms of the Expropriation Act (no 63 of 1975) and expropriated Sunmore's property for that purpose. It was not entitled to take advantage of section 92(3) of the Town-planning and Townships Ordinance (no 15 of 1986) and impose a condition authorised by that section for the purposes of expropriation.

The EMS clearly intended to expropriate Sunmore's property, when it stated that it required it to 'give off' the mid-block. This intention could not be achieved using the provisions of the Ordinance, but had to be achieved under the Expropriation Act. If the EMS did wish to impose a condition in terms of the Ordinance, it would have to do so in the proper exercise of its discretion as to what was considered expedient in the particular case.

The imposition of the condition was therefore ultra vires the powers of the EMS and was of no force or effect. The court could not however, order that the EMS approve the subdivision as applied for by Sunmore, as this was a matter which had to be dealt with by the EMS under the conditions imposed on it by the Ordinance.

BAILES v HIGHVELD 7 PROPERTIES (PTY) LTD

Property

A JUDGMENT BY NICHOLSON J
NATAL PROVINCIAL DIVISION
28 APRIL 1998

[1998] 3 All SA 205 (N)

Although an agreement for the sale of land may be created by the exchange of letters between buyer and seller, the complete terms thereof must appear therefrom in order for there to be compliance with the statutory requirement that a sale of land be recorded in writing. There is no repudiation of an agreement where one party incorrectly insists on compliance with an alleged amended agreement which was not in fact entered into between the parties, unless that party shows a clear and unequivocal intention not to be bound by the original agreement.

THE FACTS

Highveld 7 Properties (Pty) Ltd bought immovable property from Bailes. The purpose of the acquisition was to enable the establishment of a golf course estate.

After the sale, in response to an request from Highveld, Bailes indicated his willingness to enter into an addendum to the agreement of sale in a letter written to Highveld. This addendum related to further land identified by a firm which had been engaged to prepare a development plan with a view to obtaining town planning approval for the golf course estate. Highveld responded with a counter-proposal as to the precise area of the extra land it wished to obtain, and a lower price. In a letter written in reply to Bailes, it stated that it had been agreed that the size of the site was to be increased but it required that it be entitled to an increase in the number of stands to be purchased on the site.

Subsequently, Highveld stated that as a result of a failure to agree on the terms of the acquisition of the extra land, the original agreement be adhered to. Bailes disputed that there had been a failure to agree and called upon Highveld to comply with the amended agreement, failing which he would invoke the breach provisions of the agreement. Highveld stated that by his behaviour, Bailes appeared to have no intention of proceeding with the original agreement and appeared to require it to comply with the terms of a new agreement. It considered this a repudiation of the original agreement and it accepted the repudiation.

Bailes denied that he had repudiated the agreement, and brought an application for an order that the original agreement as amended, alternatively the original agreement alone, was of full force and effect.

THE DECISION

Though evidence of the circumstances surrounding the entering into of the amended agreement was admissible, there being ambiguity as to the terms of that agreement, those circumstances—in relation to the two letters exchanged between the parties after the original agreement had been entered into—did not indicate that the parties had concluded a further agreement.

Section 2(1) of the Alienation of Land Act (no 68 of 1981) 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 with their authority. This section applies to amendments to agreements as much as to agreements and must be strictly complied. The purpose of the Act is to obviate uncertainty, disputes and possible malpractices in connection with contracts for the sale of land. To this end, it requires that the parties record their agreement in documentary form. It was clear that in the present case, the amended agreement did not comply with the provisions of this section.

As far as the original agreement was concerned, the question was whether or not it had been repudiated. The test was whether or not the conduct alleged to amount to a repudiation exhibited a deliberate and unequivocal intention not to be bound to the agreement.

Bailes had not shown a deliberate and unequivocal intention not to be bound to the agreement. When faced with the allegation that he had repudiated, he denied that he had repudiated. His insistence on compliance with the amended agreement had to be seen in the light of the fact that the amendment did not significantly vary the original agreement.

Furthermore, Bailes had never indicated that he wanted compliance with the amended agreement or no deal at all. Every dispute concerning an agreement already entered into does not necessarily involve a repudiation of the agreement, nor does an intention to be bound by obligations as recorded in a purported amended agreement. In the present case, there had been no repudiation.

The original agreement was of full force and effect.

MUNNIKHUIS v MELAMED N.O.

A JUDGMENT BY WUNSH J
(CAMERON J and FEVRIER AJ concurring)
WITWATERSRAND LOCAL DIVISION
6 OCTOBER 1997

1998 (3) SA 873 (W)

Contract

When a party repudiates an obligation created in a contract, the other party's right to enforce performance arises as at the date on which the obligation was to have been performed. When the other party seeks to enforce performance of the obligation and does not cancel the contract and claim damages, the period of prescription in relation to the claim therefore begins on the date when performance was to take place, and if the party obliged to perform later expressly denies that it was obliged to perform, this does not interrupt the running of prescription.

THE FACTS

Joan Munnikhuis and her brother, Nick, were beneficiaries in two separate trusts formed by their father in Jersey in 1983. Nick brought an action against Munikhuis related to their respective interests in the trusts. In December 1986, the action was settled. It was agreed in clause 18 of the settlement that Munnikhuis would procure that Haddon Fidelity Corporation would no longer be a trustee of the trust in which she was a secondary beneficiary and Nick a primary beneficiary (the 'Nicola' trust), and that all things required to be done in the settlement would be done before 31 March 1987.

In terms of the settlement, Nick transferred his shares in Haddon to Munnikhuis. Haddon then took steps to resign as trustee, but a letter of resignation sent in January or February 1990, was ineffective because the Royal Trust of Canada (CI) Ltd of Jersey which Haddon had appointed to take office in its place, declined to accept the appointment. Nick was aware of the fact that the letter of resignation had been sent, but in February 1990, his attorney received a letter from Royal Trust indicating that it could not sign an instrument of discharge as part of Haddon's resignation due to certain defects in it. Article 15(3) of the Trusts (Jersey) Law of 1984 provides that a resignation by a trustee which would result in there being no trustee shall have no effect.

Nick died in 1992 and Melamed was appointed his executor. In 1994, Melamed became aware that Haddon's resignation had been ineffective.

In September 1994, Munnikhuis brought an action against Melamed alleging that assets had been unlawfully transferred from the Nicola trust to another trust established by Nick, the Den Haag trust, in 1990, and that this had been done without the authority of Haddon which had not retired as trustee. The purpose of the litigation was to gain control of the Nicola trust through Munnikhuis's control of Haddon.

In defending the action, Melamed depended on clause 18 and sought enforcement of it to defeat this purpose. Munnikhuis replied to this defence by contending that the right to enforcement had lapsed by effluxion of time, ie had prescribed, three years after 31 March 1987.

THE DECISION

The obligation to secure Haddon's resignation arose from a contract, which was concluded by the settlement following Nick's action. The application of the Prescription Act (no 68 of 1969) should therefore be to a period of prescription of three years, as provided for in section 11(d), from

the date on which the obligation fell due.

In the present case, it was alleged that Munnikhuis repudiated her obligation as recorded in clause 18 when she joined with Haddon in instituting the proceedings in September 1994. However, in so doing, she did not necessarily incur a new debt. That she would have done had Melamed then cancelled the contract and claimed damages. But Melamed did not do so, with the consequence that the original obligation remained, in spite of the breach of contract, and Melamed's choice had been to require specific performance of the original obligation.

Section 12(3) of the Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care. This may affect the determination of when prescription begins to run. However, in the present case, in February 1990 Nick knew that Royal Trust had refused to accept the nomination in place of Haddon, even if he did not know that as a result of article 15(3), Haddon's resignation had no effect.

When Munnikhuis later denied that she was obliged to comply with clause 18, a new debt was not created. Her attempt to comply in January or February 1990 did not amount to a tacit acknowledgement of liability which interrupted the running of prescription. Even if this was considered an interruption, the running of prescription would have recommenced at that point, and even with Nick's death in 1992, would have been completed before Melamed's assertion of the right to enforce clause 18.

The defence of prescription was upheld.

McCULLOCH v KELVINATOR GROUP SERVICES OF SA (PTY) LTD

A JUDGMENT BY CAMERON J
WITWATERSRAND LOCAL DIVISION
23 JUNE 1998

1998 CLR 343 (W)

A contract will not be rendered null and void merely because the parties contracted on the basis that if a commonly held assumption were to fail, the contract would not have been entered into, and that assumption later fails.

THE FACTS

McCulloch was employed by Kelvinator Group Services of SA (Pty) Ltd. The company had not been profitable for some years when, in 1996, it informed its employees, including McCulloch, that because it had been unable to become profitable, it intended to discontinue operations. The company informed employees that it had been in negotiation with a potential purchaser of its business, but it considered that the negotiations would not be successful.

On 27 November 1996, Kelvinator addressed a letter to McCulloch in which it terminated her services due to the discontinuation of the business. It offered benefits amounting to R147 759 and requested confirmation of acceptance. McCulloch signed her acceptance of these terms.

On 13 December 1996, Kelvinator issued a notice to employees that negotiations for the sale of the business of the company had been successful and that the business would not discontinue. The terms of redundancy agreements previously entered into would be honoured where the redundancy was confirmed.

McCulloch took the view that her retrenchment benefits could not be retracted and insisted that Kelvinator perform its obligations in terms of its letter terminating her services. Kelvinator responded that both parties had been aware of the negotiations for

the sale of the business, and it had been entitled to revoke the termination letter were these negotiations to prove successful.

THE DECISION

A proper interpretation of the agreement did not require any evidence of the background circumstances relevant to the conclusion of the agreement. The agreement was unambiguous. Although the agreement referred to redundancy, this was evidence of Kelvinator's motive in terminating McCulloch's services and was not a suspensive condition on which the operation of the agreement was to be dependent.

There was nothing in the Labour Relations Act which would render the agreement of no force or effect. The Act regulates the termination of employment, but makes no provision for a termination agreement which is entered into for reasons which later appear to be incorrect. Its purpose is to introduce a more equitable balance between the respective positions of employer and employee, but McCulloch did not act contrary to the spirit of equity on which the Act was based.

Kelvinator argued that the agreement incorporated a tacit term that it would lapse if the retrenchment fell away. This however, had not been proved. The test for a tacit term was that it would have been agreed to had the parties considered the aspect at the time of contracting. In the present case, the parties might have considered this aspect, but there was no indication of what time period they would have considered acceptable for the sale of the business.

Kelvinator also argued that since in concluding the agreement, both parties assumed that the discontinuation of the business would not be reversed, the agreement was rendered null and void by the actual continuation of the business. This argument, based on the doctrine of the failed common assumption, could not succeed. That doctrine is too widely stated if it states that a contract is rendered null and void by the failure of an assumption commonly held between the parties which, if it had not been held at the time, would have resulted in no agreement having been entered into. Having relied on this doctrine so stated, Kelvinator could not succeed.

The claim succeeded.

GENCOR SA LTD v TRANSITIONAL COUNCIL FOR RUSTENBURG AND ENVIRONS

A JUDGEMENT BY KIRK-COHEN J
TRANSVAAL PROVINCIAL DIVISION
21 MAY 1997

1998 (2) SA 1052 (T)

Where a person has a legitimate expectation that a public functionary will consider it for the acquisition of certain rights, a contract granting these rights to a third party, in contravention of the legitimate expectation may be set aside.

THE FACTS

The Transitional Council for Rustenburg (the council) invited tenders for the purchase of certain mineral rights. Gencor SA Ltd submitted a tender, as did the second respondent. No other tenders were submitted.

Some time after the submission of the tender (during which time the parties had on-going telephonic contact) Gencor received a letter from the council. This letter indicated that, the council had decided not to accept any tender, that further negotiations would be suspended until certain investigations had been completed and the matter would be revisited at a later stage. Gencor responded to this letter with a letter stating that it was still interested in acquiring the rights and requesting that this interest be borne in mind when the matter was reconsidered.

The council later negotiated and concluded a contract with the second respondent. The second respondent began execution of the contract, incurring costs of some R2,5m in exploration work.

Gencor applied for an order that the council's alienation of the

mineral rights to the second respondent and its conclusion of a notarial prospecting contract with the second respondent be declared null and void.

THE DECISION

Even before the receipt of the letter suggesting that the matter was not finally closed, Gencor had had a 'legitimate expectation' that its tender would be afforded proper consideration. The letter did nothing to disabuse Gencor of this expectation but rather reinforced it by suggesting that consideration of the matter had merely been suspended, and Gencor would be given the opportunity to tender by way of a fresh tender or resubmission of its original tender at a later stage. It created a reasonable expectation of further communication which was to be equated to a legitimate expectation. This legitimate expectation was infringed by the council when it contracted with the second respondent.

The court has a discretion in deciding whether to set aside contracts of this nature and will consider factors such as whether work under the contract had commenced and whether undue hardship would result if it was set aside. In the present case, although the second respondent had already incurred costs pursuant to the contract awarded to it, the contract had to be set aside to protect Gencor's legitimate expectation. Second respondent would probably be entitled to recover these costs from the council.

The protection thus afforded Gencor arose from its legitimate expectation, a protection which did not owe its existence to either the Constitution.

The application was granted.

GOODMAN BROS (PTY) LTD v TRANSNET LTD

A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL DIVISION
21 APRIL 1998

1998 CLR 405 (W)

A tender to supply an organ of state susceptible to the Constitution

THE FACTS

Goodman Bros (Pty) Ltd tendered to supply wrist watches to Transnet Ltd. Clause 10(a) of the conditions of tender provided that Transnet did not bind itself to accept the lowest or any tender, nor would it assign any reason for the rejection of a tender.

Transnet is a company whose shares are wholly owned by the State and whose board of directors is appointed solely by the Minster of Transport.

Goodman's tender was not accepted by Transnet. Goodman then applied for an order declaring that the provision of clause 10(a) entitling Transnet not to assign any reason for the rejection of a tender was in conflict with the provisions of section 33 or section 217 of the Constitution of the Republic of South Africa Act (no 108 of 1996) and for orders that Transnet was to supply written reasons for the rejection of its tender and provide copies of all other tenders it received with supporting documentation.

THE DECISION

Transnet was an 'organ of state'. It was ultimately controlled by the State, and it was not a free agent in the conduct of its business. In terms of the Legal Succession to the South African Transport Services Act (no 9 of 1989) it was required to provide a service in the public interest and could be directed by the Minister not to act contrary to the strategic or economic interests of the country. Being an organ of state, it was subject to the provisions of the Constitution.

In deciding whether or not to award the tender, Transnet had committed an administrative act which was within the ambit of the management of Transnet's affairs.

It was therefore an act which was subject to the Constitution.

As far as the disputed provision contained in clause 10(a) was concerned, it was contrary to the spirit of the Constitution and the terms of sections 217, 32 and 33 of the Constitution. They were therefore to be considered no part of the contract between the parties and could be struck out.

It also followed from this that Transnet was obliged to furnish reasons for its rejection of the tender. Because of the right of everyone to be furnished with reasons in writing for administrative actions which affects any of his rights, as provided for in section 33 of the Constitution, Transnet could be compelled to furnish its reasons for rejecting the tender.

As far as the information contained in competing tenders was concerned, there was no basis upon which Goodman could obtain this. The Constitution did not allow it and the confidential information contained in the tenders, if disclosed, could cause prejudice to the other tenderers.

The provision of clause 10(a) entitling Transnet not to assign any reason for the rejection of a tender was in conflict with the provisions of section 33 or section 217 of the Constitution of the Republic of South Africa Act (no 108 of 1996), and Transnet was to supply written reasons for the rejection of its tender.

SA METAL MACHINERY CO LTD v TRANSNET LTD

A JUDGMENT BY HEHER J
WITWATERSRAND LOCAL DIVISION
22 MARCH 1998

1998 CLR 484 (W)

Influence of the Constitution in tender for supply to State organ

THE FACTS

SA Metal Machinery Co Ltd tendered for the purchase of scrap metal from Transnet. In terms of clause 10(a) of the conditions of tender, Transnet did not bind itself to accept the lowest or any tender, nor would it assign any reason for the rejection of a tender.

Transnet awarded the tender to another party. SA Metal then requested information as to the price of the successful tender. Transnet refused to supply this information.

SA Metal then applied for an order that Transnet provide written reasons for the rejection of its tender and that it provide copies of all tenders received by Transnet, reports and minutes of meetings at which tenders were considered, and a copy of the contract concluded with the successful tenderer.

THE DECISION

There was no evidence of impropriety in the award of the tender, and therefore no suggestion that SA Metal's right to lawful administrative action had been violated. The fact that Transnet refused to give reasons for its award of the tender to the successful tenderer did not allow the inferrence that it had failed to act properly in so awarding the tender.

SA Metal, like anyone else, did not have an unrestricted right to inspect documents in the possession of a public body. Access to such documents should be ordered only if it was shown that this was necessary in order to determine whether a right needs to be protected.

Since SA Metal had not shown that it had reason to believe that its right to lawful administrative action was threatened by its inability to obtain access to the documentation it required, it was not entitled to such documentation.

CATERHAM CAR SALES & COACHWORKS LTD v BIRKIN CARES (PTY) LTD

A JUDGMENT BY HARMS JA (SMALBERGER JA, MARAIS JA, SCHUTZ JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
28 MAY 1998

1998 (3) SA 938 (A)

Competition

Business reputation may exist in a particular locality other than that in which the business sells its product. It must be shown to exist in the locality in which the holder alleges a passing off misrepresentation has been made, when the holder seeks an interdict restraining the alleged representor from passing off its product for that of the holder.

THE FACTS

Caterham Car Sales & Coachworks Ltd, a United Kindgom company, held the exclusive right to manufacture, sell and distribute the Lotus Seven sports car in the United Kingdom and certain European countries. It also held the exclusive right to manufacture, sell and distribute spare parts for the Lotus Seven sports car and use the Lotus symbol in connection therewith. It obtained these rights from the holder of them, the Lotus group of companies ('Lotus'), which had since 1973 ceased manufacturing the Lotus Seven sports car. Under agreements concluded with Lotus between 1985 and 1988, Caterham was assigned the copyright and goodwill in the unregistered trade marks 'Seven', 'Super Seven' and 'Super 7'.

During the 1908s, Birkin Cars (Pty) Ltd manufactured and sold in South Africa a replica of one of the models of the Lotus Seven sports cars, under the name Birkin Seven or Super Seven, thereby using the distinctive shape and appearance of the sports car. At that point, and thereafter, Lotus had not conducted any business in South Africa.

Caterham claimed that Birkin was passing off its product as that of Caterham's and sought an interdict restraining Birkin from manufacturing and selling a sports car having the same shape as the Lotus Seven. It contended that the goodwill in the sports car was its by virtue of the assignment to it of the goodwill in 1988.

THE DECISION

The essence of a passing off action is to protect a business against the misrepresentation that the business, goods or services of the representor are those of the plaintiff. It is designed to protect the goodwill of a business as regards the element of reputation making up that goodwill.

The goodwill thus sought to be protected must exist in the area of jurisdiction of the court in which the plaintiff sues, but this does not mean that the plaintiff's business has to be conducted within that area. What has to be shown is that the reputation exists within that area and that the misrepresentation complained of causes actual or potential harm to the goodwill of the plaintiff's business.

Given the fact that Lotus had ceased manufacturing the Lotus Seven sports car by the time Birkin began manufacture in South Africa, and that Caterham had hardly any market presence in the country, no reputation in the distinctive shape of the car existed in South Africa. There was therefore no goodwill which Caterham could allege it had obtained by its assignments from Lotus and no basis for the interdict it sought against Birkin.

NINO'S COFFEE BAR & RESTAURANT CC v NINO'S ITALIAN COFFEE AND SANDWICH BAR CC NINO'S ITALIAN COFFEE & SANDWICH BAR CC v NINO'S COFFEE BAR & RESTAURANT CC

JUDGMENT BY ROSE INNES AJ
CAPE PROVINCIAL DIVISION
8 APRIL 1998

1998 (3) SA 656 (C)

Where a person has acquired the exclusive right to the use of a trading name it will be entitled to use that name notwithstanding the possibility of resulting confusion of that name with another similar to it which is being used by another person. A defence in terms of s 34(2) (a) of the Trade Marks Act (no 194 of 1993) to the effect that a trade mark is not infringed by the bona fide use by a person of his own name will only be upheld where the defendant has used his full name and where the use is thereof is bona fide and consistent with fair practice. Section 36(1) of the Act is intended to protect the common law rights of a person who has continuously and bona fide used a mark which was subsequently registered by another.

THE FACTS

In 1989 a certain Mr Korkorris purchased a coffee shop and restaurant business conducted under in the name of 'Nino's Coffee and Sandwich Bar' in Johannesburg. Kokorris then expanded the business by establishing a franchise operation within Gauteng. He later incorporated Nino's Italian Coffee & Sandwich Bar CC (`the respondent') which became the owner of the franchise operation.

After the sale of the business to Korkorris, the sellers established two restaurants in Cape Town, both of these restaurants incorporating the word 'Nino' in their names, one of the members being known personally as `Nino'. They incorporated Nino's Coffee Bar & Restaurant CC (the applicant) as formal owner of the businesses.

In 1995 the respondent registered a trade mark ' in respect of Nino's Italian Coffee & Sandwich Bar, and extended its operations into Cape Town. It admitted that the result of this was some confusion in the mind of the public of the name of the respondent's business with that of the applicant. The applicant sought an interdict restraining the respondent from using the name 'Nino' as a trading name in relation to a restaurant business at or near two locations in Cape Town where the respondent conducted its business. This claim was based on the allegation that the use of the name 'Nino' in Cape Town amounted to passing off the respondent's business as that of the applicant.

In a separate application, the respondent applied for an interdict restraining the applicant from infringing its trade mark. It brought this application because the applicant had established a restaurant in Camps Bay using the word 'Nino's' after it had become aware of the respondent's trade mark rights. The applicant raised the defences provided by sections 34(2)(a) and 36(1) of the Trade Marks Act (no 194 of 1993). Section 34(2)(a) provides that a registered trade mark is not infringed by any bona fide use by a person of his own name, provided that such use is consistent with fair practice. Section 36(1) provides that the proprietor of a registered trade mark shall not be permitted to restrain the use by any person of a trade mark identical with or resembling that of such proprietor, where that person has made continuous and bona fide use of the mark prior to the use of the mark by the proprietor or prior to the registration of the mark. The two applications were considered together.

THE DECISION

The effect of the sale of the business was to transfer the goodwill of the business, including the exclusive right to the use of the name 'Nino's Coffee and Sandwich Bar'. The applicant could therefore neither use it itself nor transfer it to anyone else. The rights to the name vested with the respondent. The mere fact that the respondent may have been aware of the fact that the applicant had established a restaurant using the name 'Nino' did not mean that he had, with full knowledge of his rights, completely abandoned them. The use of the name 'Nino' by the respondent, within the Cape Town region was therefore not unlawful, notwithstanding the proof of confusion by some members of the public.

Given the different nature of the restaurants conducted by the applicant and the respondent it was, in any event, unlikely that the applicant would suffer harm, even though the members of the public did believe that the restaurants were associated. The re-

spondent was not competing unlawfully with the applicant and the applicant was therefore not entitled to the interdict sought.

The applicant failed to establish the defence provided for in section 34(2)(a) since it was not using its full name but rather part of one of its member's names. Furthermore, the use of the name 'Nino' was neither bona fide nor consistent with fair practice since the applicant was aware that the respondent had obtained the right to use the name, had registered a trade mark using the name and had extended his operations into the Western Cape.

As far as the defence based on section 36(1) was concerned, this section was intended to prevent the proprietor of a trade mark from exercising his rights merely on the basis of priority of registration. This defence would only avail a person who had made continuous and bona fide use of the trade mark from a time earlier than its registration. Since the trade mark only originated when the business was sold, the applicant failed to establish such prior use. This defence could therefore also not succeed.

The applicant's interdict was not granted. The interdict sought by the respondent was granted.

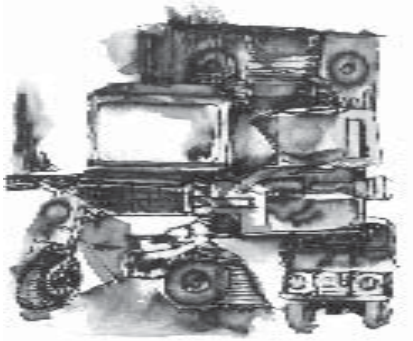
The legal position in regard to the sale of the goodwill and name of a business is clear. In the absence of any term to the contrary, a sale and transfer of goodwill confers upon the transferee the exclusive right to carry on the business transferred and the exclusive right to represent himself as carrying on such business. It also confers on him the exclusive right to use the name under which the business has been conducted.

PHEIFFER v FIRST NATIONAL BANK

A JUDGMENT BY HARMS JA (SMALBERGER JA and ZULMAN JA concurring, NIENABER JA and MARAIS JA dissenting) SUPREME COURT OF APPEAL 28 MAY 1998

1998 CLR 362 (A)

Credit Transactions



A surety's liability to pay interest on the capital debt of the principal debtor is to be calculated by reference to the capital debt actually owing by the principal debtor and not by reference to a maximum capital sum for which the surety may be liable in terms of the deed of suretyship.

THE FACTS

Pheiffer signed a deed of suretyship in favour of First National Bank, securing the payment of the debts of a certain Wilson who enjoyed overdraft facilities with the bank. The surety's liability, excluding interest liability, was limited to R175 000. Over and above her liability on the capital sum, Pheiffer was liable for interest on the R175 000 as might become and due and payable by Wilson.

Wilson's indebtedness to the bank first exceeded R175 000 on 25 October 1990. It continued to rise, though credits were passed to Wilson's account at various times. The last of the credits was passed on 22 October 1991. On 19 April 1993, the bank demanded payment from Pheiffer as surety. In response, on 1 September 1993, Pheiffer paid R175 000 and conceded her liability to pay interest from 19 April of that year until 1 September.

Pheiffer contended that the principle that payments should first be appropriated to interest and then the oldest capital debt should have been applied in determining her liability, and that her liability for interest due as surety only arose when demand was made on Wilson, alternatively when demand was made on her.

The bank contended that Pheiffer was liable as surety for all interest arising on R175 000 from 25 October 1990 until 1 September 1993. In calculating the sum so due, it applied no credits which had been applied to Wilson's account in that period.

THE DECISION

(per Harms JA (Smalberger JA and Zulman JA concurring)

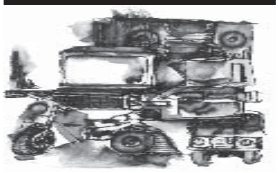
As long as the balance owing by Wilson was less than R175 000, Pheiffer's liability was identical to his. Once the balance owing by Wilson exceeded R175 000, a separate accounting exercise would have to be undertaken in order to determine Pheiffer's liability. To determine that liability, it would be necessary to determine the balance owing by Wilson, taking into account amounts paid by him in reduction of his indebtedness to the bank.

In terms of the common law of appropriation of payments, those payments were to be appropriated firstly to interest. This was to be done, irrespective of the capitalisation of the interest by the bank. Until 22 October 1991, the amount Wilson had paid exceeded the interest raised in respect of his account. Consequently, after appropriating his payments to interest, the capital amount owing by Pheiffer as at that date could not have exceeded R175 000. Thereafter, because Wilson made no further payments, Pheiffer's liability to pay interest, in terms of the wording of the deed of suretyship, was to be calculated on the maximum capital sum for which she could be liable, ie R175 000.

Pheiffer was therefore liable to pay interest on R175 000 from 22 October 1991.

(per Nienaber JA (Marais JA concurring))

As long as the balance owing by Wilson was less than R175 000, Pheiffer's liability was identical to his. However, once the balance owing by Wilson exceeded R175 000, their respective liabilities would not be identical. That this was so was illustrated by the fact that if the balance owing did exceed R175 000, any reduction in this sum by a payment by Wilson would not reduce Pheiffer's liability so long as the reduction did not bring the balance owing (after first applying such payment to interest) to an amount less than R175 000. Pheiffer's liability was



to be assessed differently from the assessment of Wilson's liability.

The question was whether, despite the fact that the respective liabilities of Wilson and Pheiffer were not identical, the credits to Wilson's account were to be applied in reduction of Pheiffer's liability. The common law rule is that a payment by a debtor is first appropriated to the interest portion of the debt, and then to the capital. The 'capital' consists of those debits passed to the account, by virtue of cheques met and other charges and costs having been imposed, as well as the interest which is capitalised at the end of the applicable period. For the purposes of appropriation of payments, once capitalisation has taken place, any payment then made is applied to the capital and not interest.

While that is the rule applicable to Wilson's debt to the bank, the payments he made could not simply be applied directly to Pheiffer's debt, since they were two separate debtors. Because their respective inebtednesses was governed by two separate contracts, it would be incorrect to take each credit passed to Wilson's account and apply it to Pheiffer's. The credits passed to Wilson's account were to be treated as payments in reduction of his indebtedness to the bank, and applying the common law rule of appropriation of payments in respect of that indebtedness alone. Having done so, as long as his indebtedness exceeded R175 000, any credits passed to his account would have no effect on Pheiffer's indebtedness to the bank.

MARLBORO TRANSPORT SERVICES CC v GOGLE

A JUDGMENT BY ELOFF AJ
WITWATERSRAND LOCAL DIVISION
9 DECEMBER 1997

1998 CLR 29 (W)

An acknowledgement of debt which incorrectly states the identity of the debtor does not prevent the creditor from obtaining provisional sentence on the instrument, where the defendant which is sued as debtor, is unable to give an explanation why it is not liable on the instrument.

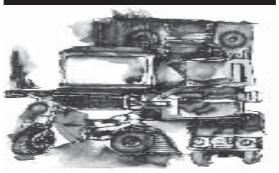
THE FACTS

In 1995, Marlboro Transport Services CC bought a truck from Mammoth Truck Co (Pty) Ltd. The truck was to be manufactured by Western Star Trucks Inc, a Canadian company, imported into South Africa and delivered to Marlboro upon payment of the purchase price of R432 500.

In 1996, Marlboro bought a truck from Gogle. The truck was also to be manufactured by Western Star Trucks Inc. Marlboro paid R423 593 for the truck, and then learnt that Western Star had cancelled the order for the truck because it had not received payment of a letter of credit. It obtained repayment of R80 000 of the amount paid for the truck, and obtained Gogle's signature to an acknowledgement of debt for payment of a balance of R312 592.

Gogle alleged that the 1996 sale was a sale between Mammoth and Marlboro and that both parties had intended that payment of the purchase price would be effected by the removal of the funds outside of South Africa in contravention of Exchange Control regulations and as part of a scheme to evade customs duties and import taxes. He alleged that a certain Mr Kahn had been given the money paid by Marlboro, and had disappeared with it.

Marlboro brought an action for provisional sentence based on the acknowledgement of debt. Gogle defended the action on the grounds that this misstated the underlying cause of debt in that it incorrectly stated the debtor as himself and not Mammoth, and that based on the true cause of debt, he was not liable to Marlboro.



THE DECISION

Assuming that the true debtor was not Gogle, but Mammoth, and that the acknowledgement of debt misstated the true debtor, the question was whether this destroyed the liquidity of the instrument.

A defendant faced with a claim based on such a document was not entitled to successfully resist the claim upon the ground only that it incorrectly states the identity of the debtor. The defendant who is sued on the instrument must also state why he is not liable for the amount in respect of which he admitted his indebtedness. Gogle was obliged to explain why he was not liable for the amount claimed by Marlboro, notwithstanding the assumption in his favour that he was incorrectly cited as debtor in the acknowledgement of debt.

The explanation that Gogle did give in respect of the transactions giving rise to the acknowledgement of debt was, by comparison with the explanation given by Marlboro, unacceptable.

Provisional sentence was granted in favour of Marlboro.

ABSA BANK LTD v DEEB

A JUDGMENT BY THIRION J
NATAL PROVINCIAL DIVISION
8 JUNE 1998

1998 CLR 421 (N)

An interest rate variation clause in a contract is not necessarily invalid merely because the determination of the interest rate is given to one of the parties to the contract. It will be invalid of the determination of the interest rate is given to one of the parties in its absolute an unfettered discretion, but such invalidity will not follow if it can be shown that the interest rate variation must be determined in accordance with an implied term which is both reasonable and necessary, and can be formulated clearly and exactly.

THE FACTS

Absa Bank Ltd passed a mortgage bond over Deeb's property. The bond recorded that Deeb was indebted to Absa in the sum of R2m in respect of money lent and to be lent. Clause 3 of the bond provided that all amounts owing to the bank would bear interest at the rate of 15,25% per annum. Clause 21 provided that, subject to the provisions of the Usury Act (no 73 of 1968), during the currency of the bond, the bank was entitled to increase the rate of interest payable on all amounts owing to it.

The bank alleged default by Deeb in paying instalments due under the bond and claimed the full amount of capital and interest owing to it. It claimed its entitlement to an interest rate of 20% per annum as a result of an increase in the interest rate after inception of the bond.

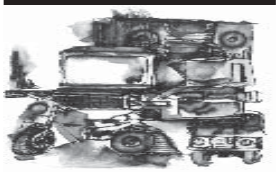
Deeb defended the action. The parties submitted to the court for adjudication the question whether or not clause 21 of the bond was valid. Deeb contended that the clause was void for vagueness in that it left the variation of the interest rate in the absolute discretion of the bank.

THE DECISION

The rule is that a contract is invalid when the determination of the extent of a party's obligation is made to depend on the mere decision of one of the parties. This rule does not result from the fact that such a contract is vague, but from the principle that the law does not permit the unfettered determination of contractual rights and obligations by one of the parties to the contract. An enforceable contract must express the consensus of the parties in all its material terms, or should fix some standard by which certainty in regard to that which is left unexpressed may be obtained.

In applying this rule in the present case, it had to be decided whether clause 21 conferred on the bank an absolute discretion in fixing the interest rate, or whether it was implied in the clause that the bank's right to fix the interest rate was subject to certain limitations. Such a term could be implied if the implication was both reasonable and necessary, and if the term could be formulated clearly and exactly.

It was clear that the parties did not intend that clause 21 would confer on the bank an absolute discretion to vary the interest rate.



In clause 3, the parties provided for a specific interest rate. Having deliberately specified the interest rate at inception of the bond, it was improbable that they would change their intentions in regard to the applicable interest rate thereafter and allow it to be specified merely at the absolute discretion of the bank. Clause 21 could therefore not be understood as conferring on the bank such a discretion.

The difficulty with formulating the alternative, an implied term, was that it had to be determined what the parties had intended in regard to future increases in the interest rate—when they could be effected, to what extent they could be effected, and the standard by which they would be effected. In making this determination, the clause had to be interpreted bearing in mind its object as intended by the parties. This object was to allow the bank to adjust its interest rate in accordance with the market rate of interest. The implied term was therefore that the bank could increase the interest rate in the ordinary course of its business as a financial institution and as a result of a general increase in interest rates. For such an implied term to have efficacy, it would have to be shown that in determining an interest rate increase the bank acts according to an external, objective standard.

For the purposes of proving that the bank did increase interest rates in accordance with such an implied term, evidence would be necessary. The matter was therefore postponed for this purpose.

MV SNOW DELTA: DISCOUNT TONNAGE LTD v SERVA SHIP LTD

A JUDGMENT BY THRING J
(KING DJP and VILJOEN AJ)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
11 MARCH 1998

1998 (3) SA 636 (C)

Shipping

A time charterer enjoys rights as against the disponent owner of a ship and may enforce them by an action in personam against the ship within a court's jurisdiction provided that the court's jurisdiction has been properly founded by the necessary attachment. Those rights are then situated within the area of jurisdiction of the court and may themselves be attached in order to found jurisdiction in an action against the time charterer.

THE FACTS

Serva Ship Ltd was the charterer of the MV *Snow Delta* under a time charterparty concluded with the disponent owner, Blue Star Line Ltd. Serva time chartered the ship to Universal Reefers Ltd.

Discount Tonnage Ltd, a peregrinus of the court, brought a claim against Serva for breach of contract. Thinking that Serva was a demise charterer, it applied for the attachment of Serva's possessory right, title and interest in the *Snow Delta*, after the ship entered the court's jurisdiction off Cape Town, in order to found the court's jurisdiction in an action in personam for damages for breach of contract.

A rule nisi was granted attaching the ship and the ship was attached. Thereafter, the rule was discharged, on the grounds that Discount Tonnage had not established that the property it had attached was within the area of jurisdiction of the court, and the ship left the court's jurisdiction. Discount Tonnage appealed the discharge of the rule.

THE DECISION

The fact that the ship had already left the jurisdiction of the court did not make the appeal of mere academic interest. If the rule had been incorrectly discharged, the original attachment would have been effective and the court would retain its jurisdiction in the matter. Furthermore, if costs were the only issue undetermined between the parties, because the object of Discount Tonnage's claim had left the court's area of jurisdiction, this would still be a matter for the court to determine.

As far as the misconception of Discount Tonnage's part was concerned—that Serva was the demise charterer of the ship—this did not render the order for the ship's attachment a complete nullity. That order had referred to Serva's possessory right and title, but Serva, not being a demise charterer, had no such right. However, the order was for the attachment of all Discount Tonnage's interest in the ship, and this could be understood to include its

interest as time charterer. Such an interest would encompass its rights as against the disponent owner of the ship.

The rule had been discharged because it had been found that the property attached was not within the jurisdiction of the court, Serva's rights being situated where it was situated and not within the jurisdiction of the court. The place where incorporeal rights are normally to be found is where the debtor exists. In the present case, this would be where the disponent owner was, ie London. However, if the disponent owner's ship entered the jurisdiction of the court, Serva could proceed by an action in personam against the owner, provided it had founded jurisdiction by attachment of the ship in order to do so. Serva's rights under the charterparty would be enforceable in Cape Town. Consequently, they constituted incorporeal property belonging to Serva which could be effectively dealt with within the jurisdiction of the court. Serva's rights being within the court's jurisdiction, they were attachable within it.

The rule should therefore not have been discharged. The appeal was upheld.

CAPRI ORO (PTY) LTD v COMMISSIONER FOR CUSTOMS AND EXCISE

A JUDGMENT BY MACARTHUR J
TRANSVAAL PROVINCIAL DIVISION
11 MARCH 1998

1998 (3) SA 571 (T)

Goods brought into an unrestricted area of the Republic are subject to the controlling provisions of the Customs and Excise Act (no 91 of 1964). Whether intended for ultimate transportation to another country or not, a failure to declare the entry of the goods into the Republic will entitle the customs authorities to seize the goods.

THE FACTS

Capri Oro (Pty) Ltd entered into an agreement with Pentagold SRL, a company in Italy, in terms of which Capri was to obtain jewellery for sale at a jewellery shop in Namibia. Capri would be entitled to a 10% commission on sales.

Capri, through its representative, D Mazor, booked a flight to Windhoek via Johannesburg. After arriving in Johannesburg, Mazor passed through customs control without declaring his possession of some of the jewellery obtained from Pentagold, his intention being to visit his father who lived in Johannesburg. He entered an unrestricted area and was then approached by the police. The police removed the jewellery then in his possession.

The jewellery was seized in terms of section 87(1) of the Customs and Excise Act (no 91 of 1964) which provides that any goods imported or otherwise dealt with contrary to the provisions of the Act shall be liable to forfeiture. Section 15(1) of the Act provides that any person entering or leaving the Republic shall declar all goods upon his person or in his possession which he brought with him into the Republic which were purchased or acquire abroad.

Capri brought an action for return of the jewellery.

THE DECISION

There were situations in which goods might enter the Republic and yet not be subject to the controlling provisions of the Customs and Excise Act. These might be situations where the goods are in transit, their ultimate destination not being the Republic but some other country. The Act will not apply to the entry of such goods since the purpose of the Act—the enforcement of the payment of customs and excise duties—will not be served by extending the control of the Act to them.

However, in the present case, the jewellery was brought into the unrestricted area. It could therefore not be considered to have been goods in transit. This brought into operation the provisions of section 15(1) of the Act. By failing to declare his possession of the jewellery, Mazor contravened the Act. Mazor's intention, whether to import the jewellery or transfer it on to Namibia, was not relevant. The ownership of the jewellery, whether that of Pentagold or Capri, was also not relevant.

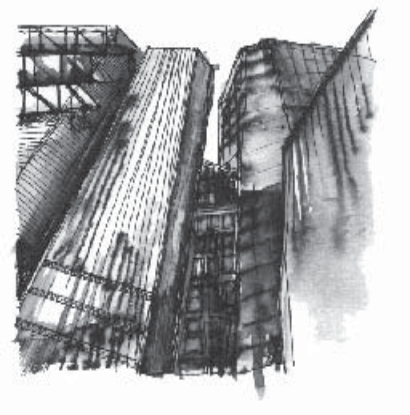
The jewellery had been lawfully seized by the customs authorities. Capri was therefore not entitled to return of it.

VISION PROJECTS (PTY) LTD v COOPER CONROY BELL & RICHARDS INC

A JUDGMENT BY SCOTT JA (VIVIER JA, EM GROSSKOPF JA, NIENABER JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
10 SEPTEMBER 1998

[1998] 4 All SA 281 (A)

Property



In proving a claim for damages against a person alleged to have caused a wrong, it must be proved that the damages were caused by that person in the sense that but for that person's action, the damages would not have occurred.

THE FACTS

In September 1991, Time Housing (Pty) Ltd purchased 17 properties from Allied Development (Pty) Ltd. In March 1992, Mr B Mackay acting as trustee for a company to be formed, purchased Time Housing's business including its rights in terms of the purchase agreement with Allied. Vision Projects (Pty) Ltd was then formed, and it assumed those rights by adopting the agreement concluded by MacKay.

Vision instructed Cooper Conroy Bell & Richards to attend to the transfer of the properties to itself. Cooper prepared a deed of sale for the purchase of the properties alone, by Vision Projects from Time Housing. This was signed, and the transfer of the properties in terms of the first sale agreement was then attended to. Before transfer of the properties to Vision Projects, Time Housing was placed in provisional liquidation.

Vision Projects claimed transfer of the properties from the liquidator. The liquidator refused and the matter was referred to arbitration. The arbitrator refused to order the liquidator to transfer the properties to Vision Projects, reasoning that the liquidator was entitled to either abandon or enforce the agreement and had elected to abandon it.

Vision Projects then claimed damages against Cooper, alleging that it had instructed that firm to ensure that there was a simultaneous transfer of the properties from Allied to Time Housing and to itself. It alleged that Cooper had breached its mandate in not ensuring that this was done, with the result that it had sustained damages in an additional sum it had to pay the liquidator in order to secure transfer of the properties.

THE DECISION

The arbitrator's decision was in fact wrong. An insolvent which buys property and then resells it prior to its insolvency is bound to transfer the property to the purchaser against payment of the purchase price. Time Housing had ceded its rights to Vision Projects prior to its insolvency. Consequently, Vision Projects had been entitled to transfer of the property.

If the properties had not been transferred from Allied, Vision Projects would have been in the same position as it had been after the actual transfer from Allied. In that case, the liquidator's co-operation would still have been required for the ultimate transfer to Vision Projects and this would have been refused in the same way as it had been refused after the actual transfer from Allied. Vision Projects therefore had not shown that the failure to effect simultaneous transfers of the properties had resulted in the damages it alleged it had suffered.

It was argued that the failure to link the transfers of the properties together was the direct cause of the loss suffered by Vision Projects. However, this would have avoided loss to Vision Projects only if the provisional order of liquidation had not come to the notice of the Registrar of Deeds prior to the transfer of the properties. There was no certainty that this would have happened.

Accordingly, it had not been shown that Cooper's failure to link the transfers was the cause of Vision Projects' loss. The claim was dismissed.

TOWNHOUSE ESTATES CC v BERRANGE N.O.

A JUDGMENT BY COMBRINCK J
DURBAN AND COAST LOCAL DIVISION
17 APRIL 1998

[1998] 4 All SA 189 (D)

An agreement of sale which provides for the payment of agent's commission from the deposit paid by the purchaser and which clearly states that the deposit is not held by the seller's conveyancer as agent for either party entitles the agent to payment of the commission despite the sequestration of the seller prior to transfer.

THE FACTS

Townhouse Estates CC was appointed the agent of 10109 Durban Trust to sell individual sectional title units in a property which had been purchased for development by the Trust. Townhouse was entitled to a commission on sales. In terms of the sale agreements, the parties thereto authorised and instructed the conveyancer appointed to attend to transfer of a unit to pay this commission to the agent out of funds paid as a deposit in respect of the purchase price. Payment thereof could be made upon Townhouse furnishing the purchaser a guarantee for commission in terms of section 26(3) of the Alienation of Land Act (no 68 of 1981). Clause 5.3 of the agreement provided that the Trust's conveyancer was to hold the deposit as a stake holder for the benefit of the purchaser or seller, dependant upon which of the two became entitled thereto but as agents for neither.

Townhouse marketed and sold a number of the units. Its mandate was later terminated. A few months after that, the Trust was sequestrated. Berrange was appointed the trustee of the Trust.

At the time of the sequestration of the Trust, the conveyancer appointed in terms of the sales agreements held money in trust which had been paid as deposits on the various sales arranged by Townhouse. Townhouse contended that it was entitled to be paid from this money, the commissions it had earned. It claimed payment of the amount it contended was owed to it. Berrange alleged that after sequestration of the Trust, the sales agreements were either terminated and the deposits forfeited, or finally executed and the deposits placed in separate interest-bearing accounts. He contended that ownership of the money remained with the purchasers. The conveyancer contended that ownership of the money vested in the Trust.

THE DECISION

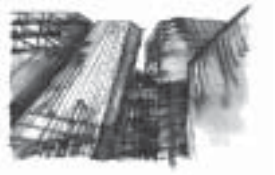
The agreement of sale expressly stated that the conveyancer was to hold the money paid as a deposit as a stakeholder and not an agent, thus indicating that he did not hold the money for either seller or purchaser. This suggested that Townhouse was to be considered the party entitled to this money. However, there were indications to contrary in other parts of the agreement.

The agreement of sale however, also indicated that the Trust or Townhouse could obtain payment of the money held in deposit when it referred to the application of the provisions of section 26(3) of the Alienation of Land Act. In terms of that section either party could obtain payment from the deposit upon furnishing the guarantees referred to therein, the Trust however obtaining such payment only after payment of the agent's commission. At that point, the conveyancer holding the money could not be said to be the Trust's agent for the purposes of receiving part payment of the purchase price.

Because the money paid as deposits had been paid into a bank account, the bank was the owner of the funds. Between the Trust and Townhouse, it was the Trust which would then have any right to that money. This was because it was never envisaged that the Trust would have any right to the portion of the money constituted by the deposit. Even if purchasers had forfeited the deposits they had paid, the Trust would not have acquired any right to the money greater than that of Townhouse.

Townhouse was therefore entitled to payment of the commission due to it in terms of the agreements of sale.

MINISTER OF LAND AFFAIRS v RAND MINES LTD



A JUDGMENT BY FARLAM AJA (SMALBERGER JA, ZULMAN JA, STREICHER JA and MELUNSKY AJA concurring)
SUPREME COURT OF APPEAL
15 MAY 1998

1998 (4) SA 303 (A)

A reference to 'minerals' in a certificate of mineral rights may include a reference to dimension stone including granite and marble in economically exploitable quantities.

THE FACTS

Rand Mines Ltd held a certificate of mineral rights, which was registered in its name, giving it the sole and exclusive right to prospect, exploit and mine for minerals, mineral substances and metals, precious stones, oil and coal located on certain property situated near Rustenburg. The owner of the property was the Minister of Land Affairs.

Rand Mines applied for an order that its rights as defined in the certificate of mineral rights included the right to all forms of granite which was suitable for dimension stone. Dimension stone includes granite and marble, both of which are often of a quality which is economically exploitable, though not necessarily so.

The Minister contended that the mineral rights held by Rand Mines did not include dimension stone and opposed the application brought by Rand Mines.

THE DECISION

The parties intended 'minerals' to have a wide meaning. This was apparent from the fact that Rand Mines had the right to buy back any land transferred to the Minister at the value of the land as assessed as agricultural land. This would mean that whatever the value of the minerals on the land, Rand Mines had the right to it upon payment of a price which might be substantially less than the market value of the land.

Foreign judgments indicate that marble and granite suitable for use as dimension stone could be covered by the expression 'minerals'. This interpretation could be accepted as the correct interpretation of the word in the present case, in the light of the clear intention of the parties to confer on the word a wide meaning.

Dimension stone was therefore included in the meaning of 'minerals' as used in the certificate of mineral rights.

SWEETS FROM HEAVEN (PTY) LTD v STER KINEKOR FILMS (PTY) LTD

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
5 OCTOBER 1998

1998 CLR 642 (W)

Although a lessor is obliged to give the lessee free and undisturbed use and enjoyment of the premises let, a lessee complaining that the lessor has failed to do so must show that that failure results from the lessor having breached a term, express or tacit, of the lease.

THE FACTS

Sweets from Heaven (Pty) Ltd held rights of occupation of a shop in an entertainment complex in terms of a lease entered into between it and Ster Kinekor Films (Pty) Ltd. In terms of the lease, it was entitled to use the leased premises for the business of the operation of a shop relating to sweets and confectionary and related products excluding pop-corn. The lease was a five-year lease beginning on 11 November 1994.

Ster Kinekor intended to lease premises to Cosmic Candy (Pty) Ltd which that company was to use for conducting the business of another confectionary shop where it would compete with Sweets from Heaven's franchisee. Those premises were situated 17 metres away from Sweets from Heaven's premises, the two premises being separated by a fast food restaurant.

Sweets from Heaven brought an application for an interdict to prevent Ster Kinekor from giving occupation of the premises to Cosmic Candy.

THE DECISION

There was no basis upon which it could be held that Ster Kinekor owed a general duty of care toward Sweets from Heaven's franchisee. Its right to occupy the premises and conduct its business from those premises did not oblige Ster Kinekor to refrain from giving occupation of premises in the near vicinity to Cosmic Candy.

Sweets from Heaven contended that by entering into a lease agreement with Cosmic Candy, Ster Kinekor was not permitting it the free and undisturbed use and enjoyment (commodus usus) it was entitled to as lessee of the premises. A landlord does have a duty to afford its lessee free an undisturbed use and enjoyment of the leased premises, but whether or not the landlord has breached the duty is determined by reference to the lease agreement itself. In showing that the landlord has not permitted the tenant free and undisturbed use and enjoyment of the premises, it must be shown that the landlord has breached an express or tacit term of that agreement.

In the present case, the comprehensive provisions of the lease left little ground for implying a term into the agreement obliging Ster Kinekor not to enter into a lease agreement of the kind it intended to enter into with Cosmic Candy. Such a tacit term, as contended for by Sweets from Heaven, could not be readily formulated with sufficient precision. Even assuming that the effect of entering into the lease with Cosmic Candy would be to disturb the commodus usus of Sweets from Heaven, the term was not justified by any of the other terms of the lease.

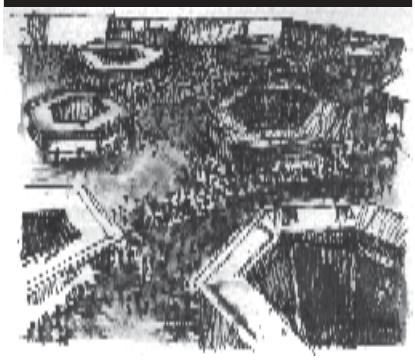
The application was dismissed.

AUGUSTO v SOCIEDA DE ANGLOANA DE COMMERCIO INTERNATIONAL

A JUDGMENT BY HANNAH J
NAMIBIA HIGH COURT
17 SEPTEMBER 1997

1998 (4) SA 124 (NmHC)

Companies



Where a share sale transaction involves a company facilitating the sale of its own shares but the effect of which is merely to substitute share capital for loan capital, the company will not have provided financial assistance for the purchase of its own shares.

THE FACTS

In an application for attachment ad fundandam jurisdictionem brought against Socieda de Angolana de Commercio International, Augusto alleged that he had lent Angolana N$3,6m to enable it to purchase 45 shares in JA Group Holdings (Pty) Ltd. Simultaneously, Augusto had himself purchased 55 shares in the company. The loan was effected by way of a debit against Augusto's credit loan account with the company, and it was agreed that the loan would be repaid within six months. Augusto alleged that Angolana had defaulted in repaying the loan and sought attachment of the shares as well as of a money claim Angolana had against himself following an arbitration award.

Angolana opposed confirmation of the interim order attaching these assets on the grounds that Augusto had not shown that he had a prima facie cause of action against it. It contended that the transaction in terms of which the shares were sold to it involved a contravention of section 38(1) of the Companies Act (no 61 of 1973) because the debit to Augusto's loan account constituted, in effect, a payment by the company to him enabling him to make the loan to Angolana for the purchase of the shares. The section provides that no company shall give financial assistance for the purpose of or in connection with the purchase of its own shares.

THE DECISION

There was no evidence that when the debit was made to Augusto's loan account, that account was insufficiently in credit to ensure that the company itself did not pay money for the purposes of the transaction. Angolana could therefore not assert that the payment made by JA was a payment made by that company.

Angolana's allegation that the transaction fell within the scope of section 38 of the Companies Act was based on the contention that the payment made by JA was not made in the ordinary course of business and to advance its own interests, but as part of a scheme to facilitate the purchase of its own shares. However, even assuming that a transaction amounts to financial assistance when it has no independent commercial purpose other than to provide finance for the purchase of its own shares, this could not be said of the share sale agreement in the present case. The effect of the transaction was the substitution of share capital for loan indebtedness—something which could have been in the commercial interests of the company.

Since Augusto had shown that he had a prima facie case against the company and had shown compliance with all the other requirements for the confirmation of an attachment ad fundandam jurisdictionem, the interim order was confirmed.

THERON v PHOENIX MARKETING (PTY) LTD (HEYMAN INTERVENING)

A JUDGMENT BY
SOUTHWOOD J
WITWATERSRAND LOCAL
DIVISION
16 FEBRUARY 1998

1998 (4) SA 287 (W)

A provision of a shareholders' agreement requiring a shareholder to offer to sell his shares to other shareholders as a pre-condition for bringing an application to liquidate the company is independently enforceable as such a pre-condition notwithstanding the fact that the provision is contained within a clause providing for such a pre-emptive right in the event of the shareholder merely wishing to sell his shares.

THE FACTS

The shareholders of Phoenix Marketing (Pty) Ltd entered into a shareholders' agreement. The agreement incoporated a clause 10 which required shareholders to offer their shares for sale to another shareholder should they wish to dispose of their shares. The same clause included a provision (clause 10.4(iv)) that no shareholder was entitled to take steps to liquidate the company until such time as such shareholder had offered to dispose of his entire shareholding and claim on loan account in the company to the other shareholders, and the other shareholders had declined to acquire the shareholding and claim so offered.

Because the company did not fare well financially, a meeting of shareholders unanimously resolved that shutdown procedures be implemented with a view to the liquidation of the company. Before this resolution was implemented, a concern known as Mecs Africa offered to purchase the majority of the assets from Phoenix prior to its closure. Heyman, one of the shareholders, wished to accept the offer, but the majority shareholders did not wish to do so because they hoped to continue the business of the company for their own account after its liquidation.

One of the directors, Theron, then brought an application for the liquidation of the company on the grounds that it was just and equitable that the company be wound up. Heyman opposed the application on the grounds that the terms of the shareholders' agreement had not been complied with in that no offer to dispose of the entire shareholding of the applicant had been made. He contended that on this ground alone, the application should be dismissed.

THE DECISION

The resolution which was passed by the shareholders could not be understood as an amendment to the shareholders' agreement. It could also not be understood as constituting a waiver of the conditions laid down in the shareholders' agreement. There was no evidence that anyone even considered the relevant provision.

The clause within which the provision was set dealt with two matters: the disposal of shares where one shareholder wished to do so, and the prohibition against taking steps to liquidate the company. The latter provision did not fit within the whole clause, and if an interpretation of the provision was given to it which forced it to fit therein, it would not be meaningful. Accordingly the provision had to be interpreted as meaning that there was an absolute prohibition on liquidating the company, unless the proper steps as outlined in the provision were followed. It was unqualified by the introductory words in the clause and therefore did not have to have anything to do with a prior intention to dispose of the shares in the company.

The provision did not deny a shareholder the right to liquidate his company. It merely delayed the enforcement of those rights. It was therefore not contrary to statute.

The application was dismissed.

BANTJIES v KUNTZE

A JUDGMENT BY FRIEDMAN JP (TRAVERSO J and CHETTY J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
11 FEBRUARY 1998

1998 (4) SA 201 (C)

Contract

A person who shows an intention to abide by a contract which that person may be entitled to cancel on the grounds of vagueness of an essential term waives his right to avoid performing his obligations under the contract.

THE FACTS

Bantjies bought from Kuntze a business known as the 'Bavarian Kitchen' for R85 000. Clause 6 of the sale agreement, which was headed 'suspensive condition', provided that the agreement was subject to (i) the landlord granting a sublease from the seller to the purchaser and (ii) 'the turnover to be not less than R15 000 monthly on aggregate'.

Bantjies paid R40 000 of the purchase price and further monthly instalments, but failed to pay a balance of R29 250. His attorney addressed Kuntze with the complaint that the business was not achieving a turnover of R15 000 and claimed a reduction in the purchase price. Bantjies then sold the business to a third party and later sought to engage Kuntze's co-operation when enforcing his rights as against the third party.

Kuntze brought an action for payment of the balance. Bantijes defended on the grounds that in the first year of operation, the monthly turnover had been less than R15 000 monthly on aggregate, alternatively that clause 6.2 was vague, meaningless and unenforceable entitling him to cancel the whole agreement.

On appeal, Bantjies relied only on the second defence.

THE DECISION

It was common cause that clause 6.2 was too vague and uncertain to be enforced. Whether or not it was severable from the contract, thus ensuring the survival of the contract, it was clear that it was inserted for the benefit of Bantjies. Even if unenforceable on the grounds of vagueness therefore, Bantjies could waive his right to rely on its unenforceability in defending the action brought against him.

The evidence showed that Bantjies had indeed so waived his rights. The fact that he had first claimed a reduction of the purchase price and then sold the business to a third party showed that Bantijes intended to continue the contract irrespective of the enforceability of clause 6.2.

Bantjies' appeal was dismissed.

STELLENBOSCH FARMERS WINERY LTD v VLACHOS

Contract

A JUDGMENT BY SOLOMON AJ
WITWATERSRAND LOCAL DIVISION
21 SEPTEMBER 1998

1998 CLR 585 (W)

A seller of a business who has secured credit terms in the name of the business is under a duty on the seller to inform its creditor of the sale where the creditor will continue to give credit on the strength of those terms, but in order to establish liability on the part of the seller, it will be necessary to show that the creditor was induced by the misrepresentation to continue to give credit on those terms.

THE FACTS

Vlachos signed a form headed 'Customer Information/Credit Application' in which he furnished information regarding himself and gave his trading name as 'Liquor Den'. The form included an application for credit facilities, and a warranty (clause 4(b)) that the information given was true and correct and that he would notify Stellenbosch Farmers Winery Ltd (SFW) of any change of ownership of the business, failing which he would be responsible for all amounts owing to SFW by the new owner. SFW, to which the form was addressed, then granted credit facilities to Vlachos, and Liquor Den made orders for the purchase of liquor from time to time.

Some five years later, Vlachos sold Liquor Den to Baron Products CC, subject to a reservation of ownership clause pending full payment of the purchase price. Orders continued to be placed by Liquor Den with SFW which sold and delivered the liquor in accordance with them. Baron Products failed to pay R205 485,88. SFW then brought an action against Vlachos for payment of this sum. It alleged that it had sold and delivered goods to this value to him, alternatively that by a tacit or implied term of their agreement, he had indemnified SFW for payment of sums owing by a purchaser of his business if he failed to notify SFW of the disposal of such business, alternatively that the agreement should be rectified to include notification of a change of possession of the business.

Vlachos defended the action on the grounds that ownership of the business had not passed to Baron Products because it had not paid the full purchase price and that accordingly clause 4(b) was not applicable. He also contended that he signed the form in error on the assumption that it was merely required to give information to SFW to consider an application for credit and that it therefore did not record any agreement between them. In a replication to this defence, SFW pleaded an estoppel.

THE DECISION

The first question was whether or not the credit application form constituted an agreement.

When Vlachos signed the credit application form, he knew that it contained terms to which he would be bound. Having done so, it was to be presumed that he knew what it contained.

The second question was whether or not Vlachos was bound to pay the debts incurred by Baron Products by virtue of the terms of clause 4(b). Those terms referred to a transfer of ownership, something which had not taken place in the present case because the full purchase price was not paid. Vlachos could therefore not be held liable to pay the debts of Baron Products by virtue of this clause.

The third basis on which SFW sought to hold Vlachos liable was that he had been under a legal duty to inform it of the sale of the business, and having failed to do so caused SFW to act to its detriment in affording credit to Baron Products. Vlachos was under a legal duty to inform SFW that he had sold the business. However, the breach of this duty was insufficient to establish liability on the grounds of estoppel. This was because it had not been shown that SFW had been induced by the misrepresentation—that Vlachos continued its ownership of the business—to give credit to Baron Products. The failure to inform SFW of this had not been the cause of it having continued to do so.

The action was dismissed.

HOTELS, INNS AND RESORTS SA (PTY) LTD v UNDERWRITERS AT LLOYDS

Contract

A JUDGMENT BY HLOPHE J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
3 APRIL 1998

1998 (4) SA 466 (C)

A party to a contract which requires that party to provide security services for the other is liable for the actions of its employees where they cause the harm which the security services were designed to prevent, even if it can be said that the employee then acts beyond the course and scope of his employment contract.

THE FACTS

Hotels Inns and Resorts SA (Pty) Ltd engaged Fend Security Services (Pty) Ltd to provide security services for it at its hotel in Cape Town. Fend undertook to minimise the risk of loss through fire. Clause 5.3 of their agreement provided that Fend would not be liable for loss or damage sustained from whatsoever cause. One of Fend's employees started fires in the hotel building on three occasions causing damage to the extent of R267 671,56.

Hotels brought an action against Fend for payment of these damages. It contended that it was a tacit or implied term of its agreement with Fend that Fend would not cause damage to its property while performing security services in the buildings.

Fend was placed in liquidation. Hotels then brought an action against Fend's insurer, against whom it was entitled to bring its action in terms of section 156 of the Insolvency Act (no 24 of 1936). The insurer defended the action on the grounds that when he started the fires, Fend's employee was not acting within the course and scope of his employment with Fend.

THE DECISION

When Fend undertook to minimise the risk of loss through fire, it undertook to reduce to the smallest degree this risk. It could hardly have been intended that it would be exonerated if it caused fires itself.

The tacit or implied term which Hotels contended subsisted between the parties was a term which could be implied into their agreement, notwithstanding the fact that it was in conflict with the express terms of clause 5.3. It was certainly the intention of both parties that Fend would be liable for loss arising from fires intentionally started by one of its employees. It could therefore be accepted that this was a tacit or implied term of the agreement.

As far as clause 5.3 itself was concerned, it had to be restrictively interpreted as it was an exemption clause which might be applied to the detriment of one of the parties. The clause formed part of a contract in which Fend was burdened with a duty to provide security services for Hotels. It could therefore not be interpreted as excluding liability where a fire was deliberately started by one of Fend's employees.

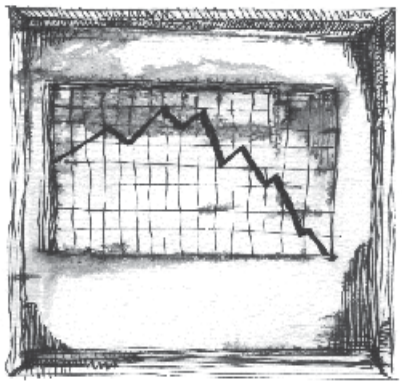
The claim was allowed.

VENTER N.O. v EASTERN METRO SUBSTRUCTURE OF THE GREATER JOHANNESBURG TRANSITIONAL COUNCIL

A JUDGMENT BY FLEMMING DJP
WITWATERSRAND LOCAL DIVISION
9 MARCH 1998

1998 (3) SA 1076 (W)

Insolvency



A municipality is not entitled to preferential payment of any items other than assessment rates and interest upon transfer of a property of a company in liquidation.

THE FACTS

A company in liquidation owned fixed property which the liquidator, Venter, sold in the course of the winding up. The company had not paid assessment rates, interest, a rezoning fee and charges for services to the Eastern Metro Substructure of the Greater Johannesburg Transitional Council. The total amount due to the municipality was R353 616,74 as at the date on which transfer was required. The municipality refused to issue a clearance certificate unless this amount was paid.

The company's attorneys wrote to the municipality informing it that they would issue a guarantee to cover the full amount required by the municipality under protest in order to bring the matter to finality and secure the clearance certificate immediately. This was paid to the municipality and transfer was passed.

It applied for repayment of the rezoning fee and charges for services.

THE DECISION

A payment under protest could indicate that the payor merely registers an objection to paying, or that he reserves the right to rely on the condictio indebiti, or that he reserves the right to bring proceedings later to establish the right to repayment. In the present case, the company had followed the last-mentioned course. It had not merely recorded dissatisfaction but indicated that it was paying in order to overcome the municipality's refusal to allow transfer without receiving payment. It was therefore appropriate to determine whether the amounts reclaimed were payable to the municipality when payment was tendered.

The municipality was entitled to payment of the amounts it claimed in terms of section 50 of the Local Government Ordinance (no 17 of 1939). This however, did not render its claims preferential claims, unless they could be brought within the terms of section 89 of the Insolvency Act (no 24 of 1936). That section provides that certain costs, such as the costs of maintaining, conserving and realizing property, shall be paid out of the proceeds of the property. The claim of R86 000 for rezoning could not be said to be one such cost and could therefore not be said to be an amount payable to the municipality in preference to other creditors. It had therefore not been entitled to put itself in a preferential position vis-a-vis other creditors by insisting on full payment for this amount. It was accordingly not an amount payable to the municipality when payment was tendered.

The company was entitled to repayment of all amounts paid other than assessment rates and interest thereon.

COOLS v THE MASTER

A JUDGMENT BY PRISMAN AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
15 APRIL 1998

1998 (4) SA 212 (C)

A late claim against an insolvent estate may be lodged after a final liquidation and distribution account has been lodged and at any time thereafter until the insolvent has been rehabilitated.

THE FACTS

The third respondent obtained judgment against Cools in the United States of America for payment of US$701 534. Four years later, Cools' estate was sequestrated in South Africa. The third respondent did not prove a claim against the estate and in due course, a first and final liquidation account was confirmed by the Master of the High Court.

The third respondent then requested the Master to allow him to lodge a claim against the insolvent estate. He stated that he had not submitted a claim at an earlier stage because he feared that he might have to make a contribution to the estate and had been investigating the possibility of Cools holding assets abroad. The Master acceded to the request and at a special meeting of creditors, the third respondent's claim was submitted and proved.

Cools was then required to appear for a hearing in terms of section 152(2) of the Insolvency Act (no 24 of 1936).

Cools brought an application for an order reviewing and setting aside these decisions of the Master.

THE DECISION

A claim against an insolvent estate need not be proved before the final distribution of the estate. An insolvent estate includes all property of the insolvent as at the date of the sequestration and which may be acquired during the sequestration, and it is only rehabilitation which puts an end to the sequestration. Because of the possibility of the inclusion of further assets in the insolvent estate until that point, there is therefore no such thing as a 'final' distribution of assets until then. This means that any further claims against the estate may be proved after the completion of a 'final' liquidation and distribution account provided that the provisions for the late proof of claims are complied with as provided for in section 104 of the Insolvency Act.

The Master's decision to allow the late proof of claim had been made upon acceptable grounds, the explanation given by the third respondent for its late claim being perfectly acceptable in itself.

The fact that it had not been shown that there were actually assets in the estate did not prevent the admission of late claims. Claims were permissible and provided for at the first meeting of creditors, when it was not known if there would be assets available for distribution, and the same principle would allow the submission of late claims in similar circumstances.

The application was dismissed.

EX PARTE MARX

A JUDGMENT BY LEVESON J
WITWATERSRAND LOCAL DIVISION
3 SEPTEMBER 1998

1998 CLR 537 (W)

An application for rehabilitation must frankly state all material facts relevant to the applicant's sequestration and must fully explain relevant facts such as whether the applicant continues to reside at the same property which he owned at the time of his sequestration.

THE FACTS

When Marx was sequestrated, there had been total claims against his estate of R670 850. Fixed property valued at R340 000 was an asset in his estate. It was sold and the mortgagee received R315 507,66 from the proceeds of the sale. A dividend of R16 080,36 was paid to concurrent creditors.

Some five years after the sequestration, Marx continued to live in the fixed property which had been sold, the property then being owned by his wife.

Marx applied for his rehabilitation. In his application he described the circumstances of his sequestration, but failed to indicate what had become of the claims of concurrent creditors who had not proved a claim against his estate. He did not disclose that he was still residing at the property which had been an asset in his estate, but in a supplementary affidavit did so. In that affidavit it was not explained how the wife was able to buy the property at the time of his sequestration. It was affirmed that an amount of R6 000 was paid to the mortgagee in respect of the mortgage bond over the property, the effect of this being that he hired the property from his spouse to whom he paid a rental. In the earlier affidavit founding the application for rehabilitation, an amount of R4 600 had been listed under monthly expenses as a rental.

THE DECISION

The discrepancies between the two affidavits deposed to by the applicant indicated a lack of candour on his part.

Explanations of why concurrent creditors had not proved claims against the insolvent estate should have been given and the fact that the applicant was still living in the same house as that in which he lived prior to his sequestration should have been disclosed. Explanation of how the spouse could have purchased the property when she and the applicant were in straightened circumstances should have been given. The discrepancy between the rental figure initially given and the higher figure paid to the mortgagee had also not been explained.

In view of these inadequacies, the application for rehabilitation was refused.

KING PIE HOLDINGS (PTY) LTD v KING PIE (PINETOWN) (PTY) LTD

A JUDGMENT BY MAGID J
DURBAN AND COAST LOCAL DIVISION
21 AUGUST 1998

1998 CLR 628 (D)

A court has a discretion to set aside voluntary winding up proceedings commenced after a creditor's winding up has begun.

THE FACTS

On 19 February 1998, King Pie Holdings (Pty) Ltd brought applications to wind up King Pie (Pinetown) (Pty) Ltd and King Pie (Durban) (Pty) Ltd (the 'respondents'). On 28 May 1998, the members of the respondents passed special resolutions in terms of section 351 of the Companies Act (no 61 of 1973) for their voluntary winding up. The respondents registered the resolutions with the Registrar of Companies and notified King Pie of them. They withdrew their defence to King Pie's applications.

Orders provisionally winding up the respondents were then granted. On the return day, the provisional liquidator applied for the discharge of these orders and an order that the voluntary winding up proceed.

THE DECISION

Section 359(1)(a) of the Companies Act provides that when a special resolution for the voluntary winding up of a company has been registered in terms of the Act, all civil proceedings by or against the company shall be suspended until the appointment of a liquidator. Section 359(2)(a) of the Act provides that legal proceedings against a company which have been suspended by a winding-up may be continued after the appointment of a liquidator upon giving the liquidator three weeks notice of such continuation.

The civil proceedings referred to in section 359(1)(a) did not include provisional winding up proceedings such as those which had been brought against the respondents. Section 346(1)(e) of the Act expressly envisages the bringing of such proceedings in circumstances where the company in question is being wound up voluntarily. Furthermore, the use of the phrase 'legal proceedings' in section 359(2)(a) did not connote a change of intention and the permission granted in that sub-section was an indication that provisional winding up proceedings could proceed despite the voluntary winding up initiated by the members.

While it was undesirable to have two winding up proceedings persisting simultaneously, the court had a wide discretion in such a case. A court need not set aside voluntary winding up proceedings before provisional winding up proceedings can take place. Having regard to the fact that the provisional winding up proceedings began on 19 February, it was in the interests of creditors that these proceedings result in the confirmation of the provisional order and that the voluntary winding up be set aside.

LORDAN v DUSKY DAWN INVESTMENTS (PTY) LTD

A JUDGMENT BY HORN AJ
SOUTH EASTERN CAPE LOCAL DIVISION
17 JUNE 1998

1998 (4) SA 519 (E)

Creditors who object to the confirmation of a compromise proposed between a company and its creditors in terms of section 311 of the Companies Act (no 61 of 1973) may not object thereto on the grounds that the company was mismanaged and the directors require interrogation in order to investigate the mismanagement. Though remedial steps may be taken in the case of such mismanagement having taken place, this is not a reason to refuse confirmation of the compromise especially where the overwhelming majority of creditors have voted in favour of the compromise.

THE FACTS

Dusky Dawn Investments (Pty) Ltd was placed in liquidation. The liquidator then made application in terms of section 311 of the Companies Act (no 61 of 1973) for the adoption of a compromise or scheme or arrangement.

The compromise proposed that the offeror would provide a loan to the company which would be subordinated to the claims of other creditors.

The application resulted in a court order that meetings of creditors be held to consider the compromise. The meetings were then called and the liquidator made his report in terms of section 312(1) of the Act. In it, the liquidator used a form that had become much used over the years and did not deal adequately with the financial state of the company.

Of the nineteen creditors, fifteen voted in favour of the compromise, two abstained and two opposed the compromise. The two who voted against the compromise opposed the confirmation of the order.

THE DECISION

The main objection to confirmation of the compromise was that it would prevent the institution of interrogation proceedings into the affairs of the company in terms of section 415 of the Act. This section however, may be utilised only where the enquiry is directed at facts which may lead to the financial benefit of creditors. The real complaint of the opposing creditors was that the directors had been involved in irregularities and mismanagement of the affairs of the company. They could pursue that complaint by employing the provisions of such sections as section 424 of the Act.

As against this, the fact that the majority of creditors supported the compromise was important. This was an indication that the offer was fair and reasonable. The objections of the minority shareholders being based on dissatisfaction with the management of the directors prior to liquidation, there was insufficient reason to reopen the enquiry which had already been completed in terms of section 311. That section is not there to constitute a forum for the investigation into the activities of the directors. Whether the provisions of the section were completely applied or not, the dissatisfied creditors could still apply the remedial provisions of section 424.

The liquidator's report in terms of section 312(1) was not an ideal report. However, it was sufficient for the present purposes. The compromise was confirmed.

CLIFFORD v COMMERCIAL UNION INSURANCE CO OF SA LTD

A JUDGMENT BY SCHUTZ JA (VAN HEERDEN DCJ, NIENABER JA, HOWIE JA and MARAIS JA concurring)
SUPREME COURT OF APPEAL
22 MAY 1998

1998 (4) SA 150 (A)

Insurance

A 'new for old' clause in an insurance policy may indicate what is considered material to the assessment of the risk on the part of the insurer so that inaccuracies contained in the proposal form giving rise to the insurance contract may entitle the insurer affected by them to repudiate a claim.

THE FACTS

Clifford submitted a proposal form to Commercial Union Insurance Co of SA Ltd with the intention of insuring a motor vehicle which she had purchased in November 1993.

When completing the form, her authorised agent stated that the year of manufacture of the vehicle was 1993. In fact, the vehicle had been manufactured in 1991 and had since then exchanged hands a number of times between parties who had been interested in the vehicle as an investment purchase. They had not registered the vehicle in order to defer the registration date to as late a date as possible.

The proposal form also stated that the registration number of the vehicle was AGP434T. This was the number given on the trade plates which had been used in the vehicle until that point but it was not a registration number.

The proposal form stated that the vehicle was registered in Clifford's name, although at that point it had not yet been transferred into her name.

An insurance policy was then issued. It incorporated a 'new for old' clause in terms of which Commercial Union undertook to indemnify to the extent of the current cost of a new motor car should the vehicle be stolen.

The vehicle was stolen. Clifford claimed under the insurance policy which had followed the submission of the proposal form. Commercial Union repudiated on the grounds that the proposal form had contained inaccuracies which entitled it to repudiate.

THE DECISION

Section 63(3) of the Insurance Act (no 27 of 1943) provides that an insurance policy will not be invalidated nor the insurer's obligation excluded or limited on account of any representation made to the insurer which is not true, whether or not the representation has been warranted to be true, unless the incorrectness of the representation is of such a nature as likely to have materially affected the assessment of the risk under the policy at the time of its issue or reinstatement or renewal.

This section was introduced to limit the insurer's right to repudiate on the grounds of a warranty incorrectly given. Whereas previously the insurer had been entitled to do so merely because a warranty had been given, whether material to the insurer's assessment of the risk or not, the section required that any representation upon which the insurer relied in assessing the risk had to be material.

The 'new for old' clause was decisive of the question whether or not Commercial Union's assessment of the risk was of such a nature as to have been materially affected by the inaccuracies in the proposal form. The importance of that clause lay in the fact that it was inserted in order to determine the amount of indemnification without regard to the value of the vehicle. As a determinant of that amount its effect was to exclude any assessment based on the actual value of the vehicle, and therefore indicated what was considered material to the assessment of the risk for Commercial Union. In accepting that the vehicle was new, as stated in the proposal form, Commercial Union was materially affected in its assessment of the risk, and had therefore been entitled to repudiate the claim.

Clifford's action was dismissed.

SANTAM BPK v CC DESIGNING BK

A JUDGMENT BY COMRIE J (FAGAN J and DESAI J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
13 AUGUST 1998

[1998] 4 All SA 70 (C)

An insurance policy which provides that the insured is obliged to take all reasonable steps to prevent loss requires that the insured does not act recklessly in circumstances where a claim may arise. It is not a provision which allows the insurer an exclusion from liability

THE FACTS

CC Designing BK insured a motor vehicle with Santam Bpk. In terms of clause 5 of the agreement, it was provided that the insured was obliged to take all reasonable steps and preventative measures to prevent accidents and loss of the vehicle.

CC's representative, Cloete, advertised the vehicle for sale. In response to the advertisement, he was contacted by a person naming himself 'Solly' and the two parties agreed to the sale of the vehicle at the price of R150 000 in cash. Solly agreed to pay for the vehicle by depositing the R150 000 into Cloete's bank account. Solly sent by fax a copy of the relevant deposit slip indicating the payment, and Cloete then arranged for the vehicle to be delivered to Solly. Cloete inquired of his bank whether or not the deposit had been made in cash, but the bank was unable to confirm whether the deposit had been by cash or cheque. The faxed copy of the deposit slip was unclear and it indicated amounts of payments both at the section provided for cash deposits and for cheque deposits.

After delivery of the vehicle, it was discovered that the deposit made into Cloete's account had not been in cash but by cheque, and that the cheque had been dishonoured. Cloete was unable to locate Solly and claimed against Santam under the insurance policy. Santam repudiated on the grounds that a loss sustained in the course of a commercial transaction was not covered by the policy, but (in view of the judgment *De Wet v Santam Bpk* 1996 (2) SA 629 (A)) later defended an action for payment in terms of the policy on the grounds that Cloete had, in breach of clause 5, failed to take all reasonable steps and precautions to avoid the loss of the insured vehicle.

THE DECISION

The cover given by the policy was widely stated. It included events arising from the negligence of the insured, qualified by the provisions of clause 5. That clause should not be interpreted as an exclusion of liability.

In order to repudiate liability under the clause, Santam had to show that Cloete acted recklessly in the sense that he failed to take reasonable precautions to prevent the loss which had occurred. It had therefore to show that Cloete recognised the dangers to which he was exposed, that he took measures to deal with them which he knew were inadequate or about which he did not care. In short, it had to show that he had been reckless.

The objective facts of the case did not show that Cloete had taken a chance when deciding to deliver the vehicle on the strength of the deposit slip which had been faxed through to him. He had assessed the evidence of the deposit as reported to him by his bank and as given by the faxed copy of the deposit slip and had made a decision based on that, as to whether or not to deliver the vehicle. He did not foresee that Solly might be intending to defraud him.

In view of Cloete's perception of the situation, it could not be said that he had acted recklessly. The claim was upheld.

THE MT TIGR v BOUYGUES OFFSHORE

A JUDGMENT BY KING J
(SELIKOWITZ J and FARLAM J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
18 MARCH 1997

1998 (4) SA 206 (C)

Shipping

A court will not order the sale of a ship following its attachment if the owner of the ship shows that the ground for arrest does not constitute a good cause of action.

THE FACTS

The *Tigr* was one of a fleet of seven vessels and the only one of them operating outside of the Caspian Sea. As such, it was the only earner of foreign exchange which was probably essential to the continuation of its owner's business.

The ship was arrested by Bouygues Offshore in an application in which it was shown that that company had made out a prima facie case against its owners. Later, an order authorising the sale of the ship was given for the purpose of creating a fund for distribution to creditors.

The ship appealed against this order.

THE DECISION

Where a claim is contested, a court will be reluctant to order the sale of the property if there is a reasonable prospect that the owner will be able to show that the ground for arrest or attachment is not a good cause of action.

In the present case, little was known of the validity of Bouygues' claims and it could not be asserted that they had been seriously made. Defences raised against the claim had been seriously raised and could constitute good defences if successful. The court was however, in no position to assess the merits of claim and defence, and this was an indication that the court should not yet make a final order for the sale of the ship.

There was confusing evidence as to the value of the ship and its potential for deterioration prior to its sale and the cost of preservation, which was being borne by Bouygues was a neutral factor.

In view of these factors, the sale of the ship could not be ordered. The appeal was upheld.