Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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Contents

Index

THOMPSON v SCHOLTZ

A JUDGMENT BY NIENABER JA (VAN HEERDEN DCJ, SMALBERGER JA, ZULMAN JA and MELUNSKY AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 1998

1999 (1) SA 232 (A)

Contract

A party claiming that the other party to a contract perform his obligations in terms of the contract, may be met with the defence that the party claiming has failed to perform properly himself in terms of the contract. However, while such a defence may give rise to an adjustment of claims between the parties, such an adjustment may not be easy to achieve where the obligations of both parties are continuing obligations and for that reason difficult of assessment. In such circumstances, a court may apply an alternative solution to claim and counterclaim and allow the plaintiff's claim, subject to a reduction in accordance with what is fair between the parties.

THE FACTS

Scholtz bought a farm from Thompson. In terms of the agreement of sale, possession of the farm was to be given to Scholtz on 1 May 1992. Occupational interest of 12½% was payable from this date to date of payment of the purchase price.

Scholtz was not given possession of the farmhouse until 10 October 1992. Furthermore, some of Thompson's labourers retained occupation of dwellings on the farm from some time after 1 May 1992, and certain goods and livestock belonging to Thompson also remained on the farm after that date.

On 18 September 1992, Scholtz took transfer of the farm and paid the purchase price. He refused to pay the occupational interest as provided for in the agreement of sale because of Thompson's failure to give him vacant possession of the farm on 1 May 1992. Thompson brought an action against Scholtz for payment of the occupational interest. Scholtz defended the action on the grounds that he was excused from payment because Thompson had failed to perform his own obligations under the agreement (the exceptio non adimpleti contractus).

Scholtz also raised a counterclaim for expenses incurred in extra travelling to and from the farm, caused by the failure to give vacant possession of the farm on 1 May 1992.

THE DECISION

Thompson argued that because the commercial benefits of the contract accruing to Scholtz overwhelmingly outweighed the shortcomings of his own performance, those shortcomings should be disregarded for the purposes of assessing his own claim. This was however, not a situation where the rule de minimis non curat lex rule (the law does not have regard to trifles) applied. The damages to which Scholtz was entitled would exceed R1 000 and this could not be considered trivial.

Thompson argued in the alternative that Scholtz should not be permitted to raise the exceptio non adimpleti contractus as an absolute defence, but that because Scholtz had accepted Thompson's defective performance, Thompson's claim should be allowed though taking into account the cost of remedying that defective performance. While this was something that could be done, on the authority of *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A), there was a difficulty in doing so when the performance being sued for was the performance of a continuing obligation, ie the payment of occupational interest, in response to the other party's continuing imperfect performance of its continuing obligation. The difficulty was that the imperfect performance (Thompson's failure to provide complete vacant occupation of the farm) could not be cured later and it was impossible to assess the cost of curing this defect later.

In order to meet this difficulty, an alternative solution could be found. This was to apply the principles of remission of rent where a landlord has failed to provide the lease premises in a tenantable condition. The amount of remission of rent is calculated by reference to what is fair in the circumstances. In the present case, in view of the reduced occupation given to Scholtz, it was fair to reduce the occupational interest payable by him by 25%.

Thompson's claim for the occupational interest was granted, reduced by 25%.

ETKIND v HICOR TRADING LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
5 SEPTEMBER 1997

1998 (1) SA 104 (W)

An agreement in terms of which one party undertakes to allot and issue shares in a company without there being any intention that the party taking the shares will give any valuable consideration therefor is contrary to the provisions of section 92(1) of the Companies Act (no 61 of 1973) and is accordingly invalid.

THE FACTS

Etkind and Tayob entered into an agreement with Hicor Trading Ltd in terms of which Hicor acquired the share capital of Miltons (1987) (Pty) Ltd and their claims against it, and Hicor agreed to indemnify Etkind and Tayob against one half of their suretyship obligations to the Credit Guarantee Insurance Corporation of Africa Ltd, Nedbank, Etron (Pty) Ltd and GDM International (Pty) Ltd. Hicor also agreed to issue to Etkind and Tayob 1 700 000 ordinary shares in the share capital of itself.

The agreement was entered into in an attempt to continue the business of Miltons which was then under winding up proceedings and was entered into with a view to concluding a compromise between Milton and its creditors.

Etkind and Tayob brought an action against Hicor for reimbursement of amounts paid by them to the creditors in terms of their suretyship obligations, and payment of the market value of the 1 700 000 shares which were not delivered to them.

Hicor defended the action on the grounds that Etkind and Tayob had not performed their obligations as required of them in terms of the agreement, ie had not delivered the shares in Miltons and their claims against it free of claims by third party creditors.

THE DECISION

Whether or not Etkind and Tayob had tendered delivery of their shares free of claims by others was linked to the question whether or not they had tendered delivery of their shares at all. Section 92(1) of the Companies Act (no 61 of 1973) provides that no company shall allot or issue any shares unless the full issue price of or any other consideration for such shares has been paid to and received by the company. This section required that the allotment or issue of Hicor's shares be made in consideration for payment of money or other valuable consideration. Hicor contended that the shares in Miltons were valueless and were therefore insufficient consideration as required by this section. The agreement was therefore void in that it contravened the provisions of the section.

The agreement clearly provided for the transfer of the Miltons shares and claims against that company to Hicor. However, there was no evidence that the cession of the shares or claims was to take place before the allotment of the shares by Hicor or that any cession ever took place. The evidence was that Etkind and Tayob did not intend to pass ownership of the shares in Miltons, on the contrary, were not in a position to do so, and Hicor accepted the risk of their inability to transfer ownership of the shares.

This meant that the provisions of section 92(1) were contravened. The agreement was therefore invalid and could not be enforced. The action was dismissed.

GRAND MINES (PTY) LTD v GIDDEY N.O.

Contract

A JUDGMENT BY SMALBERGER JA (NIENABER JA, HOWIE JA AND NGOEPE AJA concurring, SCHUTZ JA dissenting)
SUPREME COURT OF APPEAL
23 NOVEMBER 1998

UNREPORTED

The defence that a claimant has itself not performed in terms of a contract upon which the claimant sues (exceptio non adimpleti contractus) may only succeed if the obligations of each party are mutual and are to be performed reciprocally and simultaneously.

THE FACTS

Grand Mines (Pty) Ltd accepted a tender made by Bercon Mining (Pty) Ltd to mine and deliver coal. Clause 1(3) of their agreement provided that rehabilitation of the surface at any opencast mine would form an integral part of the mining operations and would be conducted concurrently with such operations. The quoted rate of R14.00 per R.O.M. ton included the removal of hard and soft overburden, the removal of coal seams and delivery of the extracted coal, and rehabilitation of any pit mined by Bercon. Payment was to be made on the 25th of each month.

Bercon proceeded to mine and deliver the coal, but a year later, Grand Mines cancelled the contract. At this time, Grand Mines had fallen so far behind with rehabilitation that it was clearly not complying with its obligations in that regard. Bercon had also not removed 'pillars of coal', a cross-section of coal defining the edge of a cut. These were not referred to in the agreement, but it was contended by Grand Mines that it was a tacit term of the agreement that their removal was to take place.

Bercon was placed under liquidation and its liquidator, Giddey, instituted action against Grand Mines for payment due to Bercon for coal mined and delivered. Grand Mines defended the action on the grounds that Bercon had failed to perform its own obligations under the agreement (the exceptio non adimpleti contractus).

THE DECISION

The exceptio can be raised as a defence when the obligations of the parties are mutual and are intended to be performed reciprocally and simultaneously. The first question was whether Grand Mines's obligation to pay for coal delivered by Bercon was reciprocal to Bercon's obligation to rehabilitate. The second question was whether it was a tacit term of the agreement that in the mining process no 'pillars of coal' were to be left behind by Bercon, and if so whether this obligation was reciprocal to Grand Mines's obligation to pay for coal delivered.

The obligations of the parties were clearly reciprocal in regard to the delivery of coal and payment for it. As far as rehabilitation was concerned however, this was not an obligation Bercon could perform at precisely the same time as payment corresponding thereto was to be made. Practical difficulties could have attended the rehabilitation process and there was therefore no reciprocity between the obligation to perform this task and the obligation to make payment. The main purpose of the agreement was, in any event, to achieve the mining and delivery of coal.

Since these obligations were not reciprocal, Grand Mines could not raise Bercon's failure to perform them as a defence to Bercon's claim for payment.

As far as the 'pillars of coal' were concerned, while it might have been reasonable for Grand Mines to expect these to be removed, there was no reason to expect that both parties would have agreed that their removal was a part of the obligations intended to be performed by Bercon.

Grand Mines's claim was dismissed.

AFCOL MANUFACTURING LIMITED v AFRIFURN INDUSTRIES CC

Contract

HOEXTER JA (HOWIE JA, SCOTT JA, ZULMAN JA and NGOEPE AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 1998

1998 CLD 654 (A)

A contract in which the seller undertakes to insure the thing sold while the purchase price remained unpaid entitles the seller to insure to the extent of its interest and in the absence of an implied term, does not oblige the seller to insure to the extent of the purchaser's interest.

THE FACTS

Afcol Manufacturing Ltd sold certain plant to Afrifurn Industries CC for R72 000. Payment of the purchase price was to be effect in eight instalments of R9 000 each, the balance outstanding to attract interest at the rate of 14¼% per annum.

The agreement of sale provided that Afcol was to insure the plant against loss through theft, riot, fire and similar hazards. Afcol did so, securing cover to the extent of R72 000. The plant was destroyed by fire and Afcol received payment from the insurer of R67 260 representing the amount insured against, less salvage and excess plus VAT. After subtracting the amount owed to it by Afrifurn, Afcol paid this sum to Afrifurn.

Afrifurn contended that upon a proper construction of the agreement of sale, Afcol had been legally obliged to insure the plant for its replacement value, alternatively its market value. It brought an action against Afcol for damages for breach of contract.

THE DECISION

The terms of the sale agreement were framed so as to protect the interests of the seller, ie Afcol. While the terms of the sale agreement were that Afcol was to insure the plant, in the sense that it was under a legal obligation to do so, the sum at which it was to do so was within Afcol's own and completely unfettered discretion. In exercising its discretion, Afcol had insured the plant to the extent of its own interest in it and it had been under no obligation to insure to the extent of Afrifurn's interest in it. In insuring the plant, Afcol had not acted as Afrifurn's agent and it was therefore not obliged on this basis, to insure any further than to the extent of its own interest.

The only other basis upon which it could be said that Afcol was obliged to insure the plant any further was on the basis of an implied or tacit term that it was so obliged. However, there was no evidence to suggest that the parties would have agreed to such a term.

Afcol was therefore not in breach of contract and Afrifurn was not entitled to damages.

DURBAN'S WATER WONDERLAND (PTY) LTD v BOTHA

Contract

A JUDGMENT BY SCOTT JA (VAN HEERDEN DCJ, HOWIE JA, HARMS JA and MELUNSKY AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1998

UNREPORTED

An ambiguous term of a contract must be interpreted against the person in whose favour the term is included in the contract, but it must be clear that there is a real ambiguity before such an interpretation is placed on the term. A party to a contract which does what is reasonably sufficient to bring a term of the contract to the attention of the other party is entitled to assume that the term is a part of the contract entered into between them.

THE FACTS

Botha and her husband attended an amusement park owned by Durban's Water Wonderland (Pty) Ltd. When there, they purchased tickets entitling Botha and her daughter to go on the 'jet ride', a ride in a car resembling a jet-propelled aircraft which was attached to a central cylindrical-shaped structure which revolved at a rate of about five to six revolutions per minute. At the cashier where they paid for their tickets, a notice was painted in white on a glass window in lettering some 2½cm high:
'The amenities which we provide at our amusement park have been designed and constructed to the best of our ability for your enjoyment and safety. Nevertheless we regret that the management, its servants and agents, must stipulate that they are absolutely unable to accept liability or responsibility for injury or damage of any nature whatsoever whether arising from negligence or any other cause howsoever which is suffered by any person who enters the premises and/or uses the amenities provided.'

When buying the tickets, Mrs Botha did not notice this sign, but she was aware of such signs being posted at amusements parks and that patrons rode on the amenities at their own risk.

While they were taking the ride, the hydraulic system controlling the vertical movement of the car failed. The car moved in a series of violent jerks, fell to its lowest limit, then bounced back up again. Its upward movement was sufficiently forceful to result in Mrs Botha and her daughter being propelled into the air together with the seat on which they had been sitting, parting from the car and landing in a nearby flowerbed.

Botha and her husband in his capacity as father and natural guardian of their daughter brought an action claiming damages against Durban's Water Wonderland (DWW). DWW denied that it had been negligent and also defended the action on the grounds that the disclaimer stated on the cashier's window exempted it from liability in respect of any injury or damage arising from use of the amenities.

DWW appealed Botha's successful action.

THE DECISION

The approach in determining the proper construction to be placed upon the disclaimer was to firstly determine whether or not there was any ambiguity in it. If not, the full effect of the exemption was to be applied. If there was any ambiguity, the exemption was not to be applied.

There was no ambiguity in the disclaimer. Botha had contended that the phrase 'unable to accept liability' indicated no more than that the management of DWW could not accept liability for damages without proof of the claim in a court of law. However, there would have been no purpose in DWW making such a disclaimer as it could always require proof of any claim brought against it. The purpose of the disclaimer was to inform users of the amusement park that liability would not be incurred at all. Accordingly, DWW was entitled to raise the disclaimer as a defence to any claim brought against it and deny liability on the grounds that it had been agreed that DWW would not be liable for injury or damage arising in the circumstances provided for within the terms of the disclaimer.

The second question was therefore whether the terms of the disclaimer were incorporated into the contract entered into between DWW and Botha. If Botha had been aware of a notice indicating

terms of this contract but had not bothered to read them, she would have been bound by them. However, her evidence was that she was merely aware of notices generally at amusement parks. The question then was whether or not DWW was reasonably entitled to assume that she had assented to the terms of the disclaimer displayed at the ticket office window. It was reasonably entitled to make this assumption because it had done what was reasonably sufficient to bring these terms to her notice. The notice was sufficiently prominent for any reasonable person to observe it, especially in circumstances where that person was aware of notices of that sort being posted at amusement parks.

The terms of the disclaimer did form part of the contract entered into between DWW and Botha. The appeal was upheld.

VULINDLELA FURNITURE MANUFACTURERS v MEC, DEPT OF EDUCATION AND CULTURE

A JUDGMENT BY VAN ZYL J
TRANSKEI DIVISION
23 OCTOBER 1997

1998 (4) SA 908 (Tk)

A court may have jurisdiction to hear a matter which concerns a party located outside its area of jurisdiction where the cause arising between the parties arises within its area of jurisdiction, as for example where the enforcement of a contract involves enforcement procedures to be applied within the court's area of jurisdiction.

THE FACTS

Vulindlela Furniture Manufacturers and the third to fifth respondents tendered for the supply of school furniture to the Transkei Tender Board. Contracts for the supply of the furniture were awarded to Vulindlela and these respondents by the MEC to whom the tenders had been made. These respondents were all Transkeian companies who were obliged to perform their obligations under the contracts within Transkei. The MEC was an organ of the Eastern Cape Provincial Government which at the time the ensuing application was brought, situated in Bisho, ie outside of the area of jurisdiction of the Transkei Division of the High Court.

The MEC required Vulindlela to pay for the costs of inspection of the furniture it supplied, the inspection being required in order to ascertain that the furniture met the standards provided for in the supply contract. Vulindlela disputed its liability to pay for these costs, but deferred legal relief for the resolution of this dispute pending the determination of an application it brought against the MEC. This application was for orders, inter alia, that the MEC verify that all furniture delivered to schools under the tender by all suppliers had been inspected and approved prior to delivery. A further application was later brought for an order that a later invitation for tenders for the supply of furniture should not be proceeded with until determination of the earlier application.

The MEC opposed the applications on two preliminary grounds, ie (i) that he and the second and sixth respondents, being located outside of the court's area of jurisdiction (perigrini) were not subject to the court's jurisdiction, and (ii) that Vulindlela lacked any right (locus standi) to bring the action against the MEC.

THE DECISION

The Transkei High Court enjoyed a jurisdiction equal to that of a provincial division of the High Court of South Africa, within the area for which the

Transkei Supreme Court had originally been established. This area did not include Bisho.

However, its jurisdiction was over all persons residing within its area, as well as all causes arising and all offences triable within its area of jurisdiction. The cause arising in the present case arose from the MEC's duty to enforce the terms of the contracts of supply of the school furniture. Enforcement of those terms would require steps to be taken within the area of the court's jurisdiction. This would require the MEC to act within this area and thereby render him subject to the court's jurisdiction.

All of the respondents were therefore subject to the court's jurisdiction.

As far as the question of locus standi was concerned, Vulindlela was asking the court to require that the MEC perform a duty imposed on him in terms of a statute. Assuming that such a duty did exist, ie the duty to ensure compliance with the contracts entered into with successful tenderers, it did not confer a right upon anyone to complain of a failure to comply with that duty. Furthermore, Vulindlela alleged financial prejudice arising from its own contract with the MEC and not as a result of the other respondents having failed to comply with their obligations, yet it was their failure to which Vulindlela pointed in proof of its own financial prejudice. That failure was irrelevant to Vulindlela's complaint.

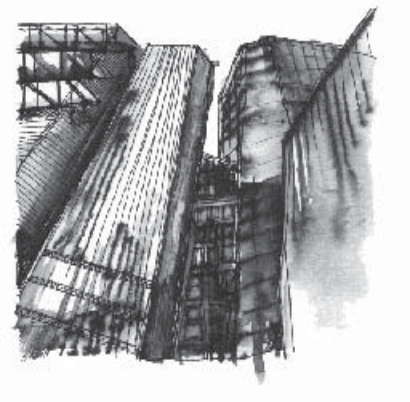
Vulindlela had therefore not shown that it had any right, ie locus standi, to bring its application against the MEC. The application was dismissed.

CROATIA MEAT CC v MILLENNIUM PROPERTIES (PTY) LTD SOFOKLEOUS v MILLENNIUM PROPERTIES (PTY) LTD

A JUDGMENT BY
SCHWARTZMAN J
WITWATERSRAND LOCAL DIVISION
24 MARCH 1998

1998 (4) SA 980 (W)

Property



In deciding between two competing lessees against a lessor which has entered into leases conferring incompatible rights, a court may take into account the respective damages which may be suffered by the two lessees. Where this is insufficient to give a clear indication of which party's right should be upheld, the party first securing the right to occupation should be given that right as against the other party.

THE FACTS

In November 1995, Sofokleous leased premises at the Fernridge Shopping Centre in Randburg under a lease which permitted sole use of the premises as a café, supermarket, butchery, fruit and vegetable store and related business activities. Sofokleous conducted the business of a supermarket at the premises, including within it a butchery taking up more than 21% of the total area leased to him. The butchery formed a large part of his business, achieving a turnover in January and February 1998 of some R100 000 each month, approximately 10% of total turnover in these months.

In terms of clause 6.4 of the lease, Millenium warranted that it would not let premises in the shopping centre for the purpose of a person conducting a business similar to that of Sofokleous.

In January 1998, Millenium leased a shop in the same shopping centre to Croatia Meat CC. Croatia was permitted to use the premises for a butchery, which had been the usual business conducted by Croatia.

When Sofokleous received notice of the lease, he objected to the lease. Millenium then advised Croatia that it was not proceeding with the lease. Croatia regarded this as a repudiation of the lease and brought an application for an order that the lease was valid and binding. Sofokleous brought an application against both Millenium and Croatia for an interdict preventing Millenium from permitting any person other than himself from conducting the business of a butchery from any premises at the shopping centre. Sofokleous also sought leave to intervene in the application brought by Croatia.

The two applications were heard together.

THE DECISION

The two main issues were whether Millenium had breached its lease with Sofokleous, and if so whether Sofokleous was entitled to the interdict or Croatia was entitled to an order for specific performance.

The facts clearly showed that Sofokleous was running a butchery, and was not merely selling meat as part of the range of food usually sold in his supermarket. The business to be run by Croatia in terms of the lease it had entered into with Millenium was essentially a butchery as well, notwithstanding the fact that it included the right to engage in other activities. Millenium had therefore committed a clear breach of the lease with Sofokleous when it entered into the lease with Croatia.

Because the claims brought by Sofokleous and by Croatia were both claims for specific performance and not claims for damages, and were mutually incompatible, it was necessary to choose between them in deciding which claim should be granted. In deciding this, the respective damages which might be sustained by each party could be taken into account. On the one hand, Sofokleous would suffer damages by losing sales to customers who would purchase from Croatia. On the other hand, without any premises to operate from, Croatia would probably suffer greater damages through lost sales.

Between the two competing claims, the difference in damages which might be suffered was insufficient to favour one party or the other. The only basis upon which one party should be allowed its claim was that stated in the rule applicable to double sales, ie he who is first in time has the greater right. The lease with Sofokleous was entered into earlier than the one entered into with Croatia. He was therefore entitled to the interdict he sought.

Sofokleous' application was granted and Croatia's was dismissed.

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

Property

A JUDGMENT BY BROOME DJP (GALGUT J and HURT J concurring)
NATAL PROVINCIAL DIVISION
22 JUNE 1998

1998 (4) SA 1030 (N)

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

THE FACTS

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

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

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

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

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

THE DECISION

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

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

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

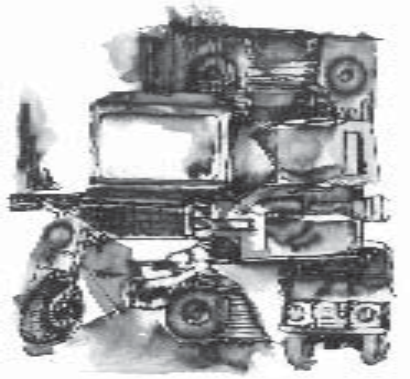
Supergro having had knowledge that the Hodgsons or Woolley owned the goods, it was unable to assert its hypothec. The bank's contention was upheld and the proceeds of the sale distributed without regard to the hypothec.

KOEKEMOER v LANGEBERG STENE BK

A JUDGMENT BY STEENKAMP J
(BUYS J concurring)
NORTHERN CAPE DIVISION
11 SEPTEMBER 1998

1999 (1) SA 361 (NC)

Credit Transactions



A partnership which dissolves in order to continue business as a close corporation should notify the public of the transformation in order to ensure that the public which was doing business with the partnership is doing business with the close corporation thereafter.

THE FACTS

From 1978, Langeberg Stene BK supplied stone and building sand to Koekemoer on credit. Koekemoer paid Langeberg's accounts timeously. Koekemoer then began trading as a partnership with his son and Langeberg continued to supply goods on credit to the partnership, rendering its accounts to G Koekemoer en Seun. After being advised of a change of name of the partnership, Langeberg rendered its accounts to Wilco Kontrakteurs.

Unbeknown to Langeberg, the partnership dissolved and transferred its business to a close corporation known as Wilco Kontrakteurs BK. Langeberg continued to render accounts as before, and received in payment of them, cheques drawn by the close corporation.

When some of the statements sent by Langeberg remained unpaid, Langeberg brought an action against Koekemoer and his son as partners in the partnership. Koekemoer defended the action on the grounds that the partnership had not incurred the debt, having been dissolved earlier, and that the close corporation was the party responsible for payment of the debt.

Langeberg contended that Koekemoer was estopped from relying on this defence as the partnership had not informed him of the dissolution of the partnership and the takeoever of the business by the close corporation.

THE DECISION

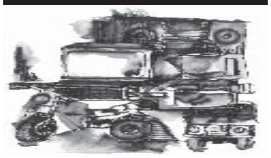
The dissolution of a partnership is effective as against third parties only if they are notified of the dissolution. If notification is not given, the partnership will remain liable to third parties on the basis of the doctrine of estoppel. To avoid this, a partner will be required to notify the public of the dissolution of the partnership if necessary by notice in the *Government Gazette.*

While it was arguable that proof of negligence was not a requirement for the establishment of estoppel in all cases, it was clear that in the present case, Koekemoer had been negligent in not informing Langeberg of the dissolution of the partnership. Langeberg itself could not be said to have been negligent in not noticing that the cheques paid to it by Koekemoer was drawn by the close corporation. Often, debts are settled by the payment of cheques drawn by others, and Langeberg had stated that it had not taken note of the name of the drawer on the cheque.

Langeberg could not have known that the partnership had been dissolved and it was not unreasonable for it to have thought that it continued to supply goods on credit to the partnership.

Its action succeeded.

STELLENBOSCH FARMERS WINERY LTD v VLACHOS



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.

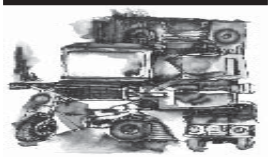
When Vlachos signed the credit application form, he knew that it contained terms to which he would be bound. Having done so, it was to be presumed that he knew what it contained.

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.

CHINATEX ORIENTAL TRADING CO v ERSKINE



A JUDGMENT BY CHETTY J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
28 MAY 1998

1998 (4) SA 1087 (C)

The Protection of Businesses Act (no 99 of 1978) prevents the enforcement of foreign judgments in respect of claims arising from transactions involving raw materials and not those involving manufactured materials.

THE FACTS

Chinatex Oriental Trading Co held a judgment against Erskine which was given by an English court in 1997 for payment of $2 332 167,02. At the time this judgment was given, Erskine was no longer resident in England, where he had been resident for two years and had owned fixed property. In an application to the Registrar of Companies in 1995, Erskine had stated that he was a British National and had furnished the address of this fixed property as his usual address. After 1997, he was resident in South Africa and owned fixed property there. He was born in South Africa and regarded it as his permanent home.

Chinatex brought an action for provisional sentence against Erskine based on the judgment it had obtained against him in England. Erskine opposed the action on the grounds inter alia that the English court had lacked jurisdiction in granting the judgment against him in that he was neither domiciled nor resident in England at that time. He also opposed the action on the grounds that as the judgment was granted upon an action for payment due under contracts of sale for manufactured garments, and such were 'any matter or material of whatever nature' as referred to in the Protection of Businesses Act (no 99 of 1978). Under that Act, no judgment emanating from outside South Africa and arising from a transaction involving such matter or material shall be enforced in South Africa.

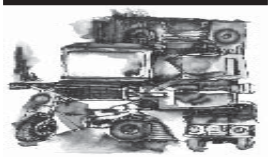
THE DECISION

The facts showed that Erskine had not visited England merely for temporary periods of time but had established a domicile of choice there. His continued presence in England was not required for the purposes of retaining that domicile and he was therefore domiciled there at the time the judgment was granted against him.

As far as the defence based on the Protection of Businesses Act was concerned, the 'matter or material' referred to in it was raw materials or substances from which physical things were made, and not manufactured things. The items in respect of which Chinatex sought to enforce its judgment were the latter kinds of things and therefore not items which fell within the ambit of the Act.

Provisional sentence was granted against Erskine.

AMALGAMATED RETAIL LTD v B.R. HODGSON GROUP INTERNATIONAL (PTY) LTD
B.R. HODGSON GROUP INTERNATIONAL (PTY) LTD v AMALGAMATED RETAIL LTD



A JUDGMENT BY McCALL J
DURBAN AND COAST LOCAL DIVISION
30 JULY 1998

1998 CLR 603 (D)

A judgment may be rescinded where the judgment was granted after an intention to defend was filed and served prior to the judgment having been granted.

THE FACTS

Amalgamated Retail Ltd brought an action against BR Hodgson Group International (Pty) Ltd for payment of R106 261,77, an amount owing in respect of goods sold and delivered to BR. On the day following the day on which it applied for default judgment against BR, BR filed and served a Notice of Intention to Defend the action. Default judgment was then granted against BR.

BR applied for rescission of the judgment.

In a separate application, Amalgamated applied for the winding up of BR.

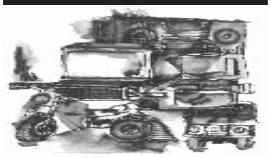
THE DECISION

Whether or not when deciding to grant rescission of judgment, a court should have regard to facts of which the person who granted the judgment was unaware, the determining factor was whether or not a notice of intention to defend had been given. If notice of intention to defend had been given, it would be incompetent for the judgment to have been given since the judgment would not have been given had the person granting judgment been aware of this at the time.

The fact that a notice of intention had been given prior to judgment having been granted meant that the judgment had been erroneously granted. The judgment could therefore be rescinded.

As far as the winding up application was concerned, there were too many disputes between the parties as to the grounds for winding up to found an order for the winding up of the company. This application was therefore postponed sine die for the hearing of further evidence.

STANDARD BANK OF SA LTD v FRIEDMAN



A JUDGMENT BY GIHWALA AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 NOVEMBER 1998

1999 CLR 1 (C)

A creditor is entitled to vary the interest rate applicable to a loan upon notice given to the debtor provided that the circumstances in which the creditor may do so are sufficiently clear from the terms of the loan.

THE FACTS

In 1994, the Standard Bank of SA Ltd lent money to Friedman and passed a mortgage bond over her property as security for the loan. In terms of the bond, interest on all amounts secured by it as well as capital, were payable by Friedman in monthly instalments.

Interest on the loan was determined at the rate of 14,75% per annum. The bank was entitled to vary the annual finance charge rate at any time upon written notice to Friedman, provided that the rate could not at any time exceed the applicable maximum rate permitted by law. The bank in fact varied the interest rate applicable to the bond from time to time.

The bank alleged that Friedman had failed to honour her obligations in terms of the bond and brought an action against her for repayment of the full amount due in terms thereof. Friedman defended the action on various grounds, inter alia that the bank had not been entitled to vary the interest rate as the provision entitling it to do so was vague and therefore void and enforceable.

The bank applied for summary judgment against Friedman.

THE DECISION

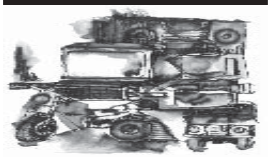
When the provisions of the bond were considered in their entirety, it was clear that it was intended that the bank would vary the interest rate to that applicable and as usually required by the bank for the kind of transaction in question. The parties therefore agreed on the framework within which the interest rate would be determined and did not agree that the variation of interest rate would be within the unfettered discretion of the bank.

The framework within which the interest rate would be determined was the market for loans as governed by the supply of money to banks by investors and the demand for money from bank by borrowers. The interest rates payable by banks would determine the interest rates they exact from those who borrow from them. The fact that the former were subject to fluctuation was reason to expect that the latter would also be subject to change, and banks were entitled to vary their interest in accordance therewith. Once a bank gave notice of an increase in interest rate, the mortgagor would be entitled to terminate the bond and if it did not, the increased interest rate would become of force and effect between them. In this respect, there was no difference between an overdraft arrangement entered into between a bank and its customer and the mortgage bond terms entered into between a mortgagor and mortgagee.

A court should, if at all possible, uphold a contract rather than declare it invalid. In the present circumstances, the court could do so on the basis of reasonableness and fairness and commercial reality.

Summary judgment was granted.

INVESTEC BANK (PTY) LTD v GVN PROPERTIES CC



A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
26 JANUARY 1999

1999 CLR 20 (W)

Where a loan agreement provides that the interest rate applicable to the loan shall be at the current rate charged by the creditor from time to time in respect of the relevant facility, a sufficient condition to the right to vary will have been provided for to ensure that the provision is not invalid for being vague. Such a condition could also be read into the loan agreement where this is not expressly provided for.

THE FACTS

Investec Bank (Pty) Ltd lent money to GVN Properties CC, the loan being secured by a bond. The bond provided that finance charges on all amounts secured by the bond would be reckoned at the current rate charged by the bank from time to time in respect of the relevant facility (clause 3.4).

The bond also provided that the borrower was to pay interest on the capital balance outstanding from time to time at the rate specified in a Transaction Schedule, the rate being specified as 18,5% variable. It was provided that the variable rate could be amended from time to time, provided that the rate could not exceed the maximum rate determined in accordance with the Usury Act (no 73 of 1968) where that Act was applicable.

The Usury Act did apply to the loan and the rate of interest applicable at the time Investec brought an action for payment in terms of the loan was 22,5% per annum. Investec applied for summary judgment against GVN. Its application was unopposed. However, the court raised the question of the validity and enforceability of the provision entitling Investec to vary the interest rate, in view of previous decisions which held that such a provision was not valid or enforceable.

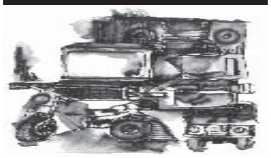
THE DECISION

A rate variation clause contained in a bank's lending documents must be understood as requiring the variation to conform with general movements in the bank's interest rate. So understood, the bank would be entitled to vary its interest rate in accordance with current rates charged by it for facilities of the same kind granted by it at that time.

In the present case, Investec's right to increase the interest rate was subject to the condition that such increase be to the prevailing rate charged by the bank for the type of loan in question. This condition was expressly stated in clause 3.4 of the bond, but could also have been read into the loan agreement had it not been so stated. The bank therefore did not have an unrestricted right to vary the interest rate and the provision in the bond entitling it to vary the rate was accordingly not invalid.

Summary judgment was granted.

GIANNAROS v MERCHANT COMMERCIAL FINANCE (PTY) LTD



A JUDGMENT BY LEVESON J
WITWATERSRAND LOCAL DIVISION
12 JUNE 1998

1998 CLR 529 (W)

An examination of a plaintiff's claim under section 11 of the Usury Act (no 73 of 1968) requires that admissible evidence be provided by the plaintiff. Where the evidence given by the plaintiff is inadmissible, no such examination would have taken place.

THE FACTS

P Giannaros borrowed money from Merchant Commercial Finance (Pty) Ltd, and EJ Giannaros was surety for the repayment of the money so borrowed. Merchant Commercial brought provisional sentence proceedings against both parties, claiming default in repaying the loan.

Giannaros defended the action on the grounds that the money lending transaction fell within the terms of the Usury Act (no 73 of 1968) and that interest rates in excess of those permitted by the Act had been charged. The maximum interest rate allowed under the Act was 26% per annum. Giannaros requested that Merchant Commercial be called as a witness to prove its claim in terms of section 11 of the Act. Section 11 allows a defendant against whom finance charges are claimed to examine the plaintiff in regard to the claim.

Merchant Commercial gave evidence of the interest charged against Giannaros' debt and the rate pertaining thereto. Its witness was a chartered accountant in private practice who normally acted as its auditor. In calculating the interest due to Merchant Commercial, he used information furnished to him by the company pertaining to the amount and date of each payment, and did not confirm the amounts paid by Giannaros and the dates on which they were paid. When it was pointed out that the interest rate used in demonstrating these calculations was not that agreed to between the parties, the accountant gave further evidence based on the agreed interest rate, despite objections to the leading of this further evidence.

Provisional sentence in the sum claimed by Merchant Commercial was then given against Giannaros. Giannaros appealed.

THE DECISION

The fact that section 11 refers to the evidence of the plaintiff does not prevent the plaintiff's agent from giving evidence, where the plaintiff is a corporate body. The agent would have to have personal knowledge of the facts of the matter.

In the present case, no agent of Merchant Commercial having personal knowledge of the transactions giving rise to the company's claim gave evidence. The accountant did not have personal knowledge of the amount and date of payments made by Giannaros, nor were his calculations based on any such personal knowledge. His evidence was therefore based on hearsay and was inadmissible. The result was that no examination within the meaning of section 11 had taken place.

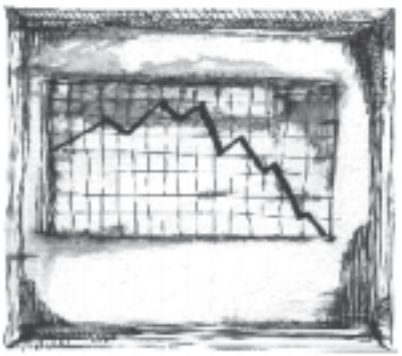
Since there was some evidence that interest rates in excess of those permitted by the Act had been charged, provisional sentence had to be refused and the matter proceeded to trial.

DUNLOP TYRES (PTY) LTD v BREWITT

A JUDGMENT BY LEVESON J
WITWATERSRAND LOCAL DIVISION
23 NOVEMBER 1998

1999 CLR 34 (W)

Insolvency



An advantage to creditors for the purposes of a final sequestration will be shown where facts come to light suggesting that the respondent might have assets which could become available for distribution to creditors

THE FACTS

Dunlop Tyres (Pty) Ltd brought an application for confirmation of the provisional order of sequestration it had obtained against Brewitt. Brewitt opposed the application on the grounds that there would be no advantage to creditors in the sequestration, as was required by section 12 of the Insolvency Act (no 24 of 1936).

Brewitt's liabilities to creditors amounted to R5 896 000 and his contingent liabilities arising from deeds of suretyship entered into amounted to R3 100 000. In opposing the application, Brewitt claimed to have no assets whatsoever. He and his wife earned a joint salary of R12 000 from Scoreprops (Pty) Ltd and the company also paid the monthly mortgage bond instalment of R6 000 on the family residential property as well as other expenses amounting to approximately R2 500 per month.

The shares in Scoreprops (Pty) Ltd were owned by a trust created for the benefit of the three children of the Brewitts. Brewitt had bound himself as surety for the debts of this company to the extent of R2,5m.

THE DECISION

The financial arrangements disclosed by the evidence suggested that Brewitt and his wife were enjoying the profits owned and earned for their children. They suggested that the trust had been set up in order to protect the business of the company from the claims of creditors of the Brewitts.

In view of this possibility, it would be an advantage to creditors if the provisional trustee were to investigate the position and question Brewitt as to the exact nature of these financial arrangements. These investigations might reveal that Brewitt and his wife were owners of the shares in Scoreprop and therefore have further assets which could become available for distribution to creditors.

The fact that Brewitt had bound himself as surety for the debts of Scoreprop suggested that he had an interest in the company greater than that disclosed in his opposition to the application. This was also a matter which the provisional trustee could investigate to the advantage of creditors.

STANDARD BANK OF SA LTD v MASTER OF THE HIGH COURT

A JUDGMENT BY NIENABER JA (HEFER JA, ZULMAN JA, PLEWMAN JA and STREICHER JA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1998

UNREPORTED

The Master is entitled to issue a subpoena and conduct an inquiry in terms of section 415(1) of the Companies Act (no 61 of 1973) after the liquidation and distribution account of the company in question has been finalised and distributions made in terms thereof.

THE FACTS

Unique Press (Pty) Ltd was finally liquidated on 5 January 1994. The joint liquidators prepared a first and final liquidation and distribution account which was confirmed by the Master of the High Court on 27 March 1995. A week later, the liquidators made a distribution to creditors.

Thereafter, Paperlink (Pty) Ltd requested the Master to issue a subpoena in terms of section 414(2)(a) of the Companies Act (no 61 of 1973) requiring the attendance of a Mr Chase, a commercial manager employed by the Standard Bank of SA Ltd, at an inquiry into the affairs of Unique Press, the inquiry being held in terms of section 415(1) of the Act. At the inquiry, questions were put to Mr Chase by Paperlink's attorney which were designed to elicit information which could be used against the bank, either to recover assets believed to be owing to Unique by the bank or to found a claim for damages against the bank based on an alleged misrepresentation made by Chase regarding Unique's creditworthiness.

The bank objected to the inquiry and attacked the Master's decision to call it. It contended that the Master acted beyond his powers in authorising the interrogation, and it brought an application to declare that after the approval of the liquidation and distribution account, the Master was no longer able to exercise his powers in that manner.

THE DECISION

Section 415(1) of the Act provides that the Master may call and administer an oath to or accept an affirmation from any person present at, or subpoenaed to appear at, a meeting of creditors of a company which is being wound up and unable to pay its debts, and any creditor may interrogate the person so called.

The bank contended that because the section refers to a company which is being wound up, the person subpoenaed to attend must be required to attend the meeting at a time when the company is being wound up. After the distribution made by a liquidator pursuant to a final liquidation and distribution account, the winding up process is complete, so that the section is inapplicable at that time.

The description of the company in question as one which is being wound up and unable to pay its debts merely qualifies the type of company being referred to. It does not purport to impose a timescale within which the holding of the inquiry must take place. It was therefore incorrect to impose the requirement that at the time the subpoena was issued or the interrogation conducted, Unique should have been undergoing a winding up and unable to pay its debts. Section 415(1) was concerned with the details of the examination and not with its timescale. The section was distinguishable from section 417 in this respect.

The winding up process in the liquidation of a company is also not necessarily complete when the liquidator makes a distribution in respect of a confirmed account. A liquidator may be required to make adjustments or recover subsequently-discovered assets. In such a case, the liquidator would be entitled to employ the machinery of the Act for these purposes, including the employment of section 415(1) or section 417.

The Master also retained the power to hold and inquiry and subpoena attendances thereat for so long as he had not yet issued a certificate, in terms of section 419 of the Act, that the affairs of the company had been completely wound up. His functions were therefore not complete, ie he was

not functus officio, when he did issue the subpoena and conduct the inquiry in question. His power to do so was not conditional on the distribution of funds not yet having been made.

The bank's objections were dismissed and its application dismissed.

MOKOENA v THE MASTER

A JUDGMENT BY DE WET AJ
WITWATERSRAND LOCAL DIVISION
17 NOVEMBER 1998

1999 CLR 41 (W)

The presiding officer at an enquiry conducted in terms of section 152 of the Insolvency Act (no 24 of 1936) has a discretion to make rulings relevant to the conduct of the enquiry, including a ruling allowing the presence of a person employed by the petitioning creditor who has intimate knowledge of the facts giving rise to the enquiry.

THE FACTS

The joint estate of Mokoena and her husband was placed under a final order of sequestration. At the request of the petitioning creditor, SA Breweries Ltd, the Master instituted an inquiry in terms of section 152(2) of the Insolvency Act (no 24 of 1936).

During the course of the inquiry, Mokoena objected to the presence of a Mrs van den Broek, the credit manager of SA Breweries. The presiding officer ruled that she was entitled to be present.

Mokoena then applied for an order reviewing and setting aside this ruling. Mokoena contended that section 152 dealt with a 'private' enquiry as opposed to a public one and that for that reason, Mrs Van den Broek was not entitled to be present at the enquiry.

THE DECISION

The inquiry in the present case was not a public enquiry, as envisaged in sections 42 and 65 of the Act. The presence of Mrs Van den Broek did not change the nature of the enquiry from a private one to a public one.

The presiding officer at enquiries under section 152 has always had a discretion to make rulings regarding the proper conduct of the enquiry. This has included the discretion to allow legal assistance to the insolvent and witnesses, and could include the discretion to allow a person such as the SA Breweries credit manager to be present at the enquiry. This would especially be allowed in circumstances where such a person has an intimate knowledge of the facts giving rise to the enquiry.

There was no evidence that Mokoena had been prejudiced by the presence of Mrs Van den Broek. There were therefore no grounds upon which it could be said that she had not been entitled to be present at the enquiry.

The application was dismissed.

DOYLE v BOARD OF EXECUTORS

JUDGMENT BY SLOMOWITZ AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
18 DECEMBER 1998

[1999] 1 All SA 309 (C)

Trusts

A beneficiary of a trust is entitled to an accounting of transactions involving trust assets prior to that date on which the beneficiary's rights vest, where it can be shown that the assets of the trust, when vested in him, are a result of investments and reinvestments effected by the trustee over the preceding years.

THE FACTS

In 1951, the Board of Executors was appointed a trustee of a trust established by Mrs SM Doyle in 1939. During Mrs Doyle's lifetime, income from the trust was paid to her by the trustees, who then included the Board of Executors and others who subsequently died.

The object of the trust directed that its income was to be paid to Mrs Doyle during her lifetime, and thereafter be utilised for the benefit of her children until they attained the age of 25 years. On attaining that age, a child's share of the capital would be paid to him or her.

Mrs Doyle died in 1994. At that time, her only son, the plaintiff, became entitled to the capital of the trust.

Doyle brought an action against the Board of Executors claiming that it give an accounting setting out each and every asset the trust owned at the time of its inception or at the time of the Board's appointment, as well as an accounting of every transaction concluded on behalf of the trust from its inception from the same time.

The parties approached the court for a determination of whether or not Doyle was entitled to an accounting for the period before his mother's death and of the period for which such an accounting could be required.

THE DECISION

An agent is bound to give an accounting of all that he has done in the execution of his mandate. Aa an agent, a trustee is similarly bound. The question was whether this duty rested on the Board in favour of Doyle, or whether the fact that his right was only contingent during the period of his mother's lifetime, denied him a right to an accounting.

It was true that Doyle's right to the capital of the trust was contingent upon him reaching the age of 25 and his mother dying. However, the capital to which he would be entitled at that point was a result of investments and reinvestments over the preceding years. Doyle was therefore entitled to a satisfactory explanation at the time it was handed to him, that that capital was what it purported to be. This would require a proper accounting of it, including an explanation of what portion of income accruing from it was not paid out but capitalised over the years.

Doyle was entitled to an accounting of the assets of the trust from inception of the Board as trustee of the trust in 1951, including all realisations and reinvestments of them from that time.

OWNERS OF THE MV FORTUNE 22 v KEPPEL CORPORATION LTD

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
28 JUNE 1998

1999 (1) SA 162 (C)

Shipping

An associated ship may not be arrested in respect of a claim against the ship of which it is an associated ship where the latter has already been arrested.

THE FACTS

Keppel Corporation Ltd had a maritime claim arising from repairs carried out on the *Mount Ymitos* in 1996 at Singapore. It issued a summons in rem against the ship claiming the balance of money allegedly due to it and applied for a warrant of arrest against the ship. The ship was arrested and sold. Keppel's claim could not be satisfied from the proceeds of the sale. It applied for and obtained default judgment in the sum of 2 264 902 Singapore dollars.

Keppel then arrested the *Fortune 22* at Saldanha Bay as an associated ship, thereby commencing an action in rem against it. The owners furnished security for the release of the ship, the ship was released, and the owners then applied for the deemed arrest, which followed in terms of section 3(10)(a)(i) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983), to be set aside. Keppel contended that the arrest of an associated ship was possible only if effected instead of the arrest of the ship in respect of which the maritime claim arose, and not as well as the latter ship.

THE DECISION

Section 3(6) of the Act provides that 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. This provision is to be read in the light of the English law rule that there may be an arrest of only one ship in respect of any one claim which the claimant seeks to enforce by means of an action in rem. Proceedings in rem being international in operation, it could be expected that section 3(6) would refer to arrests beyond the jurisdiction of the South African courts. It could therefore be interpreted to mean that an action in rem could be brought by the arrest of an associated ship notwithstanding the earlier arrest of the ship in respect of which the claim originally arose.

Section 3(8) provides that property shall not be arrested and security therefor shall not be given more than once in respect of the same maritime claim by the same claimant. This provision was not intended to be of local application only and was indicative of the intention that more than one ship should not be arrested in respect of the same claim.

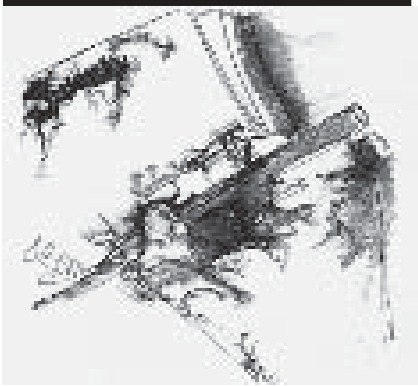
The deemed arrest of the *Fortune 22* was set aside.

INTERCONTINENTAL EXPORTS (PTY) LTD v FOWLES

A JUDGMENT BY SMALBERGER JA (MAHOMED CJ, HOWIE JA, PLEWMAN JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
23 MARCH 1999

UNREPORTED

Suretyship



A document which is reasonably capable of an interpretation consistent with its validity should be interpreted in that manner, rather than in a manner which is inconsistent with its validity. A deed of suretyship which is reasonably capable of an interpretation which gives separate identities to debtor and surety should therefore be accepted since this upholds the validity of the deed of suretyship.

THE FACTS

Frank Turner Fowles signed a document which recorded that 'the suretyship' bound and interposed himself as surety and co-principal debtor for the indebtedness of the debtor toward Intercontinental Exports (Pty) Ltd. The document defined the debtor as Mr Frank Fowles and Mrs Linda Fowles, and the surety as the party executing the suretyship as surety and co-principal debtor.

The preamble recorded that the suretyship was furnished in consideration of Intercontinental allowing the debtor or any third party all or any party of whose indebtedness to Intercontinental was guaranteed by the debtor, such banking facilities as Intercontinental deemed fit.

Intercontinental claimed that the document incorrectly recorded an agreement entered into between it and Fowles in which (i) Security Depot (Pty) Ltd was the debtor, not F.T. Fowles, (ii) it was not intended that Intercontinental would allow the debtor banking facilities, and (iii) it was not intended that Fowles would bind himself as surety and co-principal debtor for his own indebtedness. It alleged that the document's inaccuracies were occasioned by an error common to both parties, and claimed an appropriate rectification of the agreement. Intercontinental alleged that Security Depot had become indebted toward it in the sum of R2 178 844,43 and that Fowles was liable to it in the same amount, his indebtedness arising from his obligations as surety in terms of the document he had signed, as rectified. Intercontinental claimed payment of R2 178 844.

THE DECISION

Intercontinental's averments concerning the incorrect recording of the agreement between it and Fowles were undisputed and they made out a proper case for rectification. Provided that it could be shown that the agreement was formally valid, rectification could be allowed. Formal validity of the agreement depended upon proper compliance with section 6 of the General Law Amendment Act (no 50 of 1956). The section provides that no contract of suretyship shall be valid unless the terms thereof are embodied in a written document and signed by the surety. Compliance with this section requires proper identification of the principal debtor, the surety and the creditor.

The document identified the surety as the person signing the suretyship. The person who did sign the document was Frank Turner Fowles and was identified as such. The document also identified the creditor as Intercontinental.

As far as the principal debtor was concerned, it was clear that the debtor as defined was not the same party as the surety as defined. The debtor was defined as Frank Fowles whereas the surety was defined as Frank Turner Fowles. These were not necessarily the same person. Upon this interpretation of the document, the debtor could be considered a separate party from the surety. This being an interpretation which was consistent with the validity of the document, it ought to be accepted.

The document therefore properly recorded a valid contract of suretyship. Intercontinental was entitled to payment of R2 178 844.

BOE BANK LTD v TRUSTEES, KNOX PROPERTY TRUST

Suretyship

A JUDGMENT BY McCALL J
DURBAN AND COAST LOCAL DIVISION
18 JANUARY 1999

[1999] 1 All SA 425 (D)

A trust may be considered a separate entity where the intention is that the entity thereby described is the trustee of a trust in his capacity as such. A deed of suretyship which incorrectly cites the registration number of the creditor sufficiently identifies the creditor and is not invalid for failure to do so. Although a contract entered into by a trustee before the issue of letters of authority may lack the authority to enter into the contract, the terms of that contract may be incorporated in a contract later entered into by the trustee after the issue of the letters of authority.

THE FACTS

By a letter of grant, NBS Bank Ltd granted a loan to the Trustee of the Knox Property Trust, the terms thereof being recorded in a 'Letter of Grant'. The Trust Deed of this trust was signed by the donor and trustees on the following day, and the Master's letters of authority were issued some three weeks later.

The terms of the loan were then recorded in a document entitled 'Action Bond Agreement' which cited the Knox Property Trust as the borrower, and this document was signed by Choudree, the second defendant. He signed a power of attorney to pass a covering mortgage bond to secure the loan and the mortgage bond was subsequently registered over certain property. Choudree also signed a deed of suretyship binding himself for all amounts which were then or might in the future become due by the Knox Property Trust. The suretyship document was headed with the logo of NBS and the words 'NBS Bank Ltd' followed by 'Registered Bank Reg No 84/1151/06'. This registration number was in fact incorrect, the correct number being 87/01384/06.

The trust defaulted in making monthly repayments of the loan and the bank obtained judgment against the trustees for payment of the full amount of the loan together with interest thereon. The bank also sought judgment against Choudree, but this was opposed on three grounds. The first ground was that the trust could not be a debtor since it had no separate personality in law. The second ground was that since the registration number of the creditor was cited incorrectly, the deed of suretyship recorded a creditor that did not exist and was invalid for that reason. The third ground was that the agreement recorded in the Letter of Grant was invalid because when signed by Choudree, letters of authority had not been issued by the Master so that he lacked the authority to conclude the agreement on behalf of the trust.

THE DECISION

Whereas a trust might not be properly considered a separate legal entity, since the trust has not been recognised to be such in our law, a trust as a separately defined arrangement whereby assets and liabilities are vested in a trustee has been so recognised. In consequence, a trust is often given a name in the trust deed by which it was constituted and treated in practice as a separate entity. When a 'trust' is referred to in such a context it is this arrangement which is being recognised, even though in fact the entity holding the assets and incurring the liabilities is the trustee in his capacity as such.

In the present context, the existence or otherwise of the trust as a separate legal entity was a question subsidiary to the first question, which was whether or not the principal debtor was sufficiently identified in the deed of suretyship. A proper identification would have been one citing the trustees in their capacity as such, but evidence of the identity of the principal debtor could be drawn from sources other than the deed of suretyship itself. Such sources included the trust deed itself as well as the evidence of the parties themselves as to the negotiations entered into prior to the entering into of the deed of suretyship and the consensus they reached.

As far as the second ground was concerned, the deed of suretyship clearly defined the creditor as NBS Bank Ltd. Whether or not the registration number of the bank

had been incorrectly cited in the heading to the document embodying the deed, the creditor as defined was undoubtedly NBS Bank Ltd which existed at the time the deed of suretyship was entered into. Even if it were accepted that the citation of the creditor included by reference the description of the bank in the heading to document, which incorporated the incorrect registration number, it would be permissible to lead evidence that the parties intended NBS Bank Ltd to be the creditor. Such evidence might include the Letter of Grant and evidence to the effect that no company with the registration number as cited in the deed actually existed at the time it was signed by the surety.

As far as the third ground was concerned, it was true that the Letter of Grant stated that together with the terms of the Action Bond Agreement, it formed part of the agreement between the parties. However, it was severable from the Action Bond Agreement. The latter made no mention of the Letter of Grant and was not dependent on it. Its terms and those of the covering bond which was later passed, contained sufficient terms to form the basis for the action for repayment of the loan, which NBS had brought against the principal debtor. It therefore made no difference whether or not Choudree had had the necessary authority to sign the Letter of Grant. Even assuming that such authority had been necessary, when entering into the Action Bond Agreement, both parties had intended that the terms of the Letter of Grant would be incorporated into that agreement.

The deed of surertyship was therefore valid and the bank was entitled to judgment against the surety.

Since, in terms of the Deed of Suretyship, the second defendant bound himself for all amounts then and in the future becoming due `from whatever cause and howsoever arising' he bound himself as surety for the repayment of the loan which was advanced to the first defendant pursuant to the Action Bond Agreement without the necessity for the incorporation of the terms and conditions of the letter of Grant.

ADMINISTRATORS, ESTATE RICHARDS v NICHOL

A JUDGMENT BY SCOTT JA
(SMALBERGER JA, HARMS JA, ZULMAN JA and PLEWMAN JA concurring)
SUPREME COURT OF APPEAL
25 SEPTEMBER 1998

1999 (1) SA 551 (A)

Trusts

Trustees of trusts are duty bound to ensure a proper balance between the security of trust investments and their capital growth. Where the authority to invest in more risky investments is not given to trustees by a trust deed, they are nevertheless entitled and obliged to effect such investments giving prudent regard to the requirements of preserving trust investments. In the exercise of their discretion in this regard, trustees must spread the investments made in the name of the trust so as to achieve as nearly as possible both capital growth and security.

THE FACTS

J H Richards executed a will in terms of which he bequeathed certain of his property to his widow and others. In clauses 4 and 11 of the will, it was provided that payment of annuities to named beneficiaries from investments was to be made from the residue of the estate, such investments to be made by the administrators of the will with full power and at their absolute discretion to realise or acquire property.

In terms of clause 12 of the will, provision was made for the establishment of a trust in respect of the residue of the estate upon the death of the longest surviving beneficiary or earlier if this was not inconsistent with the administrators' obligations to any remaining beneficiaries. It was provided that the administrators could determine who the trustees would be, what they were to be paid and the terms and constitution of the trust. The income of the trust was to be used for the benefit of specified relations of Richards and his wife, and for charitable institutions to be determined by the trustees in their discretion.

The will made no provision for the distribution of the capital of the trust but for continuation of the trust in perpetuity.

The administrators considered that clause 12 might constitute an improper delegation of testamentary power, and if so would bring about partial intestacy. They therefore applied for an order that a valid trust had been created pursuant to clause 12 and that Richards had not died intestate. The administrators included the Board of Executors, a company which obtained on-going investment advice from a team of experts, as well as an attorney in a well-established firm of attorneys.

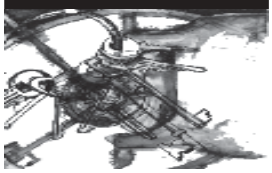
The application was granted, but subject to certain restrictions on the powers of investment of the trustees. The restrictions imposed on the trustees were that they could invest trust assets in securities quoted on the Johannesburg Stock Exchange and/or licensed unit trusts, provided that (i) no more than 50% of the value of the trust assets were to be so invested, and (ii) before such investments were made the trustees were to obtain advice from an independent stockbroker to each such investment, and (iii) a quarterly report was to be rendered to the Master setting out details of such investments.

The administrators appealed against the imposition of the restrictions.

THE DECISION

It was clear from the provisions of clauses 4 and 11 of the will that Richards had had considerable confidence in his administrators and intended them to have wide discretionary powers of investment. Nevertheless, in terms of the common law, his administrators were still required to deal and invest in trust assets with due care and diligence, and not expose the trust to business risks.

This restriction on trustees has in the past caused trustees who are not given wider powers of investment, to invest trust assets only in investments attracting less risk, such as fixed deposits, loans on mortgage and immoveable property. However, this policy has been countered by the trustee's need to preserve the capital of the trust in inflationary times, and trustees have been entitled and obliged to invest in more risky investments in order to preserve the trust investments in such circumstances. A trustee must make such investments, carefully assessing the prudence of each one, avoiding speculative investments and spreading the invest-



ment forms in order to obtain a balance of stability and growth in the capital value of the trust and the income it produces.

Applying this approach in the present case, the question was whether there was any basis upon which the restrictions imposed by the first court could be made. There appeared to be no basis for imposing such a restriction. The trustees were bound by the common law to the rules pertaining to the making of investments as established over time and given the need for flexibility which these rules required, to impose a 50% limit on the investment in shares would be to attempt to override the rules and deny the flexibility anticipated by them. There were also impracticalities attached to the imposition of such a limit, such as the difficulties of having to dispose of shares as a result of their having exceeded the 50% limit through capital gain.

The imposition of the requirement of obtaining the advice of brokers prior to investing in further securities was also neither necessary nor appropriate. The trustees already had advice from a team of investment experts as well as the judgment of an attorney in a well-established firm of attorneys. This, together with the obvious confidence with which Richards had appointed his administrators, indicated that their decisions should not be subjected to the overriding advice of a firm of stockbrokers.

As far as the requirement of a quarterly report to the Master was concerned, this was not appropriate given the fact that the Master was not equipped to assess investment decisions of trustees and should not be burdened with such a duty. The Master in any event had wide powers to call trustees to account in terms of the Trust Property Control Act (no 57 of 1988).

The restrictions imposed by the first court were set aside.

MOHAMMED N.O. v ALLY

A JUDGMENT BY SCHUTZ JA (VAN HEERDEN DCJ, SMALBERGER JA, ZULMAN JA and MELUNSKY AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1998

UNREPORTED

A trust deed which makes provision for trustees to represent the persons for whom the trust was established should be interpreted as requiring representation of all those persons and not classes of them, even where the trust deed has made provision for the original appointment of trustees in proportions relating to various sectional interests of those persons.

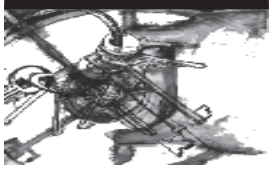
THE FACTS

The trust deed of the Juma Musjid Trust provided for the constitution of a board of nine trustees who, in terms of clause 4(a), were to represent four sections of the congregation in specified proportions. The specified proportions were five trustees for the 'Memon' section, two for the 'Surtee' section and one each for the 'Kooknee' and 'Colonial Born' sections.

The object of the trust was to own and continue the control and administration of the Grey Street Juma Musjid for the benefit of the followers of the Sunni Muslim religious faith. The deed provided that in the event of the office of a trustee becoming vacant, the remaining trustees would appoint a replacement who would continue in office until the next Annual General Meeting. In making the appointment, the trustees were to comply with the provisions of clause 4(a) in respect of the class of trustee to be appointed.

In terms of clause 4(e), all vacancies of the board of trustees were to be filled at the Annual General Meeting, provided that any nominated trustee was to belong to the class of trustee whose place was to be filled, the intention being that the trustees would always be chosen from and represent the class to which the first trustee belonged in like proportion.

Clause 7(a) provided for the holding of an annual general



meeting by not later than 31 January in each year. Clause 7(d) provided that voting was to be by a show of hands and that a majority of 75% would pass a resolution.

An annual general meeting had not been held since 1987 and four of the trustees who had been appointed in this period had therefore not been appointed by that meeting. Members of the congregation opposed the continuation of this state of affairs and called for the holding of an annual general meeting. The board of trustees conceded that one had to be held but contended that the appointment of trustees was to be effected by separate meetings of each section and was to take place only by members of that particular section. The congregants opposing the board contented that this interpretation of the trust deed was contrary to its terms.

THE DECISION

While there was provision for a quota system for trustees appointed to the board, the trust deed made no provision for a separate voting system when appointments were to be made by the annual general meeting. On the other hand, it did provide for the voting requirements for passing a resolution. This did not contain any reference to a separate electoral college for different classes of voter and did not intend to cater for different classes in the manner contended for by the board of trustees. There was no reference to any right to vote at a class meeting.

The trust deed also contained other indications that separate electoral colleges were to elect trustees to represent the various sections. For example clause 4(b) provided for the 'remaining trustees' to make the appointment of a trustee whose office had been vacated. Such an appointment was to be made regardless of section.

When the trust deed referred to the function of the trustee to represent the congregants it meant that the trustee was to represent all of the congregants and not a section of them. There was no basis upon which it could be said the trust deed provided for representation of sections as opposed to the congregation as a whole.

The contentions of the board of trustees were rejected.

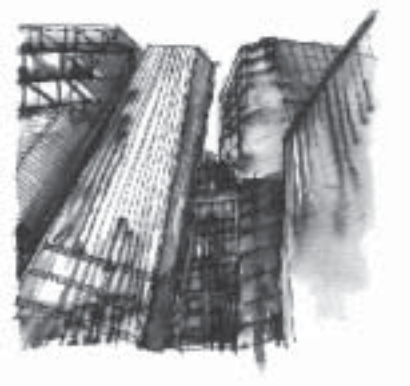
There is, to my mind, also substance in the submission for the respondent that giving effect to the appellants' interpretation will inevitably lead to the fragmentation of the congregation into artificial blocks leading to potential friction and disharmony. A consequence of applying the appellants' interpretation might well be that a representative of one section could refuse to account to or have regard to the interests of other sections. This would not accord with the broad object of the trust, which is to advance the interests of members of the Sunni Muslim faith, whatever their racial or ethnic origin.

LOW WATER PROPERTIES (PTY) LTD v WAHLOO SAND CC

A JUDGMENT BY LIEBENBERG J
SOUTH EAST COAST LOCAL DIVISION
7 JANUARY 1998

1999 (1) SA 655 (SECLD)

Property



Personal rights created and recorded in a notarial deed of servitude do not become real rights merely by registration of the notarial deed. A successor in title to the dominant property may therefore not enforce any of the obligations owed by the servient property where these are personal rights, even where the successor was aware of the existence of these rights before taking ownership of the property.

THE FACTS

Low Water Properties (Pty) Ltd and the second applicant were granted servitudes over the remainder of farm 809 situated in the district of Humansdorp by the owner of that property, a certain AW Pringle. The servitude was recorded and executed in a notarial deed on 5 September 1991, and registered in the Deeds Office on 25 June 1992. The deed provided for the rights of Low Water and the second applicant to draw water from a borehole, store the water in a demarcated area and convey the water from the servient tenement to their properties by way of a pipeline and a servitude right of way. In terms of the deed, Pringle was obliged to extract water from the borehole, supply the borehole, supply the pump for extracting water from the borehole, ensure the supply of water for domestic use by the occupiers of the dominant properties and maintain the pipeline.

In May 1996, Pringle sold his property to Wahloo Sand CC. Low Water and the second applicant alleged that the new owner refused to comply with the obligations created in the notarial deed. They brought an application against Wahloo to enforce compliance with these obligations. Wahloo defended the application on the grounds that the rights recorded in the notarial deed were personal rights, were unenforceable against successors in title to Pringle.

THE DECISION

Section 63(1) of the Deeds Registries Act (no 47 of 1937) provides that no deed purporting to create or embodying a personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration, provided that a deed containing such a condition may be registered if, in the opinion of the Registrar, such condition is complementary or otherwise ancillary to a registrable condition or right contained or conferred in such deed.

Although this section authorised the registration of personal rights it did not provide for the creation of a real right merely by virtue of such registration. In the past, before the enactment of the proviso to section 63(1), courts had allowed the registration of personal rights but had not, by so doing, sought to transform the personal right so registered into a real right. The intention of section 63(1) was not to change this situation but to accommodate a situation in which no provision had been made for the registration of personal rights no matter how pertinent they might have been to the creation of real rights. The proviso did not allow the registration of personal rights irrespective of connection with the creation of real rights but allowed this only when they were complementary or otherwise ancillary to the creation of such rights.

The fact that Wahloo might have known of the existence of the personal rights recorded in the notarial deed did not make any difference. Not being a party to the agreement which created those rights, Wahloo was entitled to ignore them.

The application was dismissed.

DE KOCK v HÄNEL

A JUDGMENT BY DAVIS AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
16 OCTOBER 1996

1999 (1) SA 994 (C)

A servitude does not impose a burden greater than it did before merely by the subdivision of the land over which it exists.

THE FACTS

In 1963, a servitude was created in favour of and against erf 3 Welbeloond and erf 9 Welbeloond. The servitude was a road common to both properties which was used to gain access to portions of them. The two erven were subsequently subdivided, Hänel becoming owner of erf 10231, Constantia, and other respondents becoming owners of various adjoining erven. De Kock became the owner of erf 4814, Constantia, another property resulting from the subdivisions. Both properties were transferred subject to the servitude.

De Kock contended that the effect of the subdivisions was to bring about a change in the servitude which created an excessive burden on the servient tenements effectively terminating the servitude. He consequently sought an order that, taking into account the present circumstances of the servitude, the servitude did not create any rights against his property in favour of Hänel's.

THE DECISION

There was no need to take into account the present circumstances of the servitude since, as recorded in the title deeds, there was no ambiguity regarding its application. It expressly provided for a right of passage along an existing road, and there was no dispute as to which properties the servitude was applicable.

The subdivision which had taken place did not in itself create any greater burden than had previously existed. There was also no evidence that the result of the subdivision was to impose any greater burden on the servient tenements. Accordingly it could not be argued that the servitude had been terminated by any excessive burden imposed on these properties.

De Kock also argued that since the utility of the servitude no longer existed, the servitude itself had to terminate. However, the authorities were that there must be utility in a servitude for it to come into existence but there was no authority for the proposition that the utility must continue to subsist in order for the servitude to continue. In any event, Hänel contended that the servitude was of use to him and as a reasonable claim, this was sufficient to establish the utility of the servitude.

De Kock's application was dismissed.

CALDEIRA v RUTHENBERG

A JUDGMENT BY VIVIER JA (VAN HEERDEN DCJ, HOEXTER JA, NIENABER JA AND NGOEPE AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1998

UNREPORTED

A person who takes delivery of an item which it knows is not owned by the person selling it and in respect of which another person holds rights is not entitled to ownership of the item since it does not take delivery thereof in good faith.

THE FACTS

Caldeira owned a Mercedes Benz motor car which he brought from England to South Africa in January 1996. It was then delivered to Exclusive Boys Toys CC where it was displayed for sale, Caldeira having given Exclusive a mandate to sell the vehicle at a minimum price of R560 000.

Exclusive sold the vehicle to Randburg Motorlink CC, which sold the vehicle to Bloomsbury (Pty) Ltd, which sold it to Ruthenberg. When Motorlink took delivery of the vehicle from Exclusive, it was told that Exclusive was the owner of the vehicle, and shown the vehicle's registration certificate reflecting Exclusive as the owner first registered as such in the country. It was however, aware of Caldeira's interest in the vehicle as it was informed that the vehicle had to be obtained from Caldeira who had earlier revoked the mandate in favour of Exclusive and re-taken possession of the vehicle.

Caldeira was not paid the purchase price and he secured the enforcement of a search warrant and seizure order in respect of the vehicle. Ruthenberg, Motorlink and the other purchasers then applied for the lifting of the search and seizure order, claiming that Caldeira was estopped from asserting any rights to the vehicle. Caldeira counter-claimed for an order that he was the owner of the vehicle and entitled to possession of it.

THE DECISION

Motorlink had not obtained the vehicle in good faith as it knew of Caldeira's interest in the vehicle. It was also not misled into the belief that Exclusive was entitled to dispose of the vehicle. It was therefore not entitled to assert any rights in respect of the vehicle as against Caldeira who could not be estopped from asserting his own right to the vehicle.

While it is true that there is said to be a common law rule that a person who gives something to an agent to sell cannot recover the item from a third party to whom the item is sold, but the person to whom it is sold must take it in good faith. This was not the position in this case.

Motorlink was also not misled into believing that Exclusive had the right to dispose of the vehicle.

The application was dismissed.

ERF 167 ORCHARDS CC v GREATER JOHANNESBURG METROPOLITAN COUNCIL

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
8 DECEMBER 1995

1999 CLR 91 (W)

An owner of property is entitled to make representations regarding the approval of building plans submitted by its neighbour where this might affect the value of its own property.

THE FACTS

The Greater Johannesburg Metropolitan Council approved building plans submitted by the second respondent for the construction of a games room on his property. The property adjoined that of Erf 167 Orchards CC ('Orchards').

Orchards objected to the construction of the games room on the grounds that it was unsightly and objectionable and derogated from the value of its own property and disfigured the area. It contended that it should have been given an opportunity to object to the approval of the plans and its consent to them obtained. It alleged that the building was an additional subsidiary dwelling unit which was disallowed by the Johannesburg Town-planning Scheme. It brought an application to review and set aside the council's decision to approve the building plans.

THE DECISION

The structure was not a subsidiary dwelling unit since it was not a structure intended to be lived in by people unrelated to the owner.

The approval of the council had been given in terms of the Building Standards Act (no 103 of 1977). As such, the council's decision was made as an administrative act which required the bona fide exercise of its judgment. If the council failed to exercise its judgment in this manner, the court could interfere to set aside the decision. There was however, no evidence that the council had failed to exercise its judgment in this manner. Similarly, there was no evidence that the council had failed to properly apply the provisions of the Town-planning Scheme.

Orchards did however, have a right to make representations regarding the effect of the building on the value of its own property. The council had to take into account that the approval of the building plans might have an effect on the value of neighbouring properties. It therefore had to notify neighbouring property owners of any application for approval of building plans. Orchards had a right to be heard on this subject and it had a legitimate expectation that it would be so heard.

As far as the rights conferred by the Scheme were concerned, it was significant that it omitted any right to be heard upon the submission of building plans for approval. It therefore excluded the application of the audi alteram partem rule.

ODENDAAL v EASTERN METROPOLITAN LOCAL COUNCIL

A JUDGMENT BY LEWIS AJ
WITWATERSRAND LOCAL DIVISION
29 SEPTEMBER 1998

1999 CLR 77 (W)

A person may not object to the decision of a local authority in relation to a neighbouring property which affects its rights of ownership where the local authority is empowered to make such a decision without any right to object being provided for in the approval mechanism, and where the decision does not affect the community as a whole.

THE FACTS

Odendaal and the other applicants owned property adjacent to Wynnbrand Properties CC in the suburb of Bryanston in Johannesburg, its property being some 3000 m² in extent.

Wynnbrand applied for the rezoning of its property to 'Residential 2' which would enable it to build 'cluster houses' on it. On the same day, the Eastern Metropolitan Local Council approved building plans for the construction of a single house on the property. Odendaal and the other applicants alleged that they were not notified of the approval of the building plans, and brought an application for a review of the Council's decision to grant the approval. They contended that the result of the approval was that the building would be constructed in one corner of the site and that because of that, when the rezoning application was brought, the Council would have no option but to approve the application. They objected to the rezoning of the property on the grounds that it would be out of keeping with other properties in the area.

The Council denied that the approval of the building plans pre-empted a decision on the rezoning application, and contended that it was not obliged to afford Odendaal and the other applicants a hearing before their approval.

THE DECISION

Section 7(1) of the National Building Regulations and Building Standards Act (no 103 of 1977) provides for the conditions under which a local authority should approve or disapprove an application for the erection of a building on property within its area of jurisdiction. It does not however, provide for the right of interested parties such as neighbours, to object to any approval given under the section. On the other hand, the Town Planning Scheme provides positively for the rights of interested parties to object to and make representations concerning applications for rezoning of properties.

Both the Act and the Scheme are legislative instruments for ensuring the harmonious, safe and efficient development of urban areas. They have been enacted for an environment in which property owners have diverse and sometimes conflicting interests. The property rights of one might be affected by what a neighbour does on its property, hence the right to object to rezoning applications. Where however, no right to object to what one property owner wishes to do on its property is provided for, where approval mechanisms are extensively set out without reference to a right to object to other peoples' plans, the inference to be drawn is that would-be objectors have no right to set aside any decision of the Council in approving such plans.

While those affected by the exercise of the powers of administrative authorities should be afforded a hearing before the power is exercised, such a legitimate expectation did not arise in the present case. This was because the Council's decision to approve the building plans did not affect the community as a whole. It was also a decision which was not calculated to cause prejudice to an individual or group of individuals.

It followed that neighbours do not even have an expectation that they may be heard in relation to the erection of a building except where the Scheme expressly affords a right to make objections or where the erection of the building will be in breach of the Act or the Scheme.

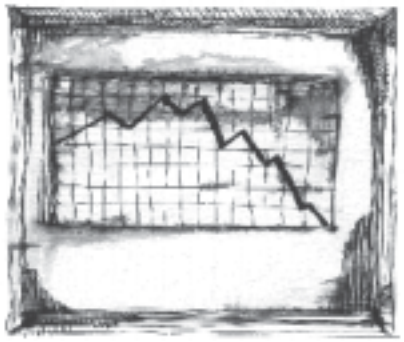
The application was dismissed.

WILKEN N.O. v REICHENBERG

A JUDGMENT BY GOLDSTEIN J
WITWATERSRAND LOCAL DIVISION
16 SEPTEMBER 1997

1999 (1) SA 852 (W)

Insolvency



A debtor does not avoid committing an act of insolvency in terms of section 8(b) of the Insolvency Act (no 24 of 1936) by merely indicating that he has certain property in a certain place. In order to do so, he must indicate what property he has and where it is located so that the sheriff can attach and sell the property in satisfaction of the judgment he is seeking to enforce.

THE FACTS

A warrant of execution was issued against Reichenberg, directing the Sheriff of the Supreme Court, Cape Town, to attach his movable goods and sell them by public auction. The warrant was executed against Reichenberg, and the sheriff reported that no assets were shown to him and he was unable to find any assets to satisfy the sum claimed and that he therefore gave a *nulla bona* return of service. He added that Reichenberg told him that he had movable assets at an address in Sandton.

Sequestration proceedings were then brought against Reichenberg and a provisional order was obtained. On the return day, Reichenberg opposed the confirmation of the order on the grounds that he had not committed an act of insolvency as provided for in section 8(b) of the Insolvency Act (no 24 of 1936). The section provides that a debtor commits an act of insolvency if a court has given judgment against him and he fails to satisfy it or indicate to the officer executing the judgment disposable property sufficient to satisfy it, or if it appears from that officer's return of service that he has not found sufficient disposable property to satisfy the judgment.

The court determined the issue of whether or not this section had been complied with and an act of insolvency committed.

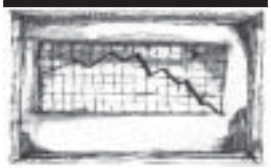
THE DECISION

One could not say that the additional movable assets referred to as being in Sandton should be considered worthless, in view of the fact that no assets of any worth had been found at the place where the warrant of execution was enforced. The return of service indicated that Reichenberg had no money or assets apart from the movables in Sandton. The question was whether the indication of the existence of these assets entailed that Reichenberg had not committed an act of insolvency within the meaning of section 8(b).

One of the ways to avoid committing an act of insolvency within the meaning of this section is for the debtor to ensure that he has indicated sufficient property to satisfy the judgment given against him. If the debtor merely indicates that certain property exists without indicating the particular nature of the goods and their locality so that the sheriff can attach and sell them, then the debtor has not avoided committing an act of insolvency. As far as the sheriff's duties are concerned, the section does not provide that the officer executing the judgment must inquire from the debtor what property he has and where it is situated. It provides merely that the officer must request the debtor to indicate sufficient property to satisfy the judgment.

In the present case, this had been done and Reichenberg had not responded with an indication of which of his goods could be attached and where they were situated. He had therefore committed an act of insolvency.

GREUB v THE MASTER



A JUDGMENT BY FRIEDMAN JP
(BRAND J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
1 OCTOBER 1998

1999 (1) SA 746 (C)

A court is entitled to review and if necessary set aside a decision of the Master not to recommend the rehabilitation of a sequestrated person. In doing so, the court will deny the application where the applicant has not been frank and has failed to explain fully the reasons for his sequestration and the circumstances surrounding it.

THE FACTS

Greub was sequestrated following an application brought for his sequestration by his mother-in-law whose claim against him amounted to R20 000. The only creditor which proved a claim in his insolvent estate was the Natal Building Society. It was a secured creditor but the property sold in realisation of its security fetched a price below that required to satisfy its claim. The petitioning creditor had to make a contribution to the costs of sequestration.

Greub did not assent to his sequestration but did not apply to set it aside because of financial constraints. He did however, have money overseas and offered to pay R65 000 to concurrent creditors were he to be rehabilitated. He estimated this to be the extent of his total liability to such creditors, while his wife (to whom he had been married in community of property at the time of his sequestration) estimated the total to be R81 059. Greub disputed the claims of some of these creditors.

Fifteen months after his sequestration, Greub applied for his rehabilitation. His trustees opposed the application. Amongst the grounds for their opposition was that in the administration of his insolvent estate, Greub had been obstructive, no dividend had been paid to creditors and a relatively short time had elapsed since the time of his sequestration. The Master of the High Court also opposed the application on the grounds that no statement of affairs had been lodged, and that during the administration of his insolvent estate Greub had been highly obstructive. The Master refused to recommend Greub's rehabilitation as was required when such an application was brought within four years of sequestration.

Simultaneously with the application for his rehabilitation, Greub applied for an order reviewing and setting aside the Master's decision not to recommend his rehabilitation.

THE DECISION

The Master's decision not to recommend the rehabilitation application was a decision which was subject to review in terms of section 151 of the Insolvency Act (no 24 of 1936). That section entitles a court to review the decision of the Master, consider the matter de novo and substitute the Master's decision for that of its own.

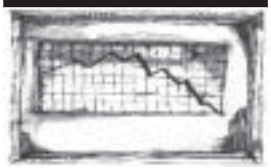
In the present case, it was clear that Greub's application for rehabilitation was based on the allegation that at the time of his sequestration he had not been insolvent, and could have applied for the setting aside of the sequestration order but had not been able to do so for financial reasons.

Greub's reasons for his rehabilitation were however, incomplete. He had not stated which creditor's claims he disputed and the reasons therefor. He had not dealt with the discrepancy between the total of creditors he admitted and those cited by his ex-wife. Furthermore, he had not explained why he could not use his overseas assets and the income generated from overseas in order to pay his creditors. He had not explained the causes of his insolvency, nor what his objections were to the claims of the petitioning creditor and of the Natal Building Society.

From this it was clear that Greub had not been frank in applying for his rehabilitation. Frankness was required in such an application. The application therefore had to be refused.

MULLER v DE WET

Insolvency



A JUDGMENT BY LEWIS AJ
WITWATERSRAND LOCAL DIVISION
15 JANUARY 1999

1999 CLR 119 (W)

An insolvent person has the right to bring an action in matters pertaining to the administration of the estate where it is alleged that there have been irregularities with regard to its administration.

THE FACTS

A final order sequestrating Muller was given against him in August 1997. Meetings of creditors were convened, and at the second meeting the creditors resolved to sell two fixed properties in the estate and instruct the trustees to proceed to do this.

The properties were sold by public auction in July 1998. Muller then brought an application to restrain his trustees, De Wet and other respondents, from confirming the sales pending the outcome of actions to be instituted by him against various creditors. Muller based the application on the allegation that the sales had been affected by a number of irregularities. The respondents opposed the application by denying the irregularities and by denying that Muller had the right (locus standi) to bring the application.

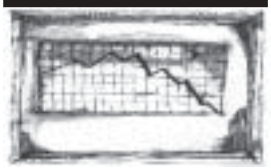
THE DECISION

An insolvent person has a reversionary interest in his estate and is therefore entitled to litigate in matters concerned with the administration of the estate where the trustee has refused to take the necessary steps, or where he alleges maladministration of the estate by the trustee or where he objects to an improper sale of assets by the trustee.

There is no authority for the proposition that an insolvent person may bring such action even where there has been no irregularity. There must in fact be some factor which would permit the insolvent to institute proceedings with regard to the administration of his estate. In the present case, the only factor upon which Muller could rely in this regard was the alleged invalidity of the auction. This was a basis upon which he could bring the present application and did afford him the right to do so.

The alleged irregularities were however, not substantiated. The application was dismissed.

TALACCHI v MASTER OF THE SUPREME COURT



A JUDGMENT BY HOWIE JA (VIVIER JA, NIENABER JA, PLEWMAN JA and MELUNSKY AJA concurring)
SUPREME COURT OF APPEAL
20 NOVEMBER 1999

1999 (1) SA 959 (A)

It cannot be inferred from the takeover of a business of an entity which continues to trade in its existing name that the parties to the takeover have agreed to confer a benefit on trade creditors of the business entitling them to claim as against the party taking over the business payment of debts to be incurred by the business. While a creditor may claim against the party taking over as undisclosed principal, if it has made an election to claim against the business, it cannot change that decision at a later stage and claim against the party which took over the business.

THE FACTS

Lite Magic (Pty) Ltd took over the assets of Litesell Distributors (Pty) Ltd and undertook to pay its liabilities. Thereafter, goods were ordered in the name of Litesell and were paid for by Lite Magic.

Lite Magic was finally liquidated on 3 December 1991. At that date, certain goods ordered in the name of Litesell had not been paid for. The supplier ceded its claims for payment to Talacchi who ceded them onward to P Hegter, the second appellant. Hegter claimed payment from Litesell, and obtained judgment against it. The judgment was unsatisfied.

Talacchi also obtained a judgment against Litesell for payment of legal fees, and that judgment was also unsatisfied.

Talacchi and Hegter then lodged claims against the liquidated estate of Lite Magic. The claims were admitted at a creditors' meeting but later expunged by the Master of the Supreme Court. The appellants sought an order reviewing and setting aside the decision to reject their claims.

THE DECISION

There was no basis upon which the claim for legal fees could be made against the liquidated estate of a company against which the legal fees were not payable. This claim could not be allowed.

As far as the claim for payment of the goods supplied was concerned, the basis suggested was that when Lite Magic took over the business of Litesell, this constituted in part an agreement intended to benefit third parties, ie a stipualtio alteri, and that the third parties benefited in this case were the creditors of Litesell.

This contention could not be supported. There was no indication that Lite Magic intended to take over the future trade liabilities of Litesell such as the obligations to pay for the goods supplied following orders made in the name of Litesell. The liabilities assumed by Lite Magic were all the existing liabilities of Litesell.

The second basis for the claim was that the claim for payment for the goods supplied could be made against Lite Magic as undisclosed principal, Litesell having acted as its agent in those circumstances.

This contention too could not be supported. Talacchi had learnt of the existence of Lite Magic and its relationship with Litesell before he had brought Hegter's claim. The first claim had been brought against Litesell in the knowledge of Lite Magic's relationship with Litesell. This meant that an election had been made to sue Litesell rather than Lite Magic. Hegter was bound by that decision and could not change it by bringing his claim now against Lite Magic.

The order sought by the appellants was refused.

PREMIER WESTERN CAPE v PARKER & MOHAMMED

Insolvency

A JUDGMENT BY DAVIS AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
8 DECEMBER 1998

[1999] All SA 176 (C)

Theft of money may give rise to a liquidated claim which would support an application for sequestration of the thief or an accomplice of the thief. A claim for restitution following the cancellation of a contract may likewise support such an application, provided that the claim is liquidated.

THE FACTS

The Premier of the Western Cape appointed Parker & Mohammed as conveyancers who would also administer a scheme on subsidies for individuals purchasing houses. Pursuant thereto, R13 302 625 was paid to Parker & Mohammed.

The Premier alleged that of this money, R617 250 was paid out without authorisation and in contravention of an instruction incorporated in an implementation manual. He also alleged that further money was paid to BDS Developers for work purportedly done but not done.

The Premier alleged that the money had been misappropriated and that they therefore had a liquidated claim against Parker & Mohamed in the sum of at least R3 486 914. He alleged that the firm was unable to pay this sum and that it was to the advantage of creditors that the firm be sequestrated. An application was then brought for its sequestration.

Parker & Mohamed contested the allegation that the Premier had a liquidated claim against them.

THE DECISION

A liquidated claim means a claim to money, the amount of which is fixed and determined either by agreement, judgment or otherwise. Such a claim could arise from the theft of money where the evidence reveals that the theft has given rise to a fixed and determined claim.

In the present case, the evidence showed that a third party, BDC Developers received money to which it was not entitled, but not that Parker & Mohamed acted in concert with BDS to achieve this. The firm might have placed too much trust in members of BDS, but this did not make it a party to theft. The evidence did not point inevitably to a theft having taken place.

While the evidence did support the allegation that the Premier was entitled to restitution of what he had paid under a contract, which he was entitled to cancel, this contractual remedy might have been available to the Premier but it had also not been shown that rescission was yet a course of action open to him, nor that it gave rise to a liquidated claim. Furthermore, this was a step he could take without recourse to sequestration proceedings.

The application was refused.

COMMERCIAL UNION INSURANCE COMPANY OF SA LTD v LOTTER

A JUDGMENT BY FARLAM AJA (VIVIER JA, SCOTT JA, ZULMAN JA and STREICHER JA concurring)
26 NOVEMBER 1998
SUPREME COURT OF APPEAL

UNREPORTED

Insurance

An insured is under a duty to disclose to an insurer that the item insured is alleged to have been stolen, because the fact that the item might have been stolen compromises the insurer's right of subrogation.

THE FACTS

In March 1994, Lotter leased a motor vehicle from the Standard Bank which it bought from Sutherlands Executive, a motor dealer. In terms of the lease agreement, the risk of loss of the vehicle passed from the Standard Bank to Lotter.

After leasing the vehicle and taking it into his possession, Lotter was informed that the vehicle had been stolen from Lombards North Central PLC in England. Police officials from the South African Police Services attempted to seize the vehicle but the warrant empowering them to do so was quashed. Police officials from the British police services examined the vehicle, identified it as stolen and advised Lotter not to sell the vehicle, contact the owner of it and inform his insurer that the vehicle had been identified as stolen.

In May 1995, Lotter changed the insurers of the vehicle to Commercial Union Insurance Company of SA Ltd. Before his broker signed the insurance proposal form on his behalf, Lotter did not inform Commercial Union that the vehicle was possibly stolen, nor that it was subject to recovery by the true owner and he had no title to the vehicle.

Three months later, the vehicle was stolen. Lotter claimed indemnification for the loss against Commercial Union. Commercial Union repudiated liability on the grounds that Lotter had no insurable interest in the vehicle and that he had failed to disclose the fact that the vehicle had been previously stolen, which materially affected the insurer's assessment of the risk it had assumed under the policy.

THE DECISION

Whether or not there has been a material non-disclosure is determined by whether or not a reasonable man would consider the information not disclosed should have been disclosed so as to enable the insurer to form its own view as to its effect.

In the present case, Lotter's failure to disclose the ealier theft of the vehicle compromised Commercial Union's rights of subrogation, subrogation being the substitution of one person for another so that the person substituted succeeds to the rights of the person whose place he takes. Commercial Union would not have been able to assume the rights of subrogation if it could be met with the answer that its insured, Lotter, had no title to the vehicle.

It was no answer to say that the risk of loss of the vehicle had passed to Lotter in terms of the lease agreement entered into with the Standard Bank. Since the risk of loss lay initially with the true owner of the vehicle, it could not have passed to a third party such as Lotter from the bank which had not owned the vehicle. It could not therefore be said that Commercial Union could have assumed any of the rights it would have had to have had in order to exercise the right of subrogation.

The fact that the vehicle had been stolen was a factor which a reasonable man would consider should have been disclosed to Commercial Union. It had therefore been entitled to repudiated the policy. The action for payment under the policy was dismissed.

ADEL BUILDERS (PTY) LTD v THOMPSON

A JUDGMENT BY MPATI J
SOUTH EASTERN CAPE LOCAL DIVISION
15 APRIL 1998

1999 (1) SA 680 (SECLD)

Contract

Damages for breach of contract should be assessed by reference to any provisions in the contract which relate to the quantification of damages including the extent to which consequential damages may be claimed. They must be assessed taking into account the claimant's duty to mitigate his damages which itself may take into account the claimant's financial ability to have mitigated his damages at the relevant time. The claimant may claim interest on damages from the date referred to in section 2 of the Prescribed Rate of Interest Act (no 55 of 1975) even where the damages were agreed to have arisen before the coming into operation of that section.

THE FACTS

Adel Builders (Pty) Ltd and Thompson entered into a contract in terms of which Adel undertook to build a house for Thompson. In terms of clause 16.3 of the contract, Adel was only to be responsible for defects arising as a result of faulty workmanship and/or materials as provided for in clause 16.1, and was under no circumstances to be responsible for consequential loss or damage. Clause 16.1 provided that Adel was obliged to make good any material latent faults or defects and any roof leakages or damage to the building works caused thereby.

Adel brought an action against Thompson for payment of the balance of the amount payable in terms of the contract and Thompson counterclaimed for payment of a much larger sum as damages for failing to complete the work in a proper and workmanlike manner.

After the commencement of the trial of the matter, Adel consented to judgment in respect of the counterclaim. Subsequently, Thompson increased the amount of the counterclaim claiming special damages resulting from having to make alternative arrangements for occupation and storage of goods in different premises from those which Thompson was supposed to have built. The counterclaim was also increased as a result of an escalation of estimated costs of remedying the uncompleted work, the escalation having taken place during a period when Thompson was unable to complete the work himself due to financial constraints but could have realised assets in order to put him in funds to complete the work.

Thompson also contended that he was entitled to claim interest on the counterclaim in terms of section 2A of the Prescribed Rate of Interest Act (no 55 of 1975) which was amended in 1997 so as to allow a claim for interest on an unliquidated debt from the date of summons for payment of such a debt or date of demand. The parties agreed that the damages sustained by Thompson amounted to R330 000 as at February 1992.

Adel denied that it was liable for special damages as this had been excluded by clause 16.3. It also denied that it was liable for the payment of the escalation in costs.

THE DECISION

The exclusion of liability for consequential damages as provided for in clause 16.3 applied to both the defects referred to in that clause and the defects referred to in clause 16.1. There was no reason to apply the exclusion to the factors referred to in the one clause and not the other. Since the parties intended to exclude liability for consequential damages in both circumstances there was no room for allowing a claim for special damages as contended for by Thompson.

As far as the escalation in costs was concerned, it was possible to take into account the financial limitations of a party, who has suffered a breach of contract by the other party, where this might affect his ability to mitigate his damages. However, in this case, Thompson could have sold assets in order to enable him to remedy the defects brought about by Adel and he was therefore not entitled to the escalation in costs caused by the delay in remedying the defects.

As far as the claim for interest was concerned, it would not be applying the amended Prescribed Rate of Interest Act retrospectively to allow this claim from the date on which the amount of

damages were agreed, ie February 1992. The obligation to pay the debt arose when the parties agreed on the amount of the debt, and it was the purpose of the Act to allow interest on such a debt to assist a plaintiff who has to wait a long period of time to establish his claim.

Thompson was entitled to judgment for payment of R330 000 with interest from February 1992 to date of payment.

NAMPESCA (SA) PRODUCTS (PTY) LTD v ZADERER

JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
27 MAY 1998

1999 (1) SA 886 (C)

A restraint of trade agreement will not be enforced where the terms of the restraint are more extensive than necessary to protect the interests of the covenantor but may be enforced where these terms are capable of convenient qualification so that they are confined to the protection of such interests.

THE FACTS

Nampesca (SA) Products (Pty) Ltd employed Zaderer as its managing director. Previously, Zaderer had managed and operated the business conducted by the company, building it up so that it achieved a turnover of R45m per year and a customer base. In terms of the employment agreement, Zaderer undertook not to carry on or become engaged in any business undertaken by Nampesca during the subsistence of the agreement and for a year after termination thereof (the first restraint). He also undertook not to use for his own benefit, during or after the restraint period, any information obtained by him as a result of his employment which could be regarded as a trade secret (the second restraint).

This restraint was to operate in Europe, North and South America, and Africa south of the equator (South Africa being specifically mentioned) and in other specified countries in Asia.

After Zaderer's resignation, Nampesca conducted investigations which led it to believe that Zaderer had contravened the terms of the restraint. Following a disciplinary enquiry, it summarily dismissed him. It then brought an application to enforce the restraint. Zaderer admitted having engaged in competitive activities against Nampesca and having encouraged business from Nampesca's customers, but contended that the restraint went too far as regards territorial extent. Nampesca's application for enforcement of the restraint limited the territories of application to less than those provided for in the agreement.

THE DECISION

The first restraint was too widely stated in regard to its territorial extent for it to be enforceable. Nampesca's legitimate interests did not need protection to the extent provided for. In order to tailor the provisions of the restraint so as to protect Nampesca's interests only to the extent necessary, the order it sought limited the territorial application of the restraint. However, in doing so, the court was being asked to rewrite the contract to an extent that the result would be inconsistent with the parties' original intentions.

The first restraint could not be enforced.

As far as the second restraint was concerned, given the admitted fact that Zaderer had built up the company prior to his employment by it, Nampesca did have a protectable interest. Zaderer could

not contend that because this was an advantage he had given to the company it was not an advantage in which Nampesca enjoyed any proprietary rights. The period of this restraint was longer than that necessary to protect the company's interests, but it was possible to reduce this neatly and conveniently by deleting the reference to 'or after' in the restraint period provided for in the agreement.

So qualified, the second restraint could be enforced.

An order was granted enforcing the second restraint imposed on Zaderer in terms of the agreement.

VAN DEN BERG & KIE REKENKUNDIGE BEAMPTES v BOOMPROPS 1028 BK

A JUDGMENT BY VAN HEERDEN AJ
TRANSVAAL PROVINCIAL DIVISION
6 MARCH 1998

1999 (1) SA 780 (T)

Since most business transactions are attended by financial pressure on one or both parties, the allegation that one party entered into the transaction as a result of duress by the other party will not be sustained where the alleged duress is no more than this kind of financial pressure.

THE FACTS

Boomprops 1028 BK held a mandate to sell a farm owned by Lodwichs Lust Ondernemings (Edms) Bpk. It found a buyer for the farm who was prepared to pay a purchase price of R19 800 000. As the buyer required certain financial information relating to the seller prior to concluding the sale, the representative of Boomprops was referred to Lodwichs' accountant for the purpose of obtaining the information. The accountant represented Van den Berg & Kie Rekenkundige Beamptes.

The accountant agreed to supply the information but required that in return, Boomprops was to pay a portion of the commission it was to earn from the sale. This was R200 000 of the commission of R1 900 000. Boomprops needed the information for the purposes of concluding the sale and could not obtain it from anyone other than the accountant. It therefore agreed to the apportionment of its commission as required by the accountant.

After conclusion of the sale, Boomprops received payment of its commission but refused to pay Van den Berg & Kie R200 000. Van den Berg & Kie sued for payment and Boomprops defended the action on the grounds that the agreement had been entered into under duress and was therefore void.

THE DECISION

The idea that duress as a reason for avoiding a contract could be applied in circumstances where duress was directed at the assets of the aggrieved contracting party was accepted in South African law. However, 'economic duress' in the sense that financial pressure is brought to bear on the contracting party, while a ground for avoiding a contract in English law was not such a ground in South African law. Even so, the circumstances of this case would not fall within the definition of economic duress as understood in English law.

In the present case, although it could be accepted that there was a

degree of financial pressure on Boomprops to agree to the payment of the sum of R200 000 to Van den Berg & Kie, the incentive was the large commission which it was to receive. At the point when it was known that only the furnishing of the information required by the purchaser would conclude the sale and hence secure the commission, it was decided that payment of the R200 000 was acceptable in order to achieve this object. The financial pressure with which this transaction was associated was the kind of pressure with which most business transactions were associated and there was nothing unusual or contra bonos mores in the application of this pressure in this case.

A binding contract had been concluded between the parties and Van den Berg & Kie was entitled to enforce it. The action succeeded.

CONSOLIDATED EMPLOYERS MEDICAL AID SOCIETY v LEVETON

A JUDGMENT BY SCHUTZ JA (VIVIER JA, HOWIE JA, ZULMAN JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1998

UNREPORTED

Interpretation of the terms of a medical aid scheme

THE FACTS

In terms of his employment agreement with Southern Life Association Ltd, Leveton was to remain a member of the medical aid schemes of which Affiliated Medical Administrators (Pty) Ltd (Ama) was a member. In terms of clause 12 of the agreement, it was agreed that on termination of the appointment, Leveton would remain a member of the medical aid and provident fund and be treated in this regard as if he had retired. Leveton became a member of Consolidated Employers Medical Aid Society (Cemas), and Ama, which was controlled by Southern, paid the employer's contributions to Consolidated. Rule 6.3 of the scheme provided for the retention of membership of the scheme in the event of a member retiring from the service of his employer.

In terms of a settlement agreement entered into between Leveton and Southern on 12 August 1991 ending Leveton's employment, it was provided that Leveton would be entitled to remain a member of the provident fund and medical aid scheme and would pay contributions applicable to a retired member after termination of his employment on 30 June 1992. Southern would honour all its obligations in terms of the employment agreement up to the date of termination. Thereafter, Ama paid Leveton's contributions as it had in the past.

In March 1994, Ama informed Leveton that it had decided to transfer its continuation members to the Southern Health medical aid. Leveton disputed its right to do so. He appealed to Cemas's disputes committee. That committee disagreed with the Cemas management committee's decision to transfer all continuation members to Southern Health medical aid and recommended rescission of the earlier decision. The Cemas management committee refused to do so. It contended that Leveton had left the service of his employer in 1992 and so became subject to the provisions of Rule 10.2 of the Cemas medical scheme rules. That rule provided that a

member who left the service of the employer for any reason would cease to be a member and all rights of participation in the benefits under the Rules would thereupon cease.

Leveton then brought an application for an order that the decision of the disputes committee was binding on Cemas and that he be readmitted to membership. He also claimed that the decision to transfer his membership be reversed as the transfer was a breach of the settlement agreement.

THE DECISION

Even if Leveton had left the service of his employer, thereby becoming subject to the provisions of Rule 10.2, he remained a member of the medical aid scheme. A 'member' was defined in the Medical Schemes Act (no 72 of 1967) as a person who has been enrolled or admitted as and is still a member of a scheme. Leveton had shown that he fell within this definition because he had shown his original certificate of membership and the continuation of his membership in terms of the settlement agreement.

Since he was a member of the scheme at the time of the purported transfer of membership to the Southern Health medical aid, he was entitled to challenge that transfer on the basis of his rights as they already existed and were provided for in the Cemas medical aid scheme. This included his right to remain a member and not be transferred to another scheme.

Leveton was also entitled to reinstatement of his membership of the Cemas medical aid scheme on the grounds that the finding of the disputes committee was binding on the management committee. The management committee had acted in a high-handed manner in ignoring or brushing aside the decision of the disputes committee. That decision was taken by a body which, in terms of section 20(1)(g) of the Act, was a tribunal independent of management and enabled to perform a function akin to that of an arbitration. It was a decision that the management committee was not entitled to ignore and one which it would have to apply for review of, should it wish to contest its decisions.

The decision of the disputes committee was binding on Cemas and Leveton was readmitted to membership.

Even supposing that the appellants' argument on interpretation is good, does it allow them to ward off the main relief sought by Leveton? I think not. The principal argument advanced by Mr Goodman on behalf of the appellants was that Leveton's seeming membership between 1 July 1992 and 31 March 1994 was a nullity. In other words, he was not a member although he was, if I may be permitted to put it that way.

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

A JUDGMENT BY Van Heerden DCJ (VIVIER JA, HARMS JA, SCOTT JA AND FARLAM AJA concurring)
SUPREME COURT OF APPEAL
20 NOVEMBER 1998

1991 (1) SA 831 (A)

Cheques

A bank which accepts a stolen cheque for collection and gives consideration for it is liable to the true owner for the amount of the true owner's loss.

THE FACTS

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

United Bank paid the cheques in the belief that Sun Homes or Nedperm was entitled to the cheques. The cheques were paid by the drawee bank under circumstances which did not render that bank liable in terms of section 81(1) the Bills of Exchange Act (no 34 of 1964). Nedperm Bank Ltd became a possessor of the cheques after the theft, and gave consideration for the cheques.

Basil Read Sun Homes (Pty) Ltd took cession of United Building Society's right of claim against Nedperm, and brought an action against Nedperm for payment of the total amount of the cheques. Nedperm defended the action on the grounds that United was no longer the owner of the cheques.

THE DECISION

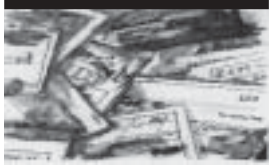
Section 81(1) provides that if a cheque is stolen or lost while crossed and marked 'not negotiable' and paid by the banker on which it is drawn in circumstances which do not render the banker liable in terms of the Act, the true owner shall be entitled to recover from any person who was a possessor of the cheque after the theft or loss and gave consideration for it or took it as donee, an amount equal to the true owner's loss or the amount of the cheque.

There was no evidence as to the precise circumstances in which the cheques were taken from United. However, it could be inferred that they were stolen. Ownership in the cheques nevertheless remained vested in United since it intended to pass ownership in them to Basil Read and not those to whom the cheques were actually given. Section 81(1) was therefore directly applicable to the situation which had arisen and Nedperm, which had become a possessor of the cheques and gave consideration for them, was liable to United in terms of that section. Basil Read had taken cession of United's right as against Nedperm and was therefore entitled to payment of the amount of the cheques.

The appeal succeeded.

CROWTHER & PRETORIUS v WARDA BUTCHERY BK

Cheques



A JUDGMENT BY HOWARD JP (VAN DER REYDEN J concurring)
NATAL PROVINCIAL DIVISION
30 SEPTEMBER 1998

1999 (1) SA 847 (N)

While an agent may receive payment of its principal's debt by accepting a cheque drawn in favour of the agent, payment might be accepted in the name of the agent, where for example the cheque is indorsed in favour of the agent. Then when the agent pays its principal from the proceeds, the agent becomes the holder for value of the cheque and may sue as a holder in due course if all other requirements for being a holder in due course are satisfied.

THE FACTS

Warda Butchery BK drew a cheque for R27 000 in favour of Pienaar in payment of goods to be delivered to it. Pienaar indorsed the cheque and negotiated it to attorneys Crowther & Pretorius and delivered it to that firm. The cheque was given in payment of a claim Crowther & Pretorius had instituted against Pienaar on behalf of Bekker and for which judgment had been obtained.

Crowther & Pretorius deposited the cheque to its trust account, then paid this amount to Bekker. Pienaar's cheque was dishonoured because it was stopped by Warda. Warda stopped the cheque because Pienaar failed to deliver the goods he was obliged to deliver to Warda.

Crowther & Pretorius brought an action against Warda for payment of the amount of the cheque, alleging that it was the holder in due course. Warda defended the action on the grounds that Crowther & Pretorius did not take the cheque for value.

THE DECISION

The cheque had been given in payment of a debt. This was a discharge of Pienaar's liability and therefore the cheque had been taken for value.

Crowther & Pretorius might have taken the cheque as agent for another party, ie Bekker, but in so doing the firm would have procured the extinction of Pienaar's debt had the cheque been paid. However, the evidence showed that Crowther & Pretorius did not take the cheque as agent but took it in its own name, since it had been indorsed in its favour. Having so taken the cheque, the firm gave value itself for it, paying Bekker and thereby discharging the debt payable to him.

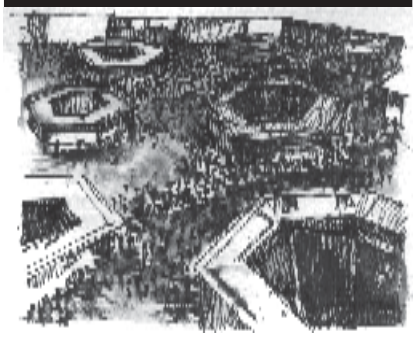
Having taken the cheque for value, Crowther & Pretorius became the holder in due course of the cheque and were entitled to sue on it. The action succeeded.

EX PARTE GRIFFIN SHIPPING HOLDINGS LTD

A JUDGMENT BY LEVINSOHN J
NATAL PROVINCIAL DIVISION
30 JULY 1998

1999 (1) SA 754 (D)

Companies



A scheme of arrangement involves the company which is the subject of the scheme by virtue of the fact that the company must recognise the transfers in shareholding which take place as a result of the adoption of the scheme. A scheme will not be considered to involve merely an expropration of the shares of minority shareholders where those shareholders receive other shares in consideration of their losing their shares in the scheme company. The statement issued to holders of scheme shares preparatory to the completion of a scheme of arrangement need not state fully the voting right entitlements of various types of shares in the company since the shareholder subject to the scheme may inform himself of these varying rights by perusing the Articles of Assocation. The value of shares in a company is not equivalent to the net asset value of the company.

THE FACTS

Griffin Shipping Holdings Ltd applied for the sanctioning of a scheme of arrangement. The scheme of arrangement proposed that Grindrod Unicorn Group Ltd, the holding company of the holding company of Griffin, would acquire all the shares owned by minority shareholders in Griffin, thus making Grindrod the holding company of Griffin. In return for obtaining the shares in Griffin, Grindrod offered one 'N' ordinary share in itself plus 60 cents per share in Griffin. 'N' ordinary shares entitled the holder to one vote per share compared to one hundred votes per share given to other ordinary shares in Grindrod. The scheme was proposed by Griffin and Grindrod.

In its explanatory statement made to minority shareholders, references to the two types of shares were made, including the fact that 'N' shares traded at a discount to ordinary shares. The statement did not disclose that earlier, Grindrod had acquired 24% of the shares in Griffin from Safmarine at a price of R4,40 per share.

At the meeting called to consider the scheme, 96% of the minority shareholders voted in favour of the arrangement. A Mr Cutten, a shareholder holding 100 000 shares in Griffin opposed the scheme at the meeting. He also opposed the application for the sanction the scheme by the court.

THE DECISION

First objection: the scheme was not a true scheme of arrangement

The scheme was attacked on the grounds that it amounted to a mere expropriation of shares, there being no quid pro quo beyond a cash payment and Griffin itself playing no role in the scheme.

This however, was untrue. The shares were not expropriated since the shareholders received something in exchange for their shares. Furthermore, they received more than cash. They received shares in the holding company. Griffin did play a role in the scheme: it had to recognise the changed status of its members' shares, transfer the shares, collect the scheme consideration from Grincor and consider any rights to dividends by the minority shareholders as waived.

Second objection: the scheme did not comply with section 312 of the Companies Act (no 61 of 1973)

Section 312 requires that notices summoning the meeting to consider a scheme must include a statement explaining the effect of the scheme and stating all information material to the value of the shares and debentures concerned in any arrangement. Cutten contended that this section was not complied with because minority shareholders were not informed of the implication of the allocation of 'N' shares in Grindrod.

The statement that was sent out did refer to 'N' shares . Any reader would be able to discern the difference between these shares and the ordinary shares. Furthermore, the reader would have seen that the Articles of Association of the both companies were available for inspection in which the distinction between these two types of shares was apparent. The fact that these two types of shares traded at different prices, the 'N' shares trading at a discount to ordinary shares, would also have alerted the minority shareholder to the difference between the two types of share.

The fact that the statement did not disclose the acquisition of the shares from Safmarine or the price at which they were acquired, was

not relevant. The market price of the Griffin shares was relevant and this was set out in the statement.

Third objection: the scheme was inherently unreasonable

This objection rested on the contention that the value of the scheme consideration was less than the net asset value of Griffin, and that 'N' shares were being issued instead of ordinary shares so that the existing majority could retain control.

The value of the shares was not determined by the net asset value of the company. The fact that the price offered for the shares was less than the net asset value was therefore no reason to consider the scheme unreasonable. A minority shareholder accepting the scheme might have compared the lower value attached to the shares to the prospect of increased dividends.

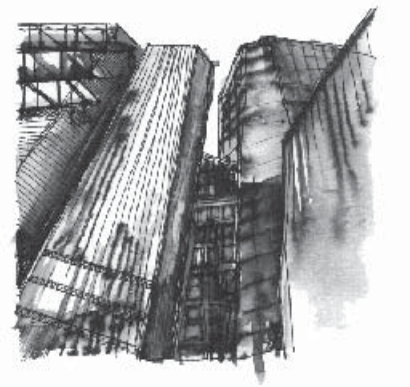
The scheme could not be considered unreasonable.

ABSA BANK LTD v AMOD

A JUDGMENT BY
SCHWARTZMAN J
WITWATERSRAND LOCAL
DIVISION
23 FEBRUARY 1999

1999 CLR 260 (W)

Property



The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) does not apply to the unlawful occupation of property, on which a structure has been built, by a person whose occupation was originally lawful in terms of some contract entered into between the person and the owner of the land.

THE FACTS

Absa Bank Ltd owned fixed property in a residential suburb on which was constructed a house then occupied by Amod. Absa brought an application for the eviction of Amod from the property. The matter was settled by agreement between the parties, Amod undertaking the vacate the property by 31 March 1999. The parties asked that the agreement be made an order of court.

Prior to settlement of the matter, Amod had argued that in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) the court was not entitled to make an order that Amod vacate the property. The court raised the question whether, in view of the provisions of this Act, it could make the agreement an order of court.

Section 4 of the Act provides that a court may grant an eviction order if an unlawful occupier of land has occupied the land for less than six months, and the court is of the opinion that it is just and equitable to do so after considering all the relevant circumstances. If the unlawful occupation exceeds six months, the same considerations apply, and the court must also consider whether land has been made available for the relocation of the unlawful occupier.

THE DECISION

Like its predecessor, the Illegal Squatting Act (no 52 of 1951), the purpose of the Act was to control the unlawful occupation of land. Though the present Act deals with the same subject matter in a completely different manner from the manner in which the previous Act dealt with this subject matter, both Acts directed their purpose at the unlawful occupation of land, as opposed to the unlawful occupation of property lawfully built on the land. Reading the Act as a whole, 'land' as used in it means vacant land.

The Act cannot be interpreted to mean that its application involves the complete denial of the force and significance of the law of landlord and tenant. If this were so, it would apply in the case of all leases entered into between landlord and tenant irrespective of the location of the property leased and irrespective of the needs and financial ability of the tenants. Having regard to the Act's definition of an 'unlawful occupier' and 'building or structure', the person to whom the Act referred was a person who moved onto the vacant land of an owner without the permission of the owner and constructed or occupied a building or structure thereon. The Act therefore did not apply to a person who had taken lawful occupation of property in terms of a contract and whose common law right to occupation had come to an end.

The agreement was made an order of court.

BODY CORPORATE OF THE LAGUNA RIDGE SCHEME NO 152/1987 v DORSE

A JUDGMENT BY McCALL J
DURBAN AND COAST LOCAL DIVISION
23 OCTOBER 1998

1999 (2) SA 512 (D)

A decision of trustees of the body corporate of a sectional title scheme is reviewable under the common law, and may be set aside where it is shown that in making the decision, the trustees failed to take into account factors relevant to the decision which its general policy pertaining thereto dictated should be taken into account.

THE FACTS

Dorse was the owner and occupier of sectional title unit no 121 in the apartment block *Laguna Ridge*. In terms of the rules of the sectional title scheme, no animals or pets could be kept in the building unless that was permitted in writing by the trustees. The house rules of the scheme provided similarly. The restriction on keeping animals was designed to avoid the causing of nuisance to other occupants of properties of the sectional title scheme.

Dorse kept a dog in her apartment without the permission of the trustees. In August 1997, the managing agents of the sectional title scheme sent her a letter requesting her to make alternative arrangements for the accommodation of the dog. Dorse requested permission to keep her dog at her apartment. This request was considered by the trustees of the scheme, but was rejected. Dorse failed to remove her dog and the body corporate then brought an application to compel compliance with the rules.

Dorse brought a counter-application for permission to keep the dog on the premises subject to the conditions that the dog remain at her unit, that it be carried when removed from the unit, that it not constitute a nuisance to other residents of the scheme and that it not be replaced when it died.

The body corporate had a policy that permission for the keeping of a pet would not be granted unless special circumstances existed warranting a departure from the general policy. When the decision was taken to refuse permission to allow the dog on Dorse's premises, the trustees took into account the general policy, and also the fact that allowing the presence of the dog might establish a precedent which would affect future decisions.

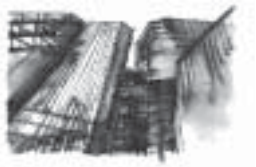
THE DECISION

Without the counter-application, the body corporate would have established its right to have the dog removed without further motivation than a reference to the rule prohibiting the keeping of dogs. However, the counter-application obliged the body corporate to give reasons for its decision in Dorse's particular case. The question then was whether that decision had been properly taken and was not reviewable under the common law.

In analysing the reasons for the trustees' decision, because of the policy of the body corporate regarding the keeping of pets, it was necessary to determine on what grounds they found that no special circumstances existed in relation to the keeping of the dog at Dorse's premises. In its founding affidavits, the body corporate had not dealt with this expressly, but it was clear that in taking into account only its general policy and the danger of establishing a precedent, the trustees had not taken into account other factors which were relevant to the decision and which had been raised by Dorse in applying for permission to keep her dog. Because of this, the trustees' decision was reviewable under the common law.

The decision of the trustees was set aside.

HOFFMAN v HOFFMAN



A JUDGMENT BY VAN ZYL J
(BLIGNAULT J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
8 JANUARY 1999

[1999] 2 All SA 80 (C)

Although an agreement for the sale of fixed property is required to be in writing, in terms of section 2(1) of the Alienation of Land Act (no 68 of 1981), where such an agreement has been entered into orally and thereafter performed fully by both parties to it, one of the parties cannot set aside the agreement on the basis of unjust enrichment.

THE FACTS

Mr A Hoffman sold to his brother, Mr I Hoffman, erf 4099, Langebaan, in terms of an oral agreement entered into in October 1995. The purchase price of R70 000 was payable only upon Mr I Hoffman's death.

At the time of conclusion of this agreement, A Hoffman was not the owner of the property but in December 1995, a close corporation of which he was one of the members, purchased property which included erf 4099, the intention being to subdivide the property and transfer erf 4099 to I Hoffman thereafter. This arrangement was later changed so that erf 4099 was to be transferred direct to I Hoffman and payment of the purchase price of R22 500 was to be made to the owners of the property. This was done in terms of a written agreement entered into between A Hoffman and the owners of the property, the purchase price being payable by A Hoffman and not I Hoffman.

I Hoffman paid the purchase price for the property earlier than provided for in terms of the original agreement and the property was transferred to him. He later brought an action against A Hoffman for repayment of the R70 000 paid to his brother, basing the claim on the allegation that since the agreement for the sale of the property had been an oral agreement and not in writing, as required by section 2(1) of the Alienation of Land Act (no 68 of 1981), it was an invalid agreement and A Hoffman had consequently been unjustifiably enriched by the payment of the purchase price of R70 000.

The action succeeded in the magistrates' court. A Hoffman appealed.

THE DECISION

It was clear that the oral agreement did not comply with the requirements of section 2(1) of the Act. However, section 28(2) of the Act was also applicable. This section provides that any alienation of land which does not comply with the requirements of section 2(1) is in all respects enforceable if the person to whom the alienation was made has fully performed in terms of the agreement of sale and the relevant land has been transferred to that person.

This section was introduced in recognition of the principle established in *Wilken v Kohler* 1913 AD 135 which holds that although a contract which conflicts with statutory formalities is void and unenforceable, it does not follow that the consequences of the contract which are implemented by agreement of the parties may also be declared void and unenforceable. Where both parties have performed in terms of such a contract, there is no basis for finding that one or other of them has been unjustifiably enriched.

The present case fell squarely within this principle, and had thus to be dealt with by reference to section 28(2). Applying this section, the transfer of the property and the payment of the R70 000 were therefore, properly understood, based on contract and had nothing to do with unjustified enrichment. Had I Hoffman not received transfer of the property, he might have had a good claim for repayment of the R70 000. However, this was not the case. A Hoffman had obtained rights to the property which secured transfer of it to I Hoffman. The fact that the method originally devised to do so, ie through the close corporation, was not adhered to, was irrelevant: section 28(2) imposed no requirements as to the precise method of performance of the relevant obligations of the contract.

The appeal succeeded.

DENEL (PTY) LTD v CAPE EXPLOSIVE WORKS LTD

A JUDGMENT BY
HARTZENBERG J
TRANSVAAL PROVINCIAL
DIVISION
25 NOVEMBER1998

1999 (2) SA 419 (T)

The obligations recorded in an agreement which is void for vagueness is not registrable as a condition of title in a deed of transfer. Where a condition provided for in a sale agreement is registrable in terms of section 63(1) of the Deeds Registries Act (no 47 of 1937) the parties may not intend that it be registered (by for example, not providing for its registration) and if so, it is not necessary that the condition be retained as a condition of title in any subsequent deed of transfer. Conversely, if the parties provide for the registration of a non-registrable condition, it may also be omitted from any subsequent deed of transfer.

THE FACTS

In the early 1970s, Armscor acquired land from Cape Explosive Works Ltd (Capex). The sale agreement stipulated two restrictions on use of the land: (i) that the land could only be used for the manufacture of armaments by the government for any defence or military purpose, and not in competition with AE&CI Ltd, and (ii) Capex was entitled to repurchase the land exclusive of the improvements thereto, if Armscor no longer required the land for the manufacture of armaments for the government. If Capex wished to purchase any of the improvements which Armscor might wish to sell, it could give notice to Armscor that it wished to do so whereupon the parties would be required to reach agreement upon the terms of sale. Armscor agreed to the registration of this condition in the deed of transfer by which it was to assume ownership of the land. Both restrictions were in fact recorded in the Deed of Transfer by which it became owner of the land.

The land was later consolidated with other land which was much larger in extent and not subject to the restrictions applicable to the land acquired from Capex. The repurchase restriction was however, omitted altogether. The omission and the failure to impose the restrictions in respect of the whole of the consolidated land was a result of a mistake made by the conveyancer who attended to the consolidation of the property.

After a subdivision of the property, the remainder was transferred to Denel (Pty) Ltd subject to the first restriction originally imposed, but again not the second. Denel consolidated the property with other property and the land use restriction was repeated in the certificate of registered title. One of the portions of the consolidated property was originally part of the land in respect of which the restrictions were imposed; only part of the other portion was originally part of that land.

Denel applied for an order that its property was not bound by any of the restrictions originally imposed. Capex counter-applied for an order rectifying Denel's title deed by the reintroduction of the original conditions.

THE DECISION

The fact that the repurchase condition stated that the seller was entitled to repurchase the property exclusive of improvements which might have been made by the purchaser was an indication that between these parties, there was an ongoing business relationship. This, together with the fact that successors in title were not expressly bound to the condition, showed that the rights and obligations were created between the direct parties to the agreement.

The repurchase agreement itself was vague insofar as it left undetermined essential terms of the sale of the improvements. These were to be agreed between the parties and were therefore indeterminable until such time as such an agreement was made. The repurchase agreement in respect of the improvements to the property was therefore void.

This aspect of the repurchase agreement was indivisible from the whole of the repurchase agreement. Being indivisible from it, the fact that it was void rendered the whole agreement void. Being so, there was no basis upon which it could be incorporated as a condition in the title deed.

Even if it were not considered a void agreement, it and the other restrictive condition, would not be registrable in terms of section

63(1) of the Deeds Registries Act (no 47 of 1937). This section provides that no condition in a deed purporting to create or embodying any personal right and no condition not restricting the exercise of any right of ownership in respect of immoveable property, shall be capable of registration unless such condition is complementary or otherwise ancillary to a registrable condition or right contained in such deed.

Applying this section, one could compare the right in question with the correlative obligation in order to ascertain whether the obligation was a burden upon the land itself or something performed by the owner personally. The purpose of the first condition was to protect AE&CI from competition by Armscor. As such it constituted a curtailment of a right and fell within the provisions of section 63(1). It was clear however, from the fact that the parties to the first sale (Capex and Armscor) did not provide for the right to registration of this condition, that it was to constitute a non-registrable condition applicable between the two parties and not to successor in title. Since their intention was that it should not be registered, there was no need to impose it as a registrable condition in any subsequent title.

While there was provision for the registration of the second condition, this was clearly not registrable in terms of section 63(1). It could also not be said to be so by virtue of its association with the first condition.

Denel's application was granted and Capex's counter-application dismissed.

If a two-stage test is applied it is in my view easier to ascertain whether a right is a real right or not. The first leg of the exercise is to determine if the right is capable of being a real right. Having found it capable of being a real right it must, secondly, be investigated whether the creator thereof intended it to be a real right.

GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA v VAN HULSTEYNS ATTORNEYS

A JUDGMENT BY LE ROUX J
TRANSVAAL PROVINCIAL DIVISION
3 DECEMBER 1998

[1999] 2 All SA 29 (T)

Cheques

A person is deemed to have been a possessor of a cheque when the cheque is paid into his account, whether or not the person actually possessed the cheque either personally or through an agent. Accordingly, such a person will be liable to the true owner of the cheque in terms of section 81 of the Bills of Exchange Act (no 34 of 1964) when the cheque has been stolen.

THE FACTS

An attorney of the firm Van Hulsteyns received a telephone call from a person, named Roy Laasen, who requested the attorney to act for him in promoting his business interests in South Africa. Part of the attorney's duties would include receiving and paying out money on Laasen's instructions. The attorney agreed to do so and requested written instructions for this purpose.

A week later, written instructions were given together with a request that the attorney furnish his firm's trust account number for the purpose of depositing funds described as 'commissions' due to Laasen from the Government of the Republic of South Africa. The account number was given, a cheque for R483 477,48 deposited into the account and Van Hulsteyns then paid this sum, less its fee, to a beneficiary nominated by Laasen.

The cheque paid into the Van Hulsteyns account was crossed and marked 'not negotiable'. It was made payable to OTK Koöperasie Bpk and was stolen after having been made out by the government and before its deposit in the Van Hulsteyns bank account. When the cheque was deposited into the account, it was not deposited in the normal way, through tellers delegated to received deposits made into bank accounts, but inserted in the bank's system of cheque collection at some point thereafter.

The government brought an action against Van Hulsteyns based on section 81 of the Bills of Exchange Act (no 34 of 1964) and against the collecting bank based on allegations of negligence in its collection of the cheque. Section 81 provides that if a crossed 'not negotiable' cheque is stolen and paid by the drawee bank which do not render the bank liable to the true owner, the true owner shall be entitled to recover any loss suffered as a result of the theft from any person who was a possessor thereof after the theft and gave consideration therefor or took it as a donee. In terms of subsection 2 of this section, a person is deemed to have been a possessor if he has paid any such cheque into his account with a banker.

Van Hulsteyns defended the action on the grounds that it had not become the possessor of the cheque and did not give consideration for it.

THE DECISION

In deciding whether or not Van Hulsteyns had been a possessor of the cheque, it was irrelevant whether it was to be held one by virtue of Laasen having been its agent in holding and depositing the cheque into its account or whether he was properly considered a principal acting on his own behalf at that point. Sub-section 2 of section 81 renders the customer of a bank the possessor whenever the cheque reaches the bank as the customer's mandatory and is collected for the customer. On the basis of this provision Van Hulsteyns was the possessor of the cheque.

Van Hulsteyns argued that the cheque had not been paid into its account because it had not been properly deposited but had been inserted into the bank's collection system at a point beyond the tellers and supervisors of the bank. It is not however, the method of deposit which is the deciding factor when determining that a payment has been made. It is the fact that a cheque has been paid. In the present case, the cheque had been paid into the Van Hulsteyns account. It had been a possessor of the cheque and gave consideration for it.

Van Hulsteyns was therefore liable to the government in terms of section 81 of the Act. The collecting bank, whether negligent or not, was not liable to the government since no damages had been proved against it.

SHROSBREE N.O. v SIMON

A JUDGMENT BY LIEBENBERG J
SOUTH EASTERN CAPE LOCAL DIVISION
17 JUNE 1998

1999 (2) SA 498 (SECLD)

Contract

An agreement which prescribes the method of cancellation of it requires that the party wishing to cancel the agreement does so according to that method before it may enforce its remedies flowing from such cancellation. Unlike cases where the prescribed notice of cancellation is dispensed with, such as cases where there has been a clear repudiation, where the method of cancellation is prescribed in the agreement, this must be followed in order to effect a proper cancellation of the agreement.

THE FACTS

In his capacity as trustee in the insolvent estate of O. Ahmed, Shrosbree N.O. sold certain immoveable property in the estate to Simon for R145 000. Clause 10(f)(2) of the agreement of sale provided that in the event of breach of the agreement, Shrosbree had the right to cancel the agreement by giving notice of such cancellation.

Simon failed to pay a deposit which she was obliged to do in terms of the agreement, and Shrosbree addressed a letter to her indicating her default as well as her failure to pay certain occupational interest. It notified her that should the default not be remedied within seven days, steps would be taken to have her evicted and the property sold by public auction.

A few weeks later, Shrosbree's attorneys addressed a letter to Simon indicating her default on various grounds and demanding that they be remedied within 14 days failing which Shrosbree would have the right to choose its remedies in terms of the agreement, and cancel the sale. Simon alleged that she had not received this letter.

Shrosbree then applied for the ejection of Simon from the property and an order directing her to give vacant possession of it to him. The grounds relied upon for the application were that Simon had not received a response to the letter sent by the attorneys but had instead insisted on the right to remain in occupation of the property.

THE DECISION

In order to obtain the relief he sought, Shrosbree had to show that the agreement had been properly cancelled. This had not been shown.

The agreement had not been cancelled by the service on Simon of the notice of motion in the present application. While service of a plaintiff or applicant's legal action on a defendant or respondent might itself constitute the cancellation of a contract, this cannot occur where the method of cancellation is prescribed in the contract itself. In the present case, the method of cancellation was prescribed in the contract and could not be substituted by the service of the application for ejectment.

As far as the letter sent to Simon by the attorneys was concerned, this did not constitute cancellation because it did not state that failing compliance with its demands, the agreement would be cancelled. Instead, it stated that failing compliance, the seller would have the right to cancel. Without cancellation actually having taken place, Simon's rights of possession of the property therefore continued unaffected and Shrosbree was not entitled to attack them.

Unlike cases where the party alleged to be in breach of an agreement which entitles the other party the right to cancel upon the occurrence of the breach without giving the prescribed notice, in the present case the method of cancellation prescribed by the contract had not been followed. There was also not a clear repudiation of the agreement in the present case, and on the basis of this distinction, the same pre-emptive remedy could not be applied.

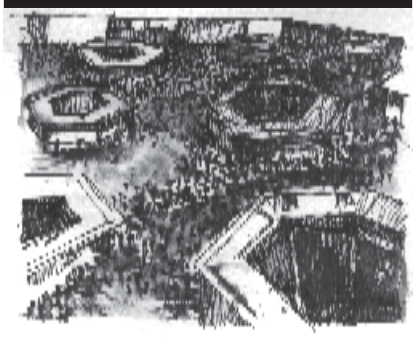
The application was refused.

KIA INTERTRADE JOHANNESBURG (PTY) LTD v INFINITE MOTORS (PTY) LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
16 SEPTEMBER 1998

[1999] 2 All SA 268 (W)

Corporations



The authority of a company's director to act for the company may be established by ratification of actions taken prior to the authority having been given, including action taken in an application for the winding up of another company.

THE FACTS

Kia Intertrade Johannesburg (Pty) Ltd and Infinite Motors (Pty) Ltd entered into an agreement in terms of which Infinite was to sell vehicles supplied to it by Kia on consignment. The agreement was signed for Kia by a certain HD Yoon.

The agreement was later cancelled following allegations of default on the part of Infinite, and Kia brought an urgent application for the liquidation of Infinite on the grounds that it was just and equitable that it should be wound up. The application was supported by the founding affidavit of Jin Soo Do who was alleged to be a director and marketing manager of Kia.

Infinite challenged the authority of Do to sign the affidavit for Kia. In response, Kia furnished a CM29 company form showing the register of directors. It showed that Do was a director of Kia as at the date of bringing the application. A resolution of the board of directors of Kia adopted and ratified the bringing of proceedings for the winding up of Infinite and nominated Do to sign all such documents as were necessary to give effect thereto.

THE DECISION

If a person signs a founding affidavit without having proper authority to do so, the defect can be remedied by ratifying what was done and proving such ratification. Alternatively, if the person did have authority, better proof thereof can be put before the court.

It was clear in the present case, that the directors of Kia authorised or ratified the application to wind up Infinite. The decision to embark on litigation was no different from any other decision which Kia might have taken and could be ratified in the same manner as any other decision. This had been done effectively by the resolution concluded by the board of directors of Kia which established the authority of Do to sign the founding affidavit in the application.

Infinite's challenge to Do's authority was rejected.

STAFFORD v LIONS RIVER SAW MILLS (PTY) LTD

A JUDGMENT BY MCLAREN J
(KONDILE J concurring)
NATAL PROVINCIAL DIVISION
17 NOVEMBER 1998

[1999] 1 All SA 275 (N)

A person who is unaware that there has been a failure to comply with section 23(2)(b) of the Close Corporations Act (no 69 of 1984) is not personally liable under that section.

THE FACTS

On 17 October 1995, Stafford telephoned a Mr Charlton of the Lions River Saw Mills (Pty) Ltd and ordered timber for a purchase price of R51 890,31. This was followed by a signed order form reflecting the orderer's name as 'Natal Agricultural Co'. The order form was signed on behalf of Kwazulu Industrial & Agricultural Services CC, the entity for which the order was earlier made telephonically, by a person who had been authorised to sign by Stafford.

The timber was delivered but the purchase price was not paid. Lions brought an action against Stafford for payment, claiming that he was liable to it in terms of section 23(2)(b) of the Close Corporations Act (no 69 of 1984). This provides that a person who authorises or issues an order for goods on behalf of a close corporation without the name of the corporation on the order shall be liable to the holder thereof for the amount of the order.

Stafford contended that before it could be said that he had authorised the signature on the order form, it had to be shown that he knew that the order did not comply with section 23(2)(b).

In an alternative claim, Lions contended that Stafford was liable to it on the grounds that he had acted for an undisclosed principal.

THE DECISION

The section had to be interpreted strictly and literally. Its purpose is to ensure that persons dealing with a close corporation are aware of the fact that they are dealing with a close corporation.

To be personally liable under the section, a person need not have known of the unlawfulness of having failed to properly comply with the section. However, to have authorised a signature on an order for goods, the person so authorising must be aware of what was being authorised. Since Stafford did authorise the making of the order, he must have known what was being authorised. However, there was no evidence that he knew that the particular order failed to comply with the requirements of section 23(2)(b). Lions was therefore not entitled to payment on this ground.

Lions was however entitled to payment on the grounds that Stafford had acted as an agent for an undisclosed principal. Lions did not know that it was contracting with the close corporation, this being a result of Stafford's failure to disclose that he was acting for the close corporation.

The action succeeded.

CUYLER v SHIERS
CUYLER v C&S MARKETING CC

A JUDGMENT BY
SHAKENOVSKY J
WITWATERSRAND LOCAL
DIVISION
17 SEPTEMBER 1998

1999 CLR 175 (W)

A member of a close corporation has the right to sue another member of the close corporation where the basis of the action is a breach of the fiduciary duties of members to the close corporation as provided for in section 42 of the Close Corporations Act (no 69 of 1984).

THE FACTS

Cuyler and Shiers each owned a 50% member's interest in C&S Marketing CC. Cuyler alleged that Shiers and others were engaging in unlawful competition with him and the close corporation and brought an application to prevent continuation of this. He also sought an order in terms of section 36(1) of the Close Corporations Act (no 69 of 1984) that he purchase Shiers' interest in the close corporation. In a separate application, Shiers claimed an order for the seizure of documentation which would be evidential material relevant to the unlawful competition application.

When he brought these applications, Shiers alleged that he also acted for C&S Marketing but he had obtained no formal resolution authorising him to bring the applications. Shiers and the other respondents contended that Cuyler did not have the right to bring the applications.

The question of whether or not Cuyler did have such a right was decided as a preliminary issue.

THE DECISION

Section 50 of the Act provides that where a member is liable to a close corporation on account of breach of duty arising from a fiduciary relationship to the corporation in terms of section 42, any other member of the corporation may institute proceedings against the corporation against such member.

The provisions of section 42 were applicable in the present case: they provided for the liability of a member to a corporation for breach of duty arising from the member's fiduciary relationship. It was this liability which Cuyler depended upon in his applications and which gave him the right to bring them.

The preliminary issue was decided in favour of Cuyler.

HILDEBRAND v KLEIN RHEBOKSKLOOF (PTY) LTD

A JUDGMENT BY LEWIS AJ
WITWATERSRAND LOCAL DIVISION
11 SEPTEMBER 1998

1999 CLR 196 (W)

A court has a discretion to order a change of a company's name where confusion may arise between that company and another entity even if the latter is not a company. It is unlikely that such an order will be made where the company whose name it is contended should be changed does not trade in a similar trade to that of the entity requiring the change.

THE FACTS

Hildebrand acquired the farm 'Rhebokskloof' and ran a guest-house on the farm under the name 'Klein Rhebokskloof'. Her neighbour, a certain Du Toit, owned a subdivided portion of the farm through a company known as Investment Facility Company Four Four Three (Pty) Ltd.

Some time later, Du Toit changed the name of the company to Klein Rhebokskloof (Pty) Ltd. When Hildebrand applied for the registration of a company with the same name, she discovered that Du Toit had changed the name of his company to reflect the name of her farm and business. The respondent did not trade but merely held the property which was a subdivision of Hildebrand's farm. Hildebrand requested Du Toit to change the name of this company. Du Toit agreed to do so, subject to Hildebrand's compliance with certain conditions. Hildebrand refused to accept the conditions and applied for an order compelling the respondent to change its name on the grounds that the name was undesirable and could be objected to in terms of section 45 of the Companies Act (no 61 of 1973).

THE DECISION

The underlying objection to the use of similar names for different entities of any nature is the confusion which may arise between them. This is an objection which ranges beyond the grounds for objection laid down in the Directive on Names of Companies which has been issued by the Registrar of Companies.

The only possible basis upon which it could be said that this sort of confusion might arise was that the two parties were trading in similar businesses and a similar name for both might give rise to such confusion. However, it was clear that the respondent was not trading at all, so that no confusion could arise. Furthermore, the name under which the respondent was registered at the time the application was brought was not in itself undesirable. Accordingly, there were no grounds upon which the respondent could be compelled to change its name.

The application was dismissed.

NOVATECH ADHESIVES LTD v DOHERTY

A JUDGMENT BY VAN ZYL J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
18 DECEMBER 1998

1999 CLR 135 (C)

A company alleging a breach of fiduciary and contractual duties must seek redress for such a breach without delay and prove the existence of the breach in order to achieve its remedy.

THE FACTS

Doherty and his brother (the second respondent) were directors of Novatech Adhesives Ltd. Novatech manufactured and sold adhesives, including one popularly known in South Africa as 'superglue'. The manufacture of the adhesive required the use of a substance known as ethyl-cyanoacetate (ECYA) the price of which began to rise. As a result of this, as a means to retain profitability, Doherty and his brother on behalf of a company controlled by them, Truloc Ltd, entered into agreements with Novatech under which Truloc agreed to purchase all superglue requirements from Novatech and Novatech would have the exclusive right to use the ECYA process.

Variations of this agreement were entered into involving changes of the ownership of shareholding in Novatech, but affirming the purchase agreement of the superglue and Novatech's exclusive licence with regard to thoe ECYA process.

In March 1997, Doherty informed one Hynes, a director of Novatech, that he was setting up an ECYA plant in South Africa with a view to supplying the pharmaceutical market. Novatech did not object, but in November 1997 it ascertained that Truloc was selling superglue in competition with Novatech.

In June 1998, Novatech brought legal proceedings against Truloc and the Dohertys in the High Court of Dublin, where those parties resided. In September 1998, it brought similar proceedings against them in South Africa, alleging breach of contractual and fiduciary duties and that Truloc had engaged in unlawful competition with it.

The Dohertys denied each of the allegations and also challenged the application on the grounds that it was not urgent and the court did not have jurisdiction to hear the matter, the parties all being resident in Ireland.

THE DECISION

Whereas all of the parties except the company controlled by the Dohertys manufacturing superglue in South Africa were Irish, the court could assume jurisdiction in the matter. The court had jurisdiction in the matter since the act to be prevented was one alleged to be done within the area of the court's jurisdiction.

As far as the question of urgency was concerned, there was no evidence that there was any prejudice to Novatech in the activities of Truloc or its directors or associate company. The fact that breaches of contractual or fiduciary obligations were alleged to be taking place was insufficient to establish that the matter was urgent. Novatech should have been aware, long before it brought its application against the Dohertys, that it might suffer prejudice by their activities and should therefore have brought proceedings against them at that time. When the Dohertys began manufacturing superglue in October 1997, Novatech did not take any steps to stop this from happening, nor did it make any claim relating to any proprietary or other interest in the ECYA process. It was only when the present application was brought, that it became clear that Novatech was opposed to the Dohertys engaging in these activities.

It followed that the application was not sufficiently urgent to warrant it having been brought on an urgent basis.

As far as the merits of the application were concerned, the allegation against Truloc was that it had breached the agreement entered

into between the parties obliging it to purchase superglue. However, it was clear from the transactions entered into by the parties that Truloc had not been obliged to continue purchasing superglue from Novatech from a certain point, and that therefore it could not be said to have breached any contract with Novatech in that regard.

Novatech also alleged that the Dohertys were in breach of their fiduciary duties toward it. It was true that the Dohertys, as directors of Novatech, owed such duties to that company. However, at a certain point, they resigned as directors of that company and were therefore under no such duties toward it.

Novatech's final allegation was that the Dohertys were competing unlawfully with it. However, while they were using the technique of ECYA, there was nothing confidential about this technique, nor did Novatech have any exclusive right to use it.

The application was dismissed.

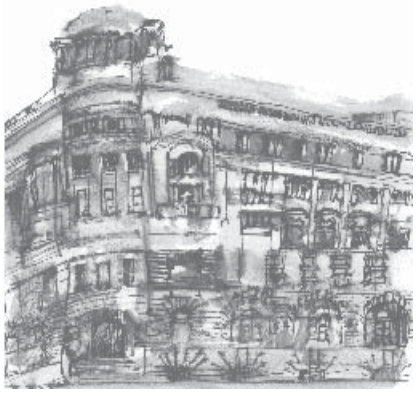
There is, in my view, another reason why this court should assume jurisdiction in a matter of this nature. The reduction of the world to a proverbial 'global village' makes it necessary to adopt a more flexible approach in matters of jurisdiction than has been the case in the past. Wide ranging and ever increasing international commerce require commensurate international co-operation in rendering it effective. Our courts are not excluded from this form of co-operation. On the contrary, greater reliance than previously may be placed on the courts of different countries to assist in the process of doing justice between parties of divergent nationalities and allegiances.

REGISTRAR OF BANKS v NEW REPUBLIC BANK LTD

A JUDGMENT BY HURT J
NATAL PROVINCIAL DIVISION
8 MARCH 1999

1999 CLR 157 (N)

Banking



The Registrar of Banks required to obtain the leave of the court to bring application for winding up of bank

THE FACTS

As a result of a report that New Republic Bank Ltd was unable to comply with statutory liquidity requirements, some of the bank's depositors withdrew their funds from the bank. This had a severely adverse effect on the liquidity of the bank. Following a request of the Chief Executive Officer of the Bank to the Registrar of Banks, the Minister of Finance appointed a curator to the bank. This was done in terms of section 69(1)(a) of the Banks Act (no 94 of 1990).

This sub-section provides that if any bank is, in the opinion of the Registrar, in financial difficulties, the Minister may appoint a curator to the bank and then certain provisions of the Companies Act (no 61 of 1973) relating to judicial management of companies shall apply in relation to the bank and the curator. For the purposes of the section, the powers conferred and the duties imposed by those provisions upon the court, the Master and the judicial manager respectively, would devolve upon the Minister, the Registrar and the curator respectively.

Shortly after the appointment of the curator, the Registrar, supported by the curator, applied for the winding-up of the bank. The basis of the application was that the bank was insolvent, had lost its entire share capital, and was unable to comply with the requirements of sections 72 and 74 of the Banks Act and posed a risk to the general public in that depositors might suffer irreparable loss.

The bank opposed the application. The opposing parties differed on the proper valuation of the bank's assets, the Registrar and the curator attaching a lower value to them than the bank. The parties agreed however, that but for the curatorship, the bank was commercially insolvent as it would be unable to meet its debts as they fell due. Both parties also agreed that in determining whether the bank should be wound up, the interests of the depositors should be protected in the most effective manner possible.

THE DECISION

Whatever the proper valuation of the bank's assets, in its application to wind up the bank the Registrar had to take into account the effect of section 69(6). This sub-section provides that while a bank is under curatorship, all legal proceedings against the bank were to be stayed and were not to be instituted or proceeded with without the leave of the court.

The restriction provided for by this sub-section included within its ambit proceedings for the winding-up or judicial management of a bank as contemplated in section 68(1) of the Act. The legislation preceding the Banks Act provided that the Minister would not have the power to stay legal proceedings against a bank under curatorship. However, this was later amended so as to confer this power and reached the formulation as given in the present section 69(6). Once the provisions of section 69(1) had been applied and a curator appointed thereunder, the provisions for the staying of legal proceedings under section 69(6) had to be applied. Section 69(1) provided for the appointment of a curator merely upon it being shown that a bank was 'in financial difficulties'. The intention was not to provide a temporary shield, as in the case of judicial management, but to provide for the protection of depositors for as long as this was necessary. Given these statutory requirements, the Registrar could not bring the

application for the winding-up of the bank without first obtaining the leave of the court.

A further indication that the Registrar was not entitled to an order winding up the bank was the fact that unlike the provisions of the Companies Act relating to judicial management, the functions of the court, the judicial manager and the Master were substituted with the Minister, the curator and the Registrar. Curatorship was thus considered to be a matter for administrative and not judicial control, not a temporary protection mechanism and a procedure under which enjoyed the staying provisions of section 69(6) could be effective.

Since the Registrar had not applied for the leave of the court prior to bringing the winding up application, the application was to be dismissed.

ABSA BANK BPK v CL VON ABO FARMS BK

A JUDGMENT BY LOMBARD J
ORANGE FREE STATE PROVINCIAL DIVISION
1 SEPTEMBER 1998

1999 CLR 294 (O)

Transfer of all assets and liabilities from one bank to another

THE FACTS

Absa Bank Bpk brought an action against CL Von Abo Farms BK for payment of R8,9m. In its particulars of claim it alleged that Bankorp Bpk had taken transfer of all the assets and liabilities of Trust Bank, and that during 1992, Absa had taken transfer of all the assets and liabilities of Bankorp, in terms of section 54 of the Deposit Taking Institutions Act (no 94 of 1990).

Von Abo denied this allegation, and the dispute between the parties over this question was then brought to court for separate adjudication.

In evidence presented by Absa, it appeared that in January 1992, the Minister of Finance approved the transfer of the assets and liabilities of Bankorp Bpk to Absa. In March 1992, Absa and Bankorp Beherend Bpk entered into an agreement in terms of which Bankorp would become a wholly owned subsidiary of the holding company (Bankorp Beherend Bpk) and Bankorp Beherend would become a wholly owned subsidiary of Absa. The agreement included a provision that subject to the fulfilment of certain conditions, Bankorp would transfer to Absa all its assets and liabilities.

The conditions were that the shareholders confirm the transfer of Bankorp's assets and liabilities to Absa, the passing of a special resolution by Bankorp authorising the cancellation of its registration as a deposit-taking institution and the registration of the special resolution by the Registrar of Companies.

The agreement also provided that Bankorp would hold a general meeting of shareholders to pass a special resolution approving the transfer. A meeting was held and the transfer was approved, as well as the cancellation of the the registration of Bankorp as a deposit-taking institution. The Registrar of Companies did not register the resolutions as he required a letter of approval from the Registrar of Banks for the resolutions. This requirement was not complied with as Absa was of the opinion that a special resolu-

tion had not been necessary for the purposes of section 54, and that all that was necessary was the approval of the shareholders as provided for in the agreement. An ordinary resolution confirming the transfer was then taken by Bankorp shareholders, and a similar one by Absa shareholders was then passed. The agreement was amended to provide for the passing of ordinary resolutions instead.

Von Abo contended that the failure to implement fully the provisions of the agreement made the agreement ineffective.

THE DECISION

Although, strictly speaking, clauses 6.2 and 6.3 of the agreement had not been complied with, these conditions had either been substantially complied with to the satisfaction of the parties or they had waived compliance of these conditions.

The agreement had to be interpreted so as to uphold its effectiveness. None of the parties to it wished it to be ineffective. They were in fact closely related to each other and none of them had any doubt about its purpose. The agreement had in fact been carried out, Bankorp's assets and liabilities having been transferred and Bankorp's registration as a banking institution having been cancelled. In the circumstances, there was no reason to cast a strong and literal interpretation on the agreement.

Von Abo was claiming, as a third party, a greater right to cancellation or to declare the agreement null and void, than that possessed by the parties to the agreement. A third party cannot have a greater right to the cancellation of an agreement than that possessed by the contracting parties themselves.

During 1992, in terms of the provisions section 54 of the Deposit-taking Institutions Act, Bankorp transferred all its assets and liabilities to Absa Bank. The bank was entitled to payment of its claim.

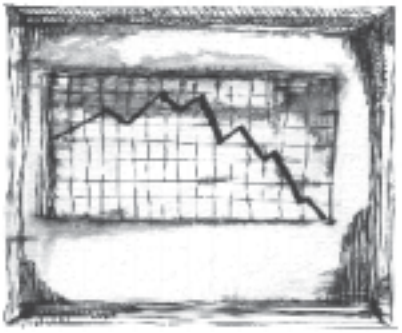
Wat die verweerders in wese hierin verlang, is dat die Hof aan hulle as derdes 'n sterker reg tot kansellasie of nietigverklaring van die Ooreenkoms moet verleen as dit waaroor die partye daartoe self beskik—dit behoef geen betoog dat geeneen van die partye op hierdie stadium en op die gronde soos deur die verweerders tans aangevoer die Ooreenkoms suksesvol sal kan laat nietig of ongeldig verklaar nie. Daar bestaan myns in siens geen beginsel, regtens of andersins, waarkragtens derdes 'n sterkere reg tot die kansellasie van 'n ooreenkoms kan verwerf as dít waaroor die kontrakterende partye self beskik nie.

JOOSTE v DE WITT N.O.

A JUDGMENT BY VAN DEN HEEVER AJ
TRANSVAAL PROVINCIAL DIVISION
30 OCTOBER 1998

1999 (2) SA 355 (T)

Insolvency



THE FACTS

Jooste's husband owned fixed property which was valued at R360 000. He formed a close corporation and applied for a loan for it for R150 000. Nedbank granted a loan in this amount, taking as security the fixed property. Simultaneously, the close corporation took transfer of the property and paid off the existing loan secured by a bond over the property. Jooste purchased her husband's 100% interest in the close corporation for R10. Jooste and her husband were married to each other out of community of property.

Jooste's husband's estate was sequestrated. As a result, control of Jooste's assets was assumed by his trustee, De Witt. Jooste then applied for the release of her member's interest in the close corporation.

De Witt opposed the application on the grounds that Jooste did not hold any right to the member's interest which was effective as against the creditors of her husband.

THE DECISION

The probabilities were that there had been an intentional attempt by Jooste and her husband to put the fixed property beyond the reach of creditors. The reason for repaying the loan already in existence was to cover the tracks of their transaction and create a new loan in favour of a new entity. The purpose was to prejudice existing creditors and ensure that the asset would be retained by both Jooste and her husband following the sequestration of his estate.

The member's interest was not obtained by Jooste in order to obtain the interest as interest, but in order to obtain control over the asset of the fixed property which was owned by the close corporation.

Jooste had had an opportunity to show to the court that she had a right to the member's interest as against the claims of creditors in the insolvent estate, but had not done so. The trustee had, on the other hand, shown that Jooste and her husband had executed a scheme the purpose of which was to prejudice creditors. In these circumstances, it could be accepted that this had been the effect of the transaction these parties had entered into.

The application was dismissed.

EX PARTE WESSELS N.O.

A JUDGMENT BY WRIGHT J
ORANGE FREE STATE PROVINCIAL DIVISION
19 FEBRUARY 1999

[1999] 2 All SA 22 (O)

A trustee in an insolvent estate of a person who enjoys the rights of a fiduciary conferred in terms of a will may alienate those rights as part of the duty of a trustee to sell the assets of an insolvent estate. However, rights conferred on the fiduciary which are personal to the fiduciary may not be assumed by the trustee and the trustee must abide any conditions provided for in the will in relation to the exercise of such rights.

THE FACTS

In his will, CJ van der Merwe bequeathed two farms to FJ van der Merwe. The bequest was subject to the condition that his heir was not to encumber the farms with mortgage bonds during his lifetime and was not to sell them to anyone other than the testator's immediate family. The bequest was further subject to the condition that if a son was born out of the marriage of one of the heirs, the farms were to be bequeathed to one of the heir's sons, preference being given to the son who showed an interest in farming.

After the death of CJ van der Merwe, his heir, FJ van der Merwe became insolvent and his estate was sequestrated. The trustee of the insolvent estate applied for an order that the farms could be sold free of the testamentary conditions provided for in the will. The court considered whether or not such an order could be granted.

THE DECISION

The condition contained in the will was a conditional fideicommissum. If the heir exercised the right to sell the property, the fideicommissum would fall away, and if he did not, it would persist. This right which had been conferred on FJ van der Merwe in terms of the will vested in his trustee, although the right of the ultimate (conditional) holder of the right, did not.

The right conferred on FJ van der Merwe was a fiduciary right, not a right to ownership of the property. This right, subject to the restrictions relating to alienation, was assumed by the trustee. In consequence, no order allowing the trustee to exercise rights free of these restrictions could be granted.

The trustee was obliged to sell all the assets in the sequestrated estate. This included the fiduciary rights of FJ van der Merwe but could not include the right of that individual to sell the property upon the conditions stipulated in the will. That right was a personal right and had to be exercised upon a decision made by FJ van der Merwe himself. In this respect, the conditions provided for in the will were, since they were connected with a fideicommissum, different from other conditions restricting alienation of an asset. The trustee was not entitled to exercise such rights and the conditions stipulated in the will had to be observed.

The order was refused.

DU PLESSIS N.O. v OOSTHUIZEN

A JUDGMENT BY OLIVIER J (CILLIÉ J and MATSEPE J concurring)
ORANGE FREE STATE PROVINCIAL DIVISION
20 NOVEMBER 1997

1999 (2) SA 191 (O)

A creditor of a party in liquidation will not normally be considered to have carried on the business of that party and will therefore not be considered personally liable for the debts of that party in terms of section 64(1) of the Close Corporations Act (no 69 of 1984).

THE FACTS

During 1990, Hennenman Meulens BK was experiencing cash flow problems. Its liabilities exceeded its assets and it faced the possibility of liquidation. A certain Mr Barry devised a scheme to ensure the continuation of the close corporation's business. The scheme, which was implemented, involved the formation of a company, West Star Milling Bpk, to which Hennenman would make payments for the supply of mielies. West Star itself would obtain the mielies from farmers and pay them and Hennenman would pay West Star from the proceeds of its sales of the processed mielies.

West Star invested R60 000 in Henneman, and Oosthuizen and the second respondent invested R300 000 by way of a loan to the close corporation. Neither of the respondents held a member's interest in Henneman and neither of them were directors of West Star.

The scheme did not work but instead, Henneman's creditors increased by R1 355 837. The close corporation was finally put into liquidation. The liquidator alleged that the respondents had conducted the business of the close corporation recklessly and that section 64(1) of the Close Corporations Act (no 69 of 1984) should be applied. The section provides that if it appears that the business of a close corporation has been carried on recklessly, then a court may declare that anyone who was a party to the carrying on of the business is personally liable for all or any of the debts of the close corporation.

The liquidator brought an application for an order in those terms. He also brought an application in terms of section 29 of the Insolvency Act (no 24 of 1936) that payments made by Henneman to the respondents within the six month period prior to its liquidation had the effect of preferring one creditor over another and were to be set aside. The respondents were however, not repaid the loan of R300 000 which they had made to Henneman.

THE DECISION

Merely to make a loan to a business in order to put it in a position to continue its operations cannot be described as taking any step in the carrying on of that business. The respondents had only made a loan to Henneman in the present case. They had not participated in the running of its business, and were therefore properly considered mere financiers of the business. The fact that Henneman had incurred more and more debt was in any case attributable to the actions of the managers of the business, ie persons other than the respondents.

The respondents had also been under no duty to bring Henneman's operations to an end by placing it in liquidation. A creditor is not obliged to do such a thing, even if the creditor is aware that its debtor is in a weak financial position.

As far as the application in terms of section 29 was concerned, the evidence had shown that the respondents had received payments just as other creditors had in the six months leading up to the liquidation of Henneman. They were therefore payments which were made in the ordinary course of business and the purpose had not been to prefer one creditor over another.

The application was dismissed.

MASTERBOND PARTICIPATION TRUST v MILLMAN N.O.

A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
5 MAY 1999

1999 CLR 270 (C)

An application by a defendant requiring the furnishing of security for costs or the provision of an indemnity brought against the liquidators of a company in liquidation must show that the company has insufficient assets to pay the costs of the action brought against it. Where the application is unsuccessful because this has not been shown, it will be equally unsuccessful against another party bringing the action under section 32(1)(b) of the Insolvency Act (no 24 of 1936). An application against the liquidators for the provision of an indemnity cannot succeed where the applicants have failed to show that they are creditors of the company in liquidation.

THE FACTS

Golf Estates (Pty) Ltd and Ma-Africa Group Holdings (Pty) Ltd, the third and fourth respondents, brought an action against Masterbond Participation Trust and the other applicants seeking an order setting aside dispositions allegedly made without value by Fancourt Properties (Pty) Ltd in their favour. The liquidators of Fancourt Properties, Millman and the second respondent, had declined to bring the action and it had proceeded at the instance of Golf Estates and Ma-Africa alone. Fancourt Properties held assets worth some R5m but the liquidators were not willing to allow the use of this to fund the action.

Masterbond applied for an order that the liquidators, alternatively Golf Estates and Ma-Africa, furnish security for costs in the action, alternatively that Golf Estates and Ma-Africa furnish an indemnity to the liquidators.

THE DECISION

Holding assets worth R5m, Fancourt was certainly able to meet the costs of the action. The reason for an order requiring the furnishing of security for costs was therefore absent. It was irrelevant that the liquidators were unwilling to allow the use of Fancourt's assets for the action, as Masterbond could always have secured an indemnity from Golf Estates and Ma-Africa to ensure that Fancourt's assets were not dissipated. There being no reason to believe that Fancourt would not be able to pay the costs of the action if unsuccessful, an order requiring the liquidators to furnish security for costs could not be granted.

As far as the alternative was concerned, the third and fourth respondents were clearly bringing the action as the real plaintiffs, although the named plaintiffs were the liquidators. This however, did not constitute a basis upon which they could be compelled to furnish security for costs of the action. In any event, since the liquidators themselves were not obliged to furnish security for costs, the third and fourth respondents were not so obliged either. In such circumstances, it was open to the liquidators to secure from the third and fourth respondents whatever indemnity they considered adequate. Since it was not in the position of the liquidators, Masterbond did not however, have any right to claim the provision of such an indemnity.

Masterbond also did not have the right to claim that the liquidators secure an indemnity from the third and fourth respondents. While they might have had such a right in terms of section 387(4) of the Companies Act (no 61 of 1973) they had not alleged that they were creditors of Fancourt.

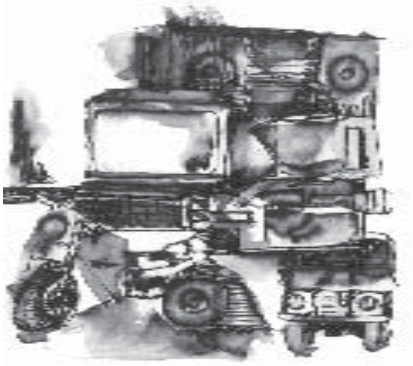
The application was dismissed.

STRUWIG N.O. v MARAIS

A JUDGMENT BY EDELING J
ORANGE FREE STATE PROVINCIAL DIVISION
27 NOVEMBER 1997

1999 (2) SA 214 (O)

Credit Transactions



A credit receiver is entitled to transfer possession of an item which he possesses under a credit agreement, notwithstanding any provision in the credit agreement reserving ownership of the item to the credit grantor. Since such an agreement is valid, the person to whom the item has been given is entitled to retain possession on the basis of the rights held by the credit receiver.

THE FACTS

Before his death, JA Nel entered into a credit agreement with Bankfin in respect of a motor vehicle. In terms of the agreement, Bankfin was to remain the owner of the vehicle until the last payment due thereunder had been paid.

Before the final payment was made, Nel sold the vehicle to Marais. They agreed that Marais would pay to Nel the instalments due under the credit agreement and Nel would pay these to Bankfin.

Nel died, and his executor, Struwig, contended that the agreement between Nel and Marais was void and that the vehicle was an asset in the deceased estate. He brought an application for an order compelling the delivery of the vehicle.

THE DECISION

The agreement entered into between Nel and Marais was not void. The purpose of that agreement had been to hand over the vehicle to Marais and arrange for his payment of the instalments due to Bankfin. In itself, there was nothing unacceptable about that.

Although the vehicle had been handed to Marais, it had not been transferred to him. Section 8(3) of the Credit Agreements Act (no 75 of 1980) may provide for notification to the credit grantor in the event of the credit receiver abandoning possession of the goods, but this did not affect the validity of the agreement. The provision was there to protect the credit grantor but it did not affect the agreement.

As the executor in the deceased estate, Struwig had no better right to the vehicle than did Nel. Having surrendered his right of possession of the vehicle he, like Nel, was therefore not entitled to delivery of the vehicle.

The application was dismissed.

HINDRY v NEDCOR BANK LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
2 DECEMBER 1998

1999 CLR 202 (W)

A taxpayer's constitutional rights are not violated by the application of section 99 of the Income Tax Act (no 58 of 1962).

THE FACTS

In making its annual returns of employees' tax paid for the 1987 and 1989 tax years, Hindry's employer erroneously showed provisional tax payments which had been made by Hindry as part of the employee's tax deducted from his salary. The Receiver of Revenue thought that the tax paid by Hindry exceeded the tax payable in those years and refunded him amounts of R43 003,58 and R36 387,33 for each of these years.

When the Receiver of Revenue discovered the mistake, by journal entries he adjusted Hindry's account and assessed Hindry's liability toward him in the sum of R79 462,18. Hindry objected to the assessment. The Commissioner for the Inland Revenue Service then issued a notice to the Isando branch of Nedcor Bank Ltd, Hindry's bank, that it was declared Hindry's agent and obliged to pay the sum of R79 462,18 from Hindry's account as and when funds became available. He did so in terms of sections 99 and 100 of the Income Tax Act (no 58 of 1962) . These provisions enable the Commissioner to declare any person an agent of any other person and require the agent so declared to pay any tax due from money which may be held by the agent.

Hindry then applied urgently for an interdict to prevent the bank from making payment to the Commissioner pursuant to this notice and attacked the constitutionality of section as inconsistent with the Constitution of the Republic of South Africa.

THE DECISION

Section 99 empowers the Commissioner to require an agent to pay any tax due to him. Hindry's contention was that the Commissioner did not seek payment of a tax due by him but a refund of an alleged erroneous refund. However, paragraph 28(7) of the Fourth Schedule to the Income Tax Act provides that if the Commissioner pays to any person a refund which was not properly payable, the amount of the payment shall forthwith be repaid and recoverable by the Commissioner as if it were a tax. This contention could therefore not be upheld.

Hindry also contended that he had not been afforded him the constitutional right to fair and justifiable administrative action, in that he had not been given a hearing before the notice in terms of section 99 was issued and the Commissioner had not given reasons for issuing the notice. This contention could also not be upheld in view of the fact that the Commissioner had entered into considerable correspondence with Hindry before and after issuing the notice.

As far as the attack on the constitutionality of section 99 was concerned, Hindry's objection was a theoretical one since he had not shown that he was not liable to pay the amount claimed by the Commissioner. The reason for the objection was that the enforcement procedures of section 99 did not require prior notice to the taxpayer, nor that the taxpayer be given an opportunity to make representations regarding the proposed action to be taken. The question was whether or not this violated the taxpayer's basic human rights because of its extrajudicial and summary nature.

Section 36 of the Constitution allows the limitation of rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Given the fact that the system of revenue collection in

South Africa depended on self-assessment by the taxpayer and was hampered by limited co-operation from taxpayers, and therefore required speedy and efficient means of collection of tax where this had been assessed as being due, the principle of section 99 was a legitimate limitation of a taxpayer's rights.

In the present case, Hindry had in any case, had an opportunity to present his case to the Commissioner before the issue of the notice in terms of section 99. In any event, the section did not deny the taxpayer a later hearing on the question of liability for tax in terms of the Income Tax.

Any limitation on constitutional rights in section 99 was reasonable and necessary in an open and democratic society as provided for in section 36 of the Constitution. The application was dismissed.

The evidence overwhelmingly shows that the principle of section 99 is a legitimate limitation of a taxpayer's rights in terms of section 36 of the Constitution. The criticism of its terms is that the appointment does not have to be in writing, that the Commissioner is not required to give notice to the taxpayer of the appointment of his/her agent and that the taxpayer is not afforded a prior hearing. In this case the appointment was in writing and it is implicit that the agent had to communicate its contents to the taxpayer, which it did. The applicant had an adequate opportunity to put his case to the Commissioner. The alleged defects in section 99 are, in this case, academic.

EXTEL INDUSTRIAL (PTY) LTD v CROWN MILLS (PTY) LTD
QUATREX MARKETING (PTY) LTD v CROWN MILLS (PTY) LTD

JUDGMENT BY SMALBERGER JA (NIENABER JA, SCHUTZ JA, SCOTT JA, STREICHER JA and NGOEPE AJA concurring)
SUPREME COURT OF APPEAL
17 SEPTEMBER 1998

1999 (2) SA 719 (A)

Contract

A contract which results from a bribe having been entered into is voidable at the instance of the contracting party which is the victim of the bribe where it is shown that the bribe brought about the formation of the contract. A party which cancels such a contract does so effectively notwithstanding the failure to tender restitution of what has been received under the contract.

THE FACTS

Through companies controlled by them, Malcolm Fallet and Francois Macray sold sheep or hog intestines, known as 'casings', to Crown Mills (Pty) Ltd. During the period 2 December 1988 to 28 January 1992, Crown Mills paid R5 903 056,45 to the companies controlled by Fallet and Macray in consideration for invoices rendered in respect of these goods. Among these companies were Extel Industrial (Pty) Ltd and Quatrex Marketing (Pty) Ltd.

In the same period, Cooper, an employee and a director of Crown Mills, received from Fallet and from companies controlled by Fallet, some R263 000. Pillay, the managing director of Crown Mills, received some R148 000. These payment were bribes paid to these individuals in order to secure the continued custom of Crown Mills in the supply of casings from the companies controlled by Fallet and Macray.

In respect of some of the casings, delivery notes were not signed by a representative of Crown Mills, but were signed by the factory manager of Extel and Quatrex's casing factory. Cooper would then present to the creditors' clerk an invoice together with a handwritten goods received voucher, and obtain a cheque in favour of one of the companies controlled by Extel or Quatrex.

In respect of other casings, delivery did take place.

Crown Mills failed to pay for casings falling into both categories. Extel and Quatrex brought an action for payment of the purchase price. Crown Mills defended the action on the grounds that it was not obliged to pay a debt, if any, which arose through bribery.

THE DECISION

Unlike the case where an agreement has taken place between the briber and the bribed, in this case, the agreement took place between the briber and a party which had no knowledge of the bribe. The question was whether the legal consequence of this was that the innocent party, Crown Mills, could avoid the agreement.

An agreement which is induced by a bribe is voidable at the instance of the party which is the victim of the bribe. Between the briber and the bribed it is void. On this basis, Crown Mills was entitled to avoid the agreement giving rise to the supply of the casings, provided that it could show that the bribery gave rise to the agreement, ie was the cause of it. Extel contended that Crown Mills would have entered into the agreement and accepted the supply of the casings notwithstanding the bribe.

Crown Mills would however, not have done so. The effect of the bribe was to taint the agreement upon which the supply of casings was made, and when the fact of the bribed came to the notice of Crown Mills, it refused to make payment. This was an indication that Crown Mills would not have entered into the agreement and was consequently entitled to avoid it.

Extel also contended that if Crown Mills wished to avoid the agreement, it was obliged to tender restitution of the goods which it had received, alternatively the market value of the goods. This however, could not be insisted upon. The casings had been used and resold and consequently could not be returned. The fact that Crown Mills had not tendered to return these goods did not nullify its cancellation of the agreement. The cancellation of an agreement is effective notwith-

standing the failure to tender restoration of what has been received by the cancelling party. Furthermore, to require of Crown Mills that it pay the market value of the goods would be to require it to perform in terms of the agreement, which it was not obliged to do in view of the fact that it had avoided the agreement.

Extel also contended that it was entitled to compensation because Crown Mills had been unjustifiably enriched at its expense. This contention had not been raised in the pleadings and consequently could not be dealt with fully. However, it was clear that were it to be dealt with, the question of whether the prices on the invoices were distorted by the bribery would have to be determined, as would the question of whether equity and justice favoured the payment of any amount by which Crown Mills might have been enriched.

The action for payment failed.

MOSSGAS (PTY) LTD v SASOL TECHNOLOGY (PTY) LTD

A JUDGMENT BY SNYDERS J
WITWATERSRAND LOCAL DIVISION
19 MARCH 1999

[1999] 3 All SA 321 (W)

A restraint of trade must be a provision which restricts a party in the conduct of its trade. When that party did not have such a right before concluding a contract incorporating a restriction on its right to trade, the incorporation of the restriction will not be considered unenforceable.

THE FACTS

Sasol Technology (Pty) Ltd granted Mossgas (Pty) Ltd a licence to use Sasol's proprietary information to construct certain units and operate them for the purposes of production of fuels. The licence expressly limited the rights of Mossgas to the production of fuels only.

The licence was entered into in order to afford Mossgas the ability to produce fuel from gas. The process by which this was done was known as the synthol process. This process involved the production of propylene, a chemical component which could be converted into acrylic acid.

Mossgas wished to produce acrylic acid and sell it, but was restricted from doing so by the limitation of its rights of production as set out in the terms of the licence. Mossgas however, contended that the restriction was unenforceable in that it was a restraint of trade and harmful to the public interest. It applied for an order upholding this contention.

THE DECISION

Mossgas' contention was that the restriction was not necessary for the protection of Sasol's synthol process and was against the public interest since it prevented the exploitation of the propylene by itself without promoting the protection of that process. However, it was necessary to determine firstly, whether the restriction amounted to a restraint of trade at all.

A restraint of trade normally consists in an independent negative stipulation which persists beyond the date of termination of the contract in which it is incorpo-

rated. In the present case, the restriction was not phrased as a negative stipulation, nor was it stated to persist beyond the period of operation of the contract. To that extent, it did not resemble a restraint of trade. Applying the test whether the practical effect of the provision was to restrict Mossgas in the conduct of its trade, it had to be accepted that before Mossgas contracted with Sasol, it had had the right to acquire and exploit the propylene. It still could do so if it did so without using the production method which had been licensed to it by Sasol. The restriction on it was therefore not to prevent absolutely the exploitation of the propylene nor even to prevent Mossgas from competing with Sasol in so doing.

Comparing Mossgas' right to exploit the propylene before it contracted with Sasol and after, it was clear that nothing had been taken away from Mossgas by entering into the contract. Before entering into the contract, Mossgas had not been entitled to produce propylene using the synthol process and this continued to be the case after the contract was entered into.

Mossgas' application failed.

JAMES v MICOR HOLDINGS LTD

A JUDGMENT BY VAN DER LINDE AJ
WITWATERSAND LOCAL DIVISION
26 NOVEMBER 1998

1999 CLR 237 (W)

A party appointed in terms of an agreement to make a determination as an expert is also entitled to interpret and apply the principles stated to be those in terms of which the determination is to be made. Where the determination is not to apply in the case of it being affected by 'manifest error' the error in question may only be a reason for not applying the determination where it has resulted in no proper determination having been made at all. A debtor is also required to pay interest on a debt from a date specified in an agreement obliging the payment of interest where the amount on which the interest is to be paid has not been determined till a later date.

THE FACTS

James, Niewenhuizen and various companies associated with them concluded an agreement with Gateway International BV involving the sale of various items, including shares in Trek America Ltd, a property situated in Staten Island, New York, and a business owned by the companies.

In terms of the agreement, Micor guaranteed Gateway's performance. The purchase price was US$500 000 payable in two equal instalments. The first was payable as soon as the audited trading profits of the company and business had been determined, expected by no later than 31 March 1985, and the second was payable on 30 November 1985. Interest at 2% over the Citibank prime lending rate from due date of payment to actual date of payment was payable.

The purchase price was variable depending on the extent of any pre-tax profit made by the company and the business in the year following1 December 1983, the effective date of the agreement. If the profit were to be less than US$300 000, the purchase price would be less and if it were to be more than US$300 000, the purchase price would be more. 'Profit' was to have its generally accepted meaning in accordance with generally accepted accounting principles (GAAP), and would take into account all overhead expenses.

In the event of a dispute between the parties as to the combined pre-tax profits of the company and business, these were to be determined by a chartered accountant in England and Wales, whose determination would be final and binding on the parties, save in the case of manifest error.

Gateway did not produce the figures of trading profits by 31 March 1985 and James brought an action to compel it to do so. The parties agreed that the combined pre-tax profits would be determined by no later than 29 January

1993. When these were produced, they showed a loss for the year following 1 December 1983. James disputed this conclusion, and a chartered accountant was nominated to determine the profits, as provided for in the agreement.

The accountant received written representations from both parties and determined the profit at US$369 920, basing the determination solely on the information placed by the parties before him. He then took the figures alleged by each party to represent the actual profit for the period and adjusted each of them after resolving fifteen areas of dispute. After adjusting James' figure downward and Gateway's figure upward, there remained a difference of US$123 595 attributable to different accounting approaches. The accountant then adjusted the different figures further by applying another reduction to James's figure and another increase to Gateway's figure in the same proportions by which the first adjustments had been made. The result was a combined net profit of US$221 952. He ordered the payment of the purchase price on the basis of this determination of net profit, with interest as provided for in the agreement.

Gateway failed to pay the purchase price so payable. James, having taken cession of the other sellers' claims, applied for enforcement of the agreement. Micor and Gateway opposed the application on the grounds that the accountant's determination contained manifest errors, that he failed to apply his mind properly to the determination, that the process applied by him contained fundamental irregularities and that he was not empowered to direct the payment of interest. In support of its contention that the accountant had contained manifest errors, Micor alleged that the accountant had, in a number of instances, deviated from a proper application of GAAP.

THE DECISION

The agreement empowered the accountant to determine any dispute as to the combined pre-tax profits. Since the same agreement had defined profits as having the meaning attributed to them by GAAP, any dispute as what GAAP required in relation to pre-tax profits was also a dispute to be determined by the accountant. As a professionally qualified person, the nomination of an accountant by the parties showed an intention that the person so nominated, being capable of doing so, would make such a determination. Since he had been appointed as an expert and not as an arbitrator, it could be accepted that the parties intended the accountant to use his own expertise in arriving at his determination.

It followed that in making his determination, the accountant was entitled to make a determination of the meaning of GAAP, and the exercise of his expertise in this regard could not be contested merely on the grounds of a difference of opinion as to the proper interpretation and application of GAAP. Micor's objections to the accountant's interpretation and application of GAAP, whether good or not, could therefore not constitute a basis for avoiding compliance with his determination.

The qualification that the determination not be attended by 'manifest error' was not a qualification which referred to an incorrect application of GAAP. To allow that 'manifest error' included an error relating to the application of GAAP would be to allow a redetermination of the matter. It was more appropriate to interpret the 'manifest error' as an error which was patent, or one which the accountant himself had not intended.

The accountant's determination was final and binding, even if the determination contained a manifest deviation from GAAP.

As far as the objection to the direction for the payment of interest was concerned, the essence of it was that interest could not run from a date before which the amount owing was determined. Since the accountant's determination had been made later than the dates on which the agreement specified would be the dates on which the price would be payable, interest could not run until that determination had been made.

However, the failure to determine the profits by the original date had been a result of default by Gateway itself. Being in default by the specified date, it was in mora, and could not avoid the consequences thereof by contending that it did not know how much it had to pay. Interest was to run from the dates originally specified in the agreement.

The agreement was to be enforced, and James entitled to payment of US$369 920 with interest from 1 December 1985 to date of payment.

TESORIERO v BHYJO INVESTMENTS SHARE BLOCK (PTY) LTD

Contract

A JUDGMENT BY WUNSH J
(SCHABORT J concurring)
WITWATERSRAND LOCAL DIVISION
1 JUNE 1999

1999 CLR 364 (W)

The contractual capacity of a person is determined by the law of the place where the contract is entered into, not the law of the matrimonial property regime to which the person's marriage pertains. Where it is clear that a contract is entered into by a person who knows and understands the meaning of the contract, there will be no ground for a finding that the contract was entered into by mistake.

THE FACTS

Tesoriero signed a deed of suretyship in favour of Bhyjo Investments Share Block (Pty) Ltd in respect of the debts of a close corporation, Sellavie Clothing CC, which she operated as a business concern manufacturing clothing and selling to boutiques. At the time, she was married according to the matrimonial property regime of Argentina which she said was the same as that of South Africa.

Tesoriero was Spanish-speaking and did not have a good command of the English language. At the time when she signed the deed of suretyship, she asked questions concerning the nature of the agreements she was concluding including the terms of the lease giving rise to the principal indebtedness. She depended on the other member of the close corporation to explain to her the nature of the contracts she was then entering into.

Bhyjo brought an action for payment under the deed of suretyship. Tesoriero appealed against the judgment given against her on the grounds that being married in community of property, she had lacked the contractual capacity to enter into the deed of suretyship, alternatively that she had not understood the nature of the transaction she had entered into.

THE DECISION

The law applicable to the determination of contractual capacity is the law of the place where the contract is concluded. In the present case, this was South Africa. The law pertaining to the matrimonial property regime was not relevant.

In terms of sections 11 and 14 of the Matrimonial Property Act (no 88 of 1984) Tesoriero had contractual capacity. In terms of section 15(2)(h) of that Act, she could not bind herself as surety without her husband's consent except where the suretyship was signed in the ordinary course of her profession, trade or business (an exception provided for in section 15(6) of the Act).

It was true that no discussion of this exception had taken place in the trial proceedings, but the evidence presented did make it possible to determine whether or not the section applied. It was clear that Tesoriero had entered into the deed of suretyship as part of her activities in a profession, trade or business.

The deed of suretyship had also been entered into without any mistake on her part as to the nature and content thereof. It had been entered into in conjunction with a lease. It was not a complicated document and stood separately from the lease and Bhyjo's representative had done nothing to encourage a misunderstanding of the document on her part.

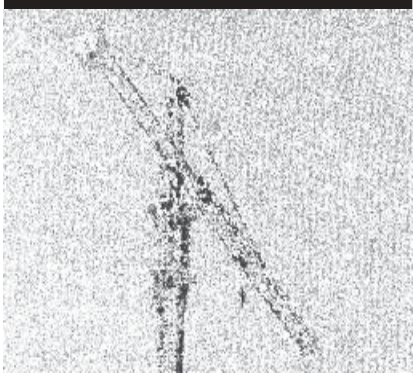
The appeal was dismissed.

GEROLEMOU/THAMANE JOINT VENTURE v AJ CONSTRUCTION CC

A JUDGMENT BY VAN DIJKHORST J
TRANSVAAL PROVINCIAL DIVISION
26 MARCH 1999

[1999] 3 All SA 74 (N)

Construction



A provision in a sub-contract that disputes be submitted to arbitration only after the practical completion of the sub-contract works applies in respect of works which must be completed in respect of the main contract to which the sub-contract relates.

THE FACTS

Gerolemou/Thamane Joint Venture and AJ Construction CC entered into a contract in terms of which AJ Construction undertook to restore certain external facades at the Palace of Justice in Pretoria. The contract was a sub-contract entered into as part of a main contract subsisting between Gerolemou and the Minister of Public Works.

In terms of clause 37.1 of the contract, if any dispute arose between the parties in regard to the contract then each party was to give the other written notice of the dispute requiring that such dispute be referred to arbitration. In terms of clause 37.3 of the contract, any reference to arbitration was not to be opened until after practical completion of the sub-contract works, with the exception of a reference to arbitration in respect of monthly applications by Gerolemou for certificates of payment.

Gerolemou was dissatisfied with the work done by AJ Construction and it cancelled the contract. AJ Construction alleged that this was a repudiation of the contract and claimed damages under various heads, including under certificates of payment, totalling R1,645m. Gerolemou counterclaimed and the disputes were submitted to arbitration.

Gerolemou applied for an order that the adjudication of the disputes be stayed until after practical completion of the works.

THE DECISION

The arbitrator's jurisdiction to arbitrate the dispute between the parties is not a matter which the arbitrator himself can decide. Even if the determination of such a matter could be considered a question of interpretation of the contract which is, in the contract, specifically provided for as a matter for determination by arbitration, an arbitrator cannot determine the issue, since his power to act is brought into question by the issue itself. It was therefore appropriate for the court itself to decide whether or not clause 37.3 of the contract precluded the commencement of arbitration proceedings between the two parties.

In interpreting clause 37.3 it was clear that the 'works' referred to in the clause were the works as defined in the main contract. These works were the complete contract works for the restoration of the building of which the external facades were a part. The arbitration was therefore subject to the suspensive condition that these works be completed. The completion of the works referred to in the clause encompassed the completion of the whole of the works including those to be executed by the other contractors engaged in the whole project.

Since those works had not been completed, the reference to arbitration was premature, except in regard to the claim under certificates of payment.

The application was granted except in regard to such claims.

BOTHA'S TRUCKING v GLOBAL INSURANCE CO LTD

A JUDGMENT BY FABRICIUS AJ
TRANSVAAL PROVINCIAL DIVISION
1 DECEMBER 1998

1999 (3) SA 378 (T)

Insurance

An exemption from liability in favour of an insurer contained in an insurance policy does not constitute a warranty by the insured in favour of the insurer which would entitle the insurer to repudiate liability should it be found that the circumstances of the exemption exist. An insurer may repudiate liability on the basis of the exemption if it is found that such circumstances indeed exist.

THE FACTS

Global Insurance Co Ltd insured a truck tractor and semi-trailer owned by Botha's Trucking against damage. The policy provided that Global would not be liable for any accident, injury, loss or damage if the insured vehicle was found to be in a state or condition which was deemed to be not roadworthy.

The vehicle was damaged. At the time, three of the vehicle's 22 tyres were in a state which did not comply with the Road Traffic Act (no 29 of 1989) in that they had become worn in various degrees. Their condition was such that they would render the vehicle dangerous under certain weather conditions. The vehicle was not roadworthy within the meaning of the Act.

Global repudiated liability under the policy, basing its right to repudiate on the exemption contained in it.

The parties approached the court for a determination of (i) the meaning of the 'state or condition which was deemed to be not roadworthy', (ii) whether the vehicle was deemed not to be roadworthy, and (iii) whether the cause of the accident which gave rise to the damage could be attributed to the alleged unroadworthiness of the vehicle.

THE DECISION

The exemption upon which Global relied was not a warranty since it did not place a duty on Botha's Trucking to keep the vehicle in a roadworthy state in order to retain the insurance cover. The validity of the policy did not depend on the vehicle being kept in a roadworthy state. Botha's Trucking was not under an absolute obligation to keep the vehicle in a roadworthy condition.

The proper interpretation of the meaning of the word 'roadworthy', as used in the policy, was that the vehicle would be fit for use on the road. It did not mean that the vehicle was to be roadworthy within the meaning of the term as used in the Act. Having regard to the fact that 19 of the 22 tyres were in a proper condition and that the vehicle itself was able to travel on the road within reasonable stopping distances, the vehicle itself could not be said to be in an unroadworthy condition.

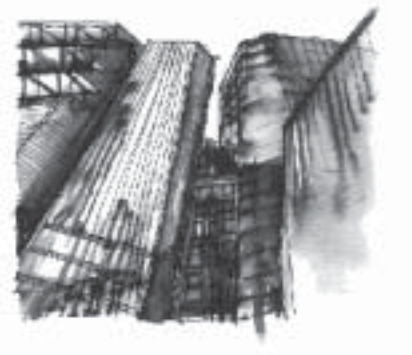
Global had not shown that the vehicle was in an unroadworthy condition and was accordingly not entitled to repudiate liability under the policy on the grounds of the vehicle's alleged unroadworthiness.

UNIMARK DISTRIBUTORS (PTY) LTD v ERF 94 SILVERTONDALE (PTY) LTD

A JUDGMENT BY VAN DER WESTHUIZEN AJ
TRANSVAAL PROVINCIAL DIVISION
9 OCTOBER 1998

1999 (2) SA 986 (T)

Property



Whether or not an item accedes to fixed property is a question determined by reference to the intention of the party affixing the item to the fixed property and the degree to which removal of the item is possible without causing damage to the fixed property. A person who was in possession of an item which has not so acceded to its fixed property will be liable to compensate the owner in the amount of the value of the item where the item no longer exists or has been lost to his possession.

THE FACTS

Unimark Distributors (Pty) Ltd was in occupation of certain premises and considered itself to be the sub-lessee of them. The sub-lessee was in fact its holding company. During 1989, it installed certain items at the premises, including certain chipcore walls, an alarm system, an electrical system, under-cover parking, two steel canopies, steel security gates, air conditioners, a kitchen sink and eleven fire extinguishers.

In 1994, Unimark was ordered to vacate the premises and it did so. It was prevented from removing any of the items it had installed at the premises.

Erf 94 Silvertondale (Pty) Ltd purchased the property on which the premises were situated and took delivery of it. Unimark then brought an action against it for delivery of the items it had installed at the premises based on the rei vindicatio, alternatively for the value of the items basing this claim on the actio ad exhibendum or upon unjust enrichment.

THE DECISION

When Unimark installed the items, it did so thinking that it would be compensated for their installation. It probably regarded itself as the owner of these items. While this was important in deciding whether or not Unimark remained the owner of the items after their installation, it was also relevant to determine the manner of their installation.

As far as the chipcore walls were concerned, these were office partitions which were demountable and had been installed with a view to their eventual removal. They were therefore, properly considered, the property of Unimark and had not acceded to the property later owned by Erf 94 Silvertondale.

As far as the alarm and intercom system was concerned, the contract whereby it was installed expressly stated that it was not become part of the premises in which it was to be installed. The intention of the parties was that it would be removable. As opposed to a residential dwelling, the item was generally considered removable and to be adapted to changing needs of the occupant. It therefore remained the property of Unimark.

The electrical system was superficially surface-mounted and was therefore considered not part of the property. It remained the property of Unimark.

As far as the steel canopies and steel gates were concerned, they could not be removed without causing considerable damage to the premises. This was sufficient indication that they acceded to the property and had become part of the property owned by Erf 94 Silvertondale.

The air conditioners were easily removable and were not considered part of the property. The floor tiles and kitchen sink had become part of the property, but the fire extinguishers were clearly removable and could not be considered as part of it.

Where Erf 94 Silvertondale was in possession of items which had not acceded to the property, these would have to be returned to Unimark since it was entitled to them on the basis of its rights as owner. However, where the items were no longer in the possession of Erf 94 Silvertondale, Unimark had to proceed against that company for the value of them, proving that it had been in possession of them and had disposed of them with knowledge of Unimark's rights of ownership in respect of them. Unimark had in fact proved the value only of the office partitioning and was entitled to payment thereof.

Where Erf 94 Silvertondale was in possession of items which had acceded to the property, the basis of Unimark's right of recovery here was unjust enrichment.

Taking into account the amount by which Unimark was impoverished and by which Erf 94 Silvertondale was enriched, Unimark would be entitled to payment thereof. However, Unimark had not demonstrated what this amount was.

Unimark's action succeeded in part.

HAYES v MINISTER OF HOUSING, PLANNING AND ADMINISTRATION (WESTERN CAPE)

A JUDGMENT BY VAN ZYL J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
8 JUNE 1999

1999 CLR 334 (C)

Zoning scheme regulations applicable to erven of a certain size are applicable to erven which together are of the size provided for even if the erven by themselves are not of the required size. Consultation includes the receiving of written representations after a request therefor. A party whose rights are affected by an appeal against a decision affecting those rights is constitutionally entitled to be notified of the appeal and to be given an opportunity to make representations regarding the appeal.

THE FACTS

The third and fourth respondents applied for permission to depart from the Stellenbosch town planning scheme in respect of erven 2375 and 2376, Stellenbosch, encroach on the building line to accommodate a refuse storage area and applied for the removal of restrictions pertaining to the erven to permit the establishments of apartments thereon. Hayes and the second applicant who owned properties neighbouring the erven, opposed the application, and they presented objections to the Stellenbosch Municipality.

The municipality rejected the application and the third and fourth respondents appealed to the Minister of Housing, Planning and Administration (Western Cape) against this decision. A copy of the appeal was served on the municipality but not on the objectors.

The Minister invited the municipality to submit comments on the appeal prior to its consideration and the municipality did so in a letter with annexure. The Minister upheld the appeal. Hayes then applied for the review of the Minister's decision on the grounds that he had misdirected himself, had failed to comply with section 44(2) of the Land Use Planning Ordinance (no 15 of 1985) and had failed to give notice of the appeal to objectors thereby infringing their constitutional right to procedurally fair administrative action.

THE DECISION

Certain provisions of the zoning scheme regulations pertained to erven measuring 2000m² and over. Each of the erven was less than this, but together they measured more than this. The Minister had considered the appeal as if the erven were consolidated as the development proposed by the third and respondents would involve the future consolidation of the erven.

The fact that each of the erven was less than 2000m² was not an impediment to the proper consideration of the appeal, given the fact that the erven were to be consolidated for the purposes of the development for which the appeal had been brought. There was no need for the erven to be brought into common ownership merely in order to bring the application. If this was required, the subdivision of the property

might be required at a later stage if the application was not granted. This would be in conflict with commercial realities and impose an unduly heavy burden on property developers.

The failure to comply with section 44(2) of the Land Use Planning Ordinance was alleged to have consisted in a failure to consult with the Stellenbosch Municipality, which was required in terms of that section. Consultation did however, take place when the municipality submitted its comments on the appeal. It did not object to the method of consultation chosen by the Minister when he invited comments on the appeal, nor did it contend that the method chosen by him was unreasonable. Consultation, understood in the wide sense of the term, had taken place.

As far as the failure to give notice of the appeal was concerned, the absence of a specific provision in the Ordinance conferring the right to notification of an appeal and the right to make representations in it, did not deprive a party of the constitutional right to administrative justice. A party is entitled to expect lawful and procedurally fair administrative action, insofar as his rights, interests or legitimate expectations are concerned. The right to be given notice and be heard was consonant with the fundamental right to lawful and fair administrative action as envisaged in section 33 of the Constitution.

The objectors had a legitimate expectation that they would be notified of the appeal and of their right to make representations thereat.

The application for review was granted.

On consideration of the authorities dealt with above, I am of the view that the approach of the Queen's Bench in the Wilson *case (supra) [Wilson v Secretary of State for the Environment v Castle Point District Council and W J Martin & Sons (Builders) Ltd [1988] JPL 540] is correct and should be followed. The absence of a specific provision in the Ordinance or accompanying regulations as to the right of a successful party to be apprised of, and to make representations in, an appeal to the first respondent by the unsuccessful party, cannot, in my view, deprive the successful party of his constitutional right to administrative justice. This means that, in so far as his rights, interests or legitimate expectations may be affected by the outcome of the appeal, he should be entitled to expect that lawful and procedurally fair administrative action will be taken by the first respondent in hearing, considering and determining the appeal.*

FW WOOLWORTH & CO (ZIMBABWE) (PVT) LTD v SUNRAY STORES (PVT) LTD

A JUDGMENT BY GILLESPIE J
ZIMBABWE HIGH COURT
11 FEBRUARY 1998

1999 (2) SA 887 (Z)

Competition

In order to show that a party has unlawfully competed against another, it must be shown that the party alleging unlawful competition has established goodwill in the particular business in which unlawful competition is alleged.

THE FACTS

FW Woolworth & Co (Zimbabwe) (Pvt) Ltd was incorporated in 1956 and carried on the business of a chain of retail department stores in Zimbabwe. It held the exclusive right to the use of the name FW Woolworth in that country.

Woolworths (Pty) Ltd, a company incorporated in South Africa, wished to commence business in Zimbabwe, and began negotiations with FW Woolworth with a view to acquiring its business. These negotiations failed and Woolworths then turned to Sunray Stores (Pvt) Ltd for this purpose. Negotiations with Sunray Stores resulted in the acquisition by that company of a sole franchise for the operation of the business of Woolworths in Zimbabwe. That business began with the opening of a department store known as the W store located in a large and prestigious suburban shopping complex.

The W store was expensively decorated and contained goods selling at relatively high prices. The goods reflected the name 'The W Store' and where the name 'Woolworths' was on the goods, this name was replaced with the 'The W Store' name. Garments and hangers bore the name 'Woolworths'. Notices displayed in the store stated that the W Store was the sole Zimbabwean franchise of the Wooltru Group of South Africa and that there was no connection with the Woolworth companies of Zimbabwe.

The stores run by FW Woolworth were less luxurious and shabby in appearance. The goods displayed in them appeared to be old and unattractive. Its logograms were different from those used in the W Store although they also consisted in a stylised letter 'W'. Many of its goods did not bear the mark of the logogram.

After the W Store began operating, FW Woolworth brought interdicts against Sunray to restrain it from passing its goods off as those sold by the business which was owned and operated by FW Woolworth and from using its name and logogram. It alleged that Sunray had engaged in unlawful competition against it.

THE DECISION

In order to show that passing off had taken place, FW Woolworth had to show that it had established some goodwill in its name, mark or get-up of its goods. It had not done so.

Given the period during which FW Woolworth had been doing business in the country, the name 'Woolworth' had considerable recognition value, but this did not necessarily confer any goodwill. The fact that goodwill had been established had to be proved, but there was no proof of this. The same could be said of the mark used in FW Woolworth logograms.

The use of the name 'W Store' was not an imitation of FW Woolworth's name. The name had in fact been used to distinguish the store from that owned by FW Woolworth. The name 'Woolworths' was used on goods kept in the W Store as a result of that name actually being that of Sunray's franchisor, which itself was a result of the common origin of both businesses.

As far as the potential for confusion was concerned, there was little likelihood of this happening given that the two parties were selling very different goods in two different sectors of the market. Taking into account the class of person which would frequent the two stores, there was little or no potential for confusion.

The application was dismissed.

ABSA BANK BPK v RETIEF

A JUDGMENT BY BUYS J
NORTHERN CAPE DIVISION
2 OCTOBER 1998

1999 (3) SA 322 (NC)

Banking

A court cannot accept as established a trade usage which might have been proved to exist in another court merely on the basis of the acceptance of its existence by the other court. It may take notice of a fact, such as that banks charge interest on overdrawn accounts, provided that the requirements for accepting the fact have been established.

THE FACTS

Absa Bank Bpk brought an action against Retief for payment of R109 246,27 being the amount outstanding under an overdraft plus interest and costs. Absa alleged that the amount of the overdraft facility had been determined by itself in its own discretion, that Retief had been obliged to repay the amount owing at any time upon demand being made, and the bank would be entitled to charge interest on the amount outstanding on Retief's account at a rate determined by the bank in its entire discretion, alternatively at an agreed rate, such interest to be calculated once per month on the daily balance and capitalised. Absa alleged that these terms were express, alternatively tacit or implied terms of their agreement, or that the rights constituted by them arose from established trade usage.

Retief opposed the action. As a preliminary proceeding, the bank applied for a determination that the court could, upon the basis of previous judgments of the court and findings of it, take notice of the trade usages of commercial banks whereby, in the absence of agreement, they were entitled to charge interest on overdrawn accounts, and further interest on any debit by which the maximum limit of such account was exceeded, the rate of interest to be determined by the bank in its own discretion and to be calculated once per month. The court was also asked to determine which of the trade usages had been proved and which required the leading of evidence in order to prove them.

Absa contended that evidence of these matters was not required in view of the fact that in *Absa Bank v Saunders* 1997 (2) SA 192 (NC) it had been held that a bank had the right to charge interest in the manner described, in the absence of agreement between the bank and customer.

THE DECISION

In the *Saunders* judgment, the court held that on the basis of evidence given by an expert, there was a trade usage that banks charged interest on overdrawn accounts and the rate of interest applied was determined in the discretion of the bank. The judgment did not hold that this trade usage would necessarily apply where there had been no express agreement between the parties as to the applicable rate of interest. That court's judgment was confined to a determination of only those issues relating to the charging of interest on an overdrawn account and the rate of interest then applicable and not to the wider issues which were of concern to the present litigants.

There was no basis upon which this court could take notice of evidential determinations made by the court in the *Saunders* matter. However, the court could take notice of the fact that creditors did charge interest on loans made by them and that this would apply in the case of a loan constituted by a bank overdraft. This did not mean that the court, upon the basis of the finding of the court in another matter, could infer that a bank was entitled to determine the applicable interest rate in its discretion.

A court could accept that a trade usage existed if it were shown to have been long established, notorious, reasonable and certain. But such a finding did not bind another court since it would be made upon the basis of evidence presented to it in a specific case. The only basis upon which a court could take judicial notice of a trade usage was that it had been shown to exist with all the characteristics required for a trade usage. This could not be done merely because another court had accepted the existence of such a trade usage.

The application was dismissed.

KAPLAN N.O. v THE PROFESSIONAL AND EXECUTIVE RETIREMENT FUND

A JUDGMENT BY HOWIE JA (HEFER JA, GROSSKOPF JA, PLEWMAN JA and STREICHER JA concurring)
SUPREME COURT OF APPEAL
14 MAY 1999

UNREPORTED

Trusts

The nomination of beneficiaries in terms of the rules of a pension fund does not preclude the operation of the provisions of section 37C(1) of the Pension Funds Act (no 24 of 1956) and will not effectively prevent the allocation of the benefits of the fund to all the dependants of a person to whom such benefits accrue.

THE FACTS

Mr A R Kaplan was a member of two pension funds. In terms of the rules of the funds, he nominated his two sons as the beneficiaries in respect of each fund in the event of his death. On his death, he was survived by his two sons and his widow, all of whom were his dependants.

Liberty Life Association of Africa Ltd which managed the funds, allocated the benefits payable by the funds to all three dependants. It did so acting in terms of section 37C(1) of the Pension Funds Act (no 24 of 1956) which provides that notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund in respect of a deceased member, shall not form part of the assets in the estate of such a member, but shall be paid to such dependants as are identified by the fund within twelve months of the death of the member.

The trustees of trusts created for the benefit of the two sons then brought an application for an order declaring that the benefits were payable to them to the exclusion of the widow.

The application was refused. The trustees appealed.

THE DECISION

Kaplan's nomination of his two sons as the beneficiaries in respect of the funds was made in terms of the rules of the funds, but the question was whether section 37C(1) of the Act overrode the nomination.

The trustees argued that the provisions of this section aimed to exclude from the estate of the member of the pension fund that which would have fallen into it. Since the benefits of the funds would not have fallen into Kaplan's estate, because he had nominated beneficiaries in respect of them, the provisions of the section did not apply.

This argument however, went against the plain meaning of the section, which aimed to exclude all benefits payable in respect of a deceased member whether subject to a nomination or not. The phrase 'notwithstanding anything to the contrary contained in the rules' made in clear that whatever the rules said, the benefits were to be disposed of according to the scheme provided for in the Act.

The trustees also argued that the pension fund had improperly delegated its power when dividing the benefits between the three dependants. Since Liberty Life had been delegated the power to do this, it was not itself entitled to delegate this power to one of its employees to do so.

This argument however, failed to take into account the fact that a person managing the business of a fund as envisaged in the Act might be a company, which could not act except through the agency of its officers and employees. The power to delegate therefore had to be implied in the provisions of the Act.

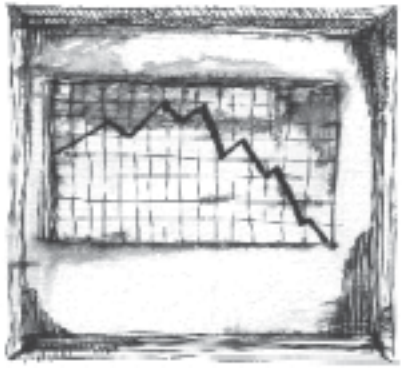
The appeal failed.

S A I INVESTMENTS v VAN DER SCHYFF N.O.

A JUDGMENT BY NICHOLSON J
NATAL PROVINCIAL DIVISION
27 OCTOBER 1998

1998 (3) SA 340 (N)

Insolvency



A contract for the sale of property entered into by the trustee of an insolvent estate without the prior consent of the Master having been obtained is null and void since it fails to comply with section 18(3) of the Insolvency Act (no 24 of 1936). Such a contract cannot be revived by subsequently obtaining the consent of the Master to the sale.

THE FACTS

On 12 September 1997, a written contract was entered into between SAI Investments and Van der Schyff acting in his capacity as trustee in the insolvent estate of M Pillay. The contract recorded the sale of erf 382, Umzinto, on which was situated a business complex, and the price was R850 000. The signatory for SAI was a certain Chetty, whose authority to sign for SAI was not given or annexed to the document.

Van der Schyff requested the consent of the Master to the sale and on 23 September 1997, the Master approved the sale.

SAI made certain payments in terms of the contract, but was put on terms to comply fully with the terms thereof. Van der Schyff alleged that compliance had not been forthcoming, and he cancelled the contract and returned payments which had been made by SAI. He proceeded to sell the property to Inclusive Investments (Pty) Ltd. Before completion of that sale, negotiations began between Van der Schyff and SAI with a view to reviving the original sale. These did not result in a completed sale, and Van der Schyff finally concluded an agreement of sale in respect of the property to Inclusive Investments, the price being R950 000.

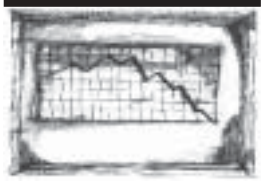
SAI alleged that the original contract was valid and enforceable between it and Van der Schyff and sought an interdict preventing the transfer of the property to Inclusive Investments. Van der Schyff contended that the original contract was not enforceable as it had been signed by Chetty without written evidence of his authority to do so as required by section 2(1) of the Alienation of Land Act (no 68 of 1981) and that it was not clearly indicated that the contract was signed by him in a representative capacity. He also contended that section 18(3) of the Insolvency Act (no 24 of 1936) had not been complied with. That section requires that the trustee of an insolvent estate shall not sell any property without the authority of the court or the Master.

THE DECISION

The authority of Chetty to sign the sale agreement should have been proved once it had been challenged. However, the challenge was a formalistic one and there was no reason to deny SAI its claim on the basis of a failure to prove the authority of the person it contended was its agent.

The fact that it was not clearly indicated on the written contract that Chetty was signing as an agent was not destructive of the contract. Extrinsic evidence is not admissible to prove that a person is acting as agent for the seller where there is no indication ex facie the written contract that the signatory does so act, but in the present case the seller was clearly stated to be SAI Investments. The signatory was consequently bound to be signing in a representative capacity despite the lack of any express indication thereof.

As far as section 18(3) of the Insolvency Act was concerned, the question was whether the prior consent of the Master was required or his consent which was given after the sale was sufficient. In certain circumstances, a requirement contained in a statute for the proper execution of some action must be complied with prior to execution and not afterwards, in order to validly execute that action. The statute itself must be examined in order to determine whether it requires compliance beforehand and whether the intention was that a contract entered into without prior compliance is null and void.



By implication, section 18(3) did require prior compliance with the requirement that the consent of the Master be obtained to any sale. Whether or not the intention was that the sale should be considered null and void because of the failure to comply depended in part on whether there would be any resulting inconvenience from the nullity of the contract. There would certainly be inconvenience to SAI but there would also be inconvenience to concurrent creditors if the contract was not rendered null and void—they would not enjoy the benefits of the surplus realised by the sale at the higher price of R950 000.

Taking into account the purpose of section 18(3), the implication was that it did intend to render contracts void which were entered into without the prior consent of the Master. SAI therefore could not be said to have a contract upon which it was entitled to bring the interdict proceedings against Van der Schyff. The application was dismissed.

BEDDY N.O. v VAN DER WESTHUIZEN

A JUDGMENT BY SCHUTZ JA (VAN HEERDEN JA, HEFER JA, NIENABER JA AND MARAIS JA concurring)
SUPREME COURT OF APPEAL
24 MAY 1999

1999 CLR 381 (A)

The spouse of an insolvent person may not secure the release of her assets from the insolvent estate without proof that in any transaction, the spouses did not collude to secure the transfer of assets from the insolvent spouse to the other.

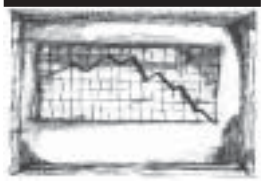
THE FACTS

Van der Westhuizen married her husband out of community of property in 1957. In 1982, Mr van der Westhuizen purchased a house for R62 500. In 1990, he sold the house to his wife for R67 000 and it was transferred into her name. Mrs van der Westhuizen paid for the house by means of payments from her bank account direct to the bondholder. She alleged that some R45 000 of this also constituted a set off of debts owed by her to her husband.

In 1989, when an application for the sequestration of Mr van der Westhuizen's estate was made by Boland Bank, in an opposing affidavit he assessed the value of the house at R120 000. He also did not show any debt owed to his wife in his list of liabilities.

Van der Westhuizen alleged that during her marriage, she had generated an income independently of her husband, chiefly from farming activities. She alleged that in 1990, she received some R110 000 from the sale of assets acquired over this period. From these resources, she stated she had paid for the house purchased from her husband.

In 1989, van der Westhuizen's husband sold his farms. After paying creditors, a surplus of some R75 000 was available and used to pay two sons for inadequate remuneration received when farming for Mr van der Westhuizen and to support a daughter. A creditor was not paid, the Davis Myles Trust, and it brought an application for the sequestration of Mr van der Westhuizen's estate. It succeeded. The trustee then appointed, refused to release Mrs van der Westhuizen's property which, by section 21 of the Insolvency Act (no 24 of 1936) had come within the control of the trustee. The trustee contended that the house sold to Mrs van der Westhuizen in 1990 was worth R180 000 at that



time, and furnished a valuation to this effect.

Van der Westhuizen applied for the release of her property in terms of section 21(2) of the Act.

THE DECISION

The purpose of section 21 is to prevent or hamper collusion between spouses to the detriment of creditors of the insolvent spouse, and to ensure that property which properly belongs to the insolvent ends up in the estate. The allegations made by van der Westhuizen in response to the trustee's assertion that her property fell within the insolvent estate was therefore of crucial importance in deciding whether or not such collusion had taken place. What had to be determined was whether or not the sale of the house to Mrs van der Westhuizen constituted a collusive donation conferring no title on her as against creditors of her husband.

In examining Mrs van der Westhuizen's response to the claim made by the trustee, it was significant that her explanations omitted substantiating evidence which could have assisted her. No details were given of the disposal of the assets which gave her some R110 000, and she furnished no alternative valuation of the house to that given by the trustee. It was clear that at the time of the sale of the house, both spouses were aware that Mr van der Westhuizen would be left with practically nothing if all his creditors were paid. By allowing Mrs van der Westhuizen to set off her claims against debts owing by her husband, they ensured that they would not all be paid and that Mrs van der Westhuizen would be paid in full.

The effect of this transaction was to confer on Mrs van der Westhuizen a preference to which operated to the detriment of creditors of the insolvent estate. Her application for the release of her assets was refused.

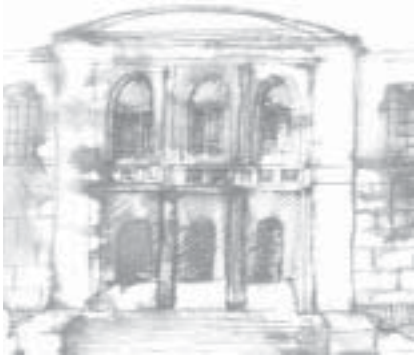
The purpose of section 21 is to 'prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse' (as van Heerden JA put it in De Villiers N.O. v Delta Cables (Pty) Ltd *1992 (1) SA 9 (A) at 13 I); and, viewed from the other angle, 'to ensure that property which properly belonged to the insolvent ends up in the estate' (as Goldstone J put it in* Harksen v Lane N.O. *1998 (1) SA 300 (CC) at 318 E).*

DEACON v CONTROLLER OF CUSTOMS AND EXCISE

A JUDGMENT BY HORN AJ
SOUTH EASTERN CAPE LOCAL DIVISION
20 JANUARY 1999

1999 (2) SA 905 (SECLD)

Constitution



Where draconian provisions affect the right of an individual thereby prejudicing his right to lawful and procedurally fair administrative action, the individual is entitled to be heard by the officials who apply such provisions against the interests of such an individual. Whereas the right to be so heard is not an absolute right, it will exist where circumstances show that the administrative official has not fully considered matters which could properly have been considered before taking the action affecting the individual.

THE FACTS

In November 1995, Deacon bought an imported Rolls Royce Silver Spirit from Gib Motors CC. He took delivery of the vehicle in March 1996. It then came to Deacon's attention that the documentation relating to the import of the vehicle may have reflected an undeclared value. He brought the matter to the attention of officials of the Controller of Customs and Excise. It was agreed between them that Deacon could retain the vehicle if he provided a guarantee for payment of R275 959,14 pending a final determination of the assessment of import duties in respect of the motor vehicle.

The Controller of Customs and Excise then investigated the matter and discovered that the invoice used at the time clearance for the import of the vehicle was given was false and the vehicle was liable for forfeiture in terms of the Customs and Excise Act (no 91 of 1964). The Controller informed Deacon of this and demanded removal of the vehicle to the State warehouse, release of it being permitted against payment of the full duty, VAT thereon and a penalty of 10% of the previous underpayment.

In order to avoid seizure of the vehicle, Deacon paid R268 487,14 under protest. The Controller refused to accept this and returned Deacon's cheque. Deacon then brought an application for a review of the Controller's decision to seize the vehicle and claimed that the decision should be corrected and set aside. Deacon based the application on his constitutional right to fair administrative action, both procedurally and administratively, and that he had been denied this in that the Controller had assumed that he was the owner of the vehicle at the time of its importation and had failed to consider any steps to be taken against Gib Motors CC.

THE DECISION

Section 87(1) of the Customs and Excise Act provides that any goods imported contrary to the provisions of the Act shall be liable to forfeiture wheresoever and in possession of whomsoever they are found. Section 88(1)(a) provides that goods may be detained for the purpose of establishing whether or not they are liable to forfeiture.

The Controller of Customs and Excise contended that upon breach, these provisions entitled him to impose forfeiture of the goods, no matter who dealt with the goods or committed the irregular acts.

Section 33 of the Constitution of the Republic of South Africa Act (no 108 of 1996) provides that every person has the right to lawful and procedurally fair administrative action where the rights of that person are affected or threatened. While this right could not be stretched to such a point that it undermined the foundation of a competent and civilised administration, the application of discretionary power by an official of such administration had to be done with regard to the spirit and objects contemplated in section 33 of the Constitution.

Section 87 and section 88 did not exclude the right to be heard on the part of a person whose goods were liable to forfeiture under them. Taking into account the objects of the Customs and Excise Act, the nature of the discretionary power conferred on the Controller under it, the conduct being controlled under it and the prejudice to the individual concerned, the right of the individual to be heard in any matter where that individual's rights would be affected by the Controller could not be said to have been excluded by the provisions of the Act. It would not have been a difficult

matter for Deacon to have been heard on the question of whether the vehicle he had purchased should be forfeited. The Controller's view was that once he had formed the view that duty was payable in terms of the Act, he was entitled to invoke the provisions of sections 87 and 88 of the Act. However, in the light of section 33 of the Constitution, he was not entitled to do so without affording Deacon the right to make representations concerning the matter.

Deacon had tendered the full amount claimed in respect of duties and penalties. He had denied any involvement in the irregular importation of the vehicle and had alerted the Controller to the irregularities as soon as he discovered them. As against this, the Controller had not afforded him an opportunity to be heard and had not considered the position of Gib Motors CC. The inference to be drawn from this was that Deacon was an innocent owner. It would not have affected the Controller significantly to allow him an opportunity to be heard; were he to have done so, he might have applied the mitigating provisions of section 93 of the Act in Deacon's favour. These were circumstances in which the right of the individual to be heard and allowed lawful and procedurally fair administrative action as provided for in the Constitution.

The Controller's decision to seize the vehicle and levy the duties and penalties thereon was set aside. The Controller was directed to reconsider the matter after conducting a full and proper hearing.

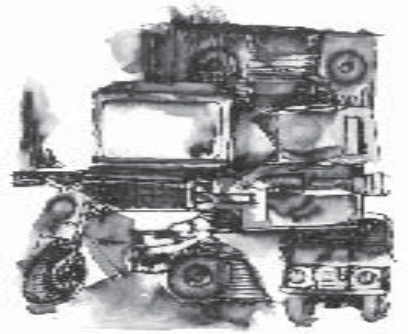
The only reasonable inference to be drawn from all the facts is that the respondent must have unknown or at least should have known that the applicant was an innocent owner. Permitting the applicant to make the necessary representations and hearing the applicant in respect of those representations was but a small sacrifice for the repondent to make in order to to get to the truth of the matter.

BMW FINANCIAL SERVICES (PTY) LTD v MOGOTSI

A JUDGMENT BY WILLIS J
WITWATERSRAND LOCAL DIVISION
16 APRIL 1999

1999 (3) SA 384 (W)

Credit Transacations



A credit grantor is entitled to an order that the goods which are the subject of the credit agreement be preserved pending the institution of an action for the enforcement of the credit grantor's rights despite the fact that the 30-day period provided for in section 11 of the Credit Agreements Act (no 75 of 1980) has not elapsed by the time the order is applied for.

THE FACTS

BMW Financial Services (Pty) Ltd leased a motor vehicle to Mogotsi, the lease being governed by the Credit Agreements Act (no 75 of 1980). In terms of the lease, BMW retained ownership of the vehicle. In the event of default by Mogotsi in making any rental payment, BMW would be entitled to obtain possession of the vehicle and recover such damages as might have been suffered in consequence of Mogotsi's breach of the agreement.

Mogotsi failed to pay certain monthly rentals, and BMW gave notice to him to return the vehicle in terms of section 11 of the Act. The section provides that a credit grantor cannot claim return of goods supplied under a credit transaction by reason of default on the part of a credit receiver unless the credit grantor has given the credit receiver written notice requiring compliance within 30 days.

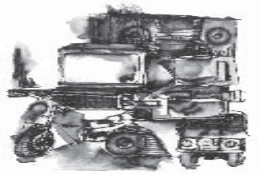
Before the expiry of the 30-day notice period, BMW applied for an order that the sheriff be authorised to attach the vehicle and keep it in his possession pending the outcome of an action for the return of the vehicle to be instituted by BMW.

THE DECISION

The return of goods contemplated in section 11 of the Act is not the same thing as forfeiture of the goods by the credit receiver. The former does not envisage the termination of the agreement as the latter does. It is therefore open to a credit grantor to enforce the terms of a credit agreement after having claimed return of the goods.

The fact that a right of action has not yet accrued—because demand as provided for in section 11 of the Act has not been effected—does not deny a credit grantor the right to preservation of the property forming the subject matter of a credit agreement. A credit grantor may secure such property pending the institution of an action and is entitled to ensure that it is properly kept until its rights in respect thereof have been finally established. BMW was therefore entitled to an order achieving that object.

The application was granted.



NUNSOFAST SHIPPING (PTY) LTD v GLENASHLEY SERVICE STATION

A JUDGMENT BY GALGUT J
DURBAN AND COAST LOCAL DIVISION
23 DECEMBER 1998

1999 CLR 360 (D)

A creditor holding a document which is liquid but for the proper citation of the creditor, is entitled to provisional sentence on the document where it is alleged that the creditor is the plaintiff. Such an allegation may be made either expressly or impliedly.

THE FACTS

Nunsofast Shipping (Pty) Ltd held a cheque made in favour of Nunsofast Shipping. It brought an action for provisional sentence against Glenashley Service Station for payment of the amount of the cheque, claiming that it was entitled to payment according to the terms of the cheque from Glenashley Service Station.

Glenashley Service Station contended that the plaintiff, Nunsofast Shipping (Pty) Ltd, was not the holder of the cheque as the holder was reflected merely as Nunsofast Shipping. It contended that provisional sentence could accordingly not be granted against it.

THE DECISION

Provisional sentence affords a remedy to a plaintiff which holds a liquid document, ie one in which the defendant has unconditionally acknowledged its indebtedness owing to a particular creditor. Where therefore, the identity of the creditor does not appear in that document, provisional sentence will not be possible, unless the plaintiff can be identified as the creditor by an appropriate allegation to that effect. Accordingly, if the name of the creditor reflected in the liquid document is the name under which the plaintiff trades or is known, this will be considered to be the plaintiff if an allegation is made that this is the creditor.

The allegation that the creditor as named in the liquid document is the same as the plaintiff may be made impliedly and not expressly. This is done where it is alleged that the cheque is payable to the plaintiff, and the cheque is made in favour of a party other than the plaintiff. The plaintiff had done this in the present case.

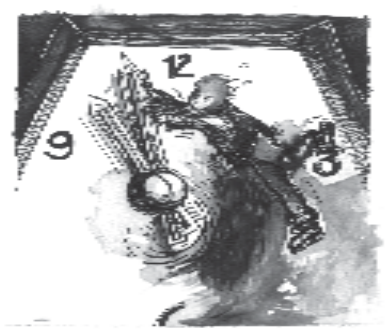
Provisional sentence was granted.

ABP 4X4 MOTOR DEALERS (PTY) LTD v IGI INSURANCE CO LTD

A JUDGMENT BY MARAIS JA (SMALBERGER JA, GROSSKOPF JA, MELUNSKY AJA and MADLANGA AJA concurring)
SUPREME COURT OF APPEAL
27 MAY 1999

1999 CLR 315 (A)

Prescription



The suspension of the running of prescription in favour of a creditor which is a person under curatorship applies to both natural and juristic persons under curatorship.

THE FACTS

IGI Insurance Co Ltd claimed from ABP 4X4 Motor Dealers (Pty) Ltd the purchase price of the salvage value of certain vehicles. At the time, it had been placed under curatorship in terms of section 6 of Act no 39 of 1984.

ABP contended that the claim had prescribed in terms of the Prescription Act (no 68 of 1969). IGI contended that the running of prescription had been delayed because it had been placed under curatorship. It contended that section 13(1)(a) of the Act applied to it. The section provides that if the creditor of a debtor is (inter alia) a person under curatorship, the period of prescription shall not be completed before a year has elapsed after the date of completion of prescription in the normal course. ABP contended that the suspension of the running of prescription in terms of section 13(1)(a) of the Act was not applicable to IGI as the reference to a person under curatorship was a reference to a natural person only.

ABP further contended that the court order placing IGI under curatorship had put the short term insurance business of the company under the control of a curator and had done no more than this. IGI had therefore, in any event, not become a person under curatorship within the meaning of Act no 39 of 1984.

THE DECISION

Section 13 of the Prescription Act contains elements of the interruption and suspension of prescription. Depending on how far prescription has run at the time the impediment referred to in the section takes place, the period of prescription may be extended or may not be affected at all.

The usual interpretation to be given to the word 'person' would include a juristic person as well as a natural person. With the changes introduced by the new Prescription Act, which abandoned any distinction between absolute and relative inability to sue, any reason to continue such a distinction was similarly abandoned. Upon the normal interpretation of the word, both natural and juristic persons were referred to by the term 'person under curatorship'.

As far as the argument that IGI was not a person under curatorship, but a company whose business was partially under the control of a curator, was concerned, it had to be remembered that the idea of a curatorship was a broadening one, as statutory creations of curatorship increased. It was apparent that a person under curatorship would be considered broadly and loosely. The fact that a curator is appointed to a person makes it appropriate to refer to the person as being under curatorship, but the appointment of a curator for a particular purpose does not always result in the person being under curatorship.

In the present case, IGI's short term insurance business had been placed under curatorship giving the curators extensive powers and the company immunity from legal proceedings brought against it. This assumption of control meant that IGI was a person under curatorship within the meaning of the Act.

IGI's claim was upheld.

BELFRY MARINE LIMITED v PALM BASE MARITIME SDN BHD THE HEAVY METAL

A JUDGMENT BY SMALBERGER JA (NIENABER JA, MARAIS JA and MELUNSKY AJA concurring) FARLAM AJA dissenting
SUPREME COURT OF APPEAL
31 MAY 1999

UNREPORTED

Shipping

THE FACTS

Palm Base Maritime SDN BHD purchased the *Sea Sonnet* from Dahlia Maritime Ltd. Palm Base alleged that Dahlia breached a term of the sale agreement, which was recorded as clause 11 and imposed on Dahlia the duty to notify the Classification Society of any matters which would lead to the withdrawal of the vessel's class or the imposition of a recommendation relating to her class. Palm Base intended to bring arbitration proceedings in London against Dahlia, claiming US$2 737 776,49. It sought an order for the arrest of the *Heavy Metal*, a ship owned by Belfry Marine Ltd, as security for this claim. Belfry appealed against the grant of this order.

Palm Base contended that the *Heavy Metal* was an associated ship of the *Sea Sonnet* by virtue of the nominee ownership of the shares in Dahlia and Belfry by a certain Emilios Lemonaris, an advocate in Cyprus where both companies were registered. It contended alternatively, that the ships were associated ships by virtue of the ultimate control over both ships by a certain N H Vafias whose company managed and operated them.

Lemonaris denied that he held the shares in the two companies as nominee for Vafias and alleged that 52% of the shares in Dahlia were held by himself as nominee for a Liberian corporation, and 48% of them by another Liberian corporation, the ultimate beneficial owner of the *Sea Sonnet* being a certain Mr Tsavliris. Lemonaris stated that he could not disclose the beneficial ownership of the *Heavy Metal* but could confirm that Tsavliris had no interest in the ship.

The application for the arrest of the *Heavy Metal* was based on sections 3 and 5 of the Admiralty Jurisdiction Regulation Act (no 105 of 1983). Section 3(6) entitles a claimant to bring an action in rem by the arrest of an associated ship instead of the ship in respect of which a maritime claim has arisen. In terms of section 3(7)(a) an associated ship is a ship owned by a person who either owned the ship in respect of which the maritime claim arose, directly or through a company, or a company controlled by such a person.

Belfry opposed the application for the arrest of the *Heavy Metal* on the grounds that Palm Base could not arrest an associated ship of a ship which was its own property, alternatively that the *Sea Sonnet* was Palm Base's property when the claim against Belfry arose and could not for that reason, be an associated ship as defined in the Act. Belfry also contended that Lemonaris did not have the power to control Dahlia and itself so that the two ships were not associated ships as referred to in the Act.

THE DECISION

(per Farlam AJA)

An important indication of Parliament's intention in regard to the ownership of the 'guilty' ship when the arrest of an associated ship is made is found in section 3(7)(a)(i) of the Act. This section provides that an associated ship is one which is owned at the time the action commenced by a person who *was* the owner of the ship concerned at the time when the maritime claim arose. This shows that changes of ownership after the time the claim arose are irrelevant and that it does not matter that the guilty ship is not owned by the person who owns the associated ship at the time of its arrest. There was therefore no impediment to the arrest of the *Heavy Metal* on the grounds that at that stage, Belfry did not own the *Sea Sonnet*.

As far as the time when Palm Base's cause of action arose was concerned, it was clear that this occurred when Belfry became in breach of contract. This was when it breached clause 11 of the memorandum of agreement, alleged to have happened before delivery of the *Sea Sonnet* took place. That meant that Palm Base's cause of action arose at a time when Dahlia was still the owner of the *Sea Sonnet*. Consequently, the *Heavy Metal* being linked by the alleged ultimate common ownership, could be considered an associated ship and susceptible to arrest in terms of section 3 of the Act.

As far as the position of Lemonaris was concerned, section 3(7)(b)(ii) was relevant. The subsection provides that a person shall be deemed to control a company if he has power, directly or indirectly, to control the company. Belfry argued that as Lemonaris was merely a nominee shareholder of Dahlia, he could not be said to control the company.

Against Lemonaris's allegation that he was merely the nominee shareholder was the allegation by Palm Base that he had a controlling interest in the companies which owned the two ships and therefore the power to control them. Lemonaris had however, alleged that Tsavliris was the ultimate beneficial owner of the *Sea Sonnet*, and had not denied that Vafias was the ultimate beneficial owner of the *Heavy Metal*. Without further evidence, it had to be accepted that this was the position. Consequently, the two ships could not be said to be associated ships.

The nominee ownership of the shares on the part of Lemonaris could not, in any event, be said to indicate real control of the ships. The Act intended to refer to real control and not merely nominal control. It did not envisage the possibility of two repositories of control.

(per Smalberger JA (Nienaber JA, Marais JA and Melunsky AJA concurring))

When interpreting section 3(7)(b)(ii), it had to be remembered that the object of the associated ship provisions, was to enable an associated ship to be arrested instead of the ship in respect of which the maritime claim arose. The principal purpose of the Act is to assist the party applying for arrest.

The section refers to the power to control a company, directly or indirectly. Lemonaris controlled the companies through his nominee shareholding in them, and was therefore in a position of indirect control of the companies owning the two ships. While Lemonaris might have merely been a nominee shareholder, he had factual control of the companies. As a result, the two ships could be considered associated ships for the purposes of the Act.

Belfry had also failed to answer the allegation that the power behind Lemonaris was the same power that controlled both ships. It had disclosed the identity of the *Sea Sonnet* but had refused to disclose the identity of its own beneficial owner. In those circumstances, Palm Base could not be criticised for failing to lead evidence contradicting that presented by Belfry.

The appeal was dismissed.

TRADAX OCEAN TRANSPORTATION SA v MV SILVERGATE

A JUDGMENT BY FARLAM AJA (NIENABER JA, MARAIS JA, PLEWMAN JA and STREICHER JA concurring)
SUPREME COURT OF APPEAL
24 MAY 1999

UNREPORTED

A dispute between the parties to a charter party which is decided in a foreign court will be considered res judicata in a South African court where there is nothing unfair or unjust about the decision given by the foreign court and both parties have been given a full and fair opportunity to litigate the dispute in the foreign court. A letter of undertaking given by one of the parties that it will not re-arrest a ship owned by the other precludes that party from re-arresting the ship after the proceedings in connection with the letter of undertaking normally applies to arrests beyond the jurisdiction in which the letter of undertaking was first given.

THE FACTS

On 7 July 1983, Tradax Ocean Transportation SA concluded a voyage charter party with a party described as 'Panagiotis Stravelakis SA Piraeus as disponent owners of [the vessel]', a party which did not exist. The vessel was the MV *Silvergate* which was owned by Astyanax SA. A dispute arose between Tradax and the owner's representatives who claimed US$218 895,83 as demurrage. Tradax paid this amount under protest to S Stravelakis SA against receipt of an owner's fleet guarantee to repay the amount either by written agreement or by final arbitration award. S Stravelakis signed the fleet guarantee on behalf of eight companies in his group, binding them as surety and co-principal debtor in favour of Tradax for the discharge by the registered owners of Astyanax in whatever amount the principal debtor was found to be indebted to Tradax.

In August 1985, arbitration proceedings began in London between Tradax and Panagiotis Stravelakis SA in respect of Tradax's claim for repayment of the demurrage. These proceedings were resisted, the respondent's representatives failing to inform the other parties that the respondent did not exist. The arbitration ended in an award in favour of Tradax, the total amount payable in terms thereof being US$500 960.

In June 1986, the *Silvergate* was arrested in the Netherlands at the instance of the Chase Manhattan Bank, the mortgagee of the vessel and Astyanax SA was ordered to pay US$139 487 734 to the bank. A judicial sale was held and the vessel was sold to Carla Maritime Inc which sold it to Silver Trident Shipping Co Ltd. A year later, the *Silvergate* was sold to Gardenia Maritime Inc and registered in the Panamanian registry.

Tradax then sought and obtained an order from a Greek court against Panagiotis Stravelakis SA enforcing the arbitration award. The order was served at the offices of the companies in the S Stravelakis group, but it was then revealed that Panagiotis Stravelakis SA did not exist. Tradax then began proceedings against all the companies which had given the guarantee, as well as against Stefanos and Panagiotis Stravelakis basing its claim against them on delict.

Before obtaining judgment under these proceedings, Tradax obtained a writ of attachment issued by the District Court for the Central District of California, and caused the *Silvergate* to be arrested at Long Beach, California. The vessel was released after a letter of undertaking was furnished by Gardenia's attorneys, and the matter proceeded to trial. In terms of the letter of undertaking, Tradax promised to release the vessel immediately, restrict its claim to US$600 000, and not to re-arrest the vessel. In the meantime, Tradax obtained an order by a Greek court that Astyanax pay the amount of the arbitration award given in the arbitration proceedings. The proceedings in the District Court in California resulted in the grant of an application brought by Gardenia for summary judgment in its favour. Tradax appealed against this judgment but the appeal was not proceeded with because in November 1992, the *Silvergate* was arrested in Durban in order to enforce certain judgments given by the Greek court. In the Durban and Coast Local Division, the parties proceeded to trial on the question of whether the judgments given by the Greek court could be enforced and in whom ownership of the *Silvergate* vested.

In the US Court of Appeals, Gardenia applied for the dismissal of the appeal still pending by Tradax. This application was granted on the grounds that Tradax had stated before the Durban court that it had abandoned and withdrawn the appeal.

Tradax appealed against the unfavourable judgment given in the Durban and Coast Local Division. In argument, a number of issues were debated. The court decided the matter on the basis of two issues, ie (i) whether the question of the ownership of the vessel was res judicata as a consequence of the decision of the District Court in California, and (ii) whether the terms of the letter of undertaking given to secure the release of the vessel from attachment in the California proceedings precluded Tradax from pursuing the proceedings in the Durban and Coast Local Division.

THE DECISION

Tradax argued that the courts in California had not given a final or definitive decision because the US Court of Appeals had dismissed its appeal without giving it a full and fair opportunity to litigate the dispute in California. It also argued that because of the manner in which the District Court arrived at its decision and the manner in which the appeal was dismissed, the principle of audi alteram partem had not been applied. It argued that the matter was therefore not res judicata as contended for by Gardenia.

The dismissal of the appeal by the US Court of Appeals was however, given in the exercise of its plenary power to dismiss an appeal and there was nothing unfair or unjust in what it did. The manner in which the District Court reached its decision was equally unobjectionable. Both parties were afforded a full hearing at the summary judgment application, and given an opportunity to present further argument. There was no compelling showing of unfairness in the decisions of these courts. Whether or not a South African court would have made similar decisions, they were made after Tradax had been given a full and fair opportunity to litigate the dispute in California and were final or definitive in nature.

Tradax's alternative argument that a judgment of the Greek court should be preferred to that given by the District Court was also to be rejected on the grounds that the judgment of the Greek court given after that of the District Court had been extinguished pending a decision on a contention of abuse of right.

The judgments of the United States courts therefore rendered the dispute between the parties res judicata.

As far as the second issue was concerned, the letter of undertaking did not relate only to claims made in the California proceedings. The parties would not have contemplated further arrests in California, since security had been given for Tradax's claim, and Gardenia would have been concerned about arrests in other jurisdictions. The letter of undertaking was, properly construed, an undertaking not to arrest in any country in respect of the same claim. The fact that Gardenia's attorneys contended that the letter of undertaking became void following the decision by the District Court was no indication that the obligation not to re-arrest the vessel fell away. Tradax's counter-promise remained effective.

The terms of the letter of undertaking therefore precluded Tradax from pursuing its claim in the Durban and Coast Local Division.

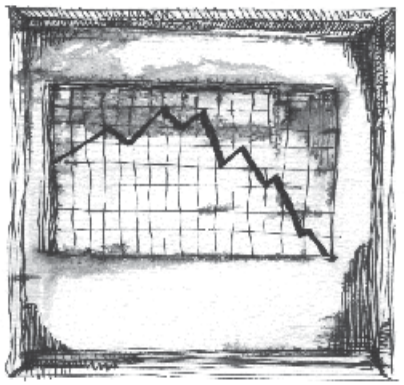
The appeal was dismissed.

WELTMANS CUSTOM OFFICE FURNITURE (PTY) LTD v WHISTLERS CC

A JUDGMENT BY MELUNSKY AJA and NIENABER JA (HEFER JA, SCHUTZ JA and MADLANGA AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 1999

1999 (3) SA 1116 (A)

Insolvency



A transfer of assets under a sale of business agreement which takes place after the institution of proceedings for the enforcement of a claim against the seller is void as against the creditor claiming enforcement. To the extent that proceedings are brought subsequent to the transfer of such assets, the creditor cannot enforce its claim against the seller. Though a settlement agreement may replace the agreement in terms of which a creditor has brought its claim, proceedings for the enforcement of the settlement agreement may still be considered as having begun with the original institution of proceedings for the enforcement of the original agreement.

THE FACTS

In February 1994, Mr I Weltman purchased a business known as DMS Woodcraft from Whistlers CC for R140 000. The purchase price was payable in monthly instalments of R5 000 starting on 1 May 1994.

Weltman failed to pay the instalments due for each month of 1994. At various stages, Whistlers issued four summonses against Weltman for payment of instalments then due to it, the first in respect of the May and June instalments being served on 20 June. in January 1995, Whistlers obtained judgments in respect of each action, except that instituted for the July instalment, the total in its favour amounting to R37 188,57.

In August 1995, the parties entered into a settlement agreement. This recorded that in settlement of a dispute between them, the purchase price would be reduced to R114 000, payable in monthly instalments of R8 000, and that Weltman would sign a consent to judgment in terms of section 58 of the Magistrates' Court Act (no 32 of 1944). Weltman signed the consent to judgment. Weltman made only two payments under the agreement and Whistlers obtained judgment in terms of the consent to judgment. A warrant of execution was issued, and in December 1995, the sheriff attached property in satisfaction of the judgment.

In September 1994, Weltman had sold his own business, which included the assets of the business purchased from Whistlers, to Weltmans Custom Office Furniture (Pty) Ltd ('the company'). These assets were transferred to the company in terms thereof. The sale agreement provided that the sale would not be advertised in terms of section 34 of the Insolvency Act (no 24 of 1936). At this time, Whistlers' claims against Weltman amounted to R22 188,57.

After the attachment of the assets, the company alleged that it was the owner of them, and claimed them as owner. The sheriff issued an interpleader summons the result of which was a rejection of the company's claim. The company appealed.

THE DECISION

(per Melunsky AJA (Madlanga AJA concurring)

Section 34 of the Insolvency Act provides that if a trader transfers any business belonging to him and has not advertised the intended transfer as specified in the section, the transfer shall be void as against his creditors for a period of six months after such transfer. Sub-section 3 of the section provides that if any person who has any claim against the trader in connection with the business has, before transfer, instituted proceedings against the trader for the purpose of enforcing his claim, the transfer shall be void as against him for the purpose of such enforcement.

Whistlers contended that this section was directly applicable, and that because it had instituted proceedings against Weltman before transfer of the assets for the purpose of enforcing its claim, the transfer of them to the company was void. The company contended that the settlement agreement terminated the original agreement for the sale of the business and that Whistlers' claim was being brought in terms of the later agreement, so that it had not instituted proceedings before the transfer of the assets.

The settlement agreement amounted to a compromise, ie the conclusion of a new agreement which replaced the original agreement. This however, did not change the essential nature of

Whistlers' claim against Weltman which related to the sale of the business. Even though the settlement agreement changed the amount payable and the method of payment, it did not change Whistlers' claim or Weltman's obligation. The proceedings instituted by Whistlers before transfer of the assets were therefore sufficiently closely connected to its claim under the settlement agreement to warrant the conclusion that the transfer was void for the purposes of section 34(3) of the Act.

The transfer was however, void only in respect of those claims for which Whistlers had instituted proceedings by the time transfer took place. Those claims amounted to R22 188,57 at that time and Whistlers was entitled to consider those transfers void which made up that amount. There being some relationship between these claims and previously instituted proceedings, section 34(3) was applicable to them and Whistlers was entitled to consider the transfer of the assets void to that extent. To the extent that its claims exceeded those claims, the transfer of the assets could not be considered void.

(per Nienaber JA (Hefer JA and Schutz JA concurring)

While it was true that the transfer was void to the extent of R22 188,57, Whistlers had never asserted that it was entitled to satisfaction of its claim to any greater extent than this. It had obtained a judgment in excess of this amount, in terms of the consent to judgment, but the extent to which it could satisfy that judgment was not in issue between the parties. What was in issue was whether or not Whistlers could obtain satisfaction of the judgment to any extent, in view of the provisions of section 34.

Since Whistlers had shown that it could, it was entitled to judgment in its favour. The appeal was therefore to be dismissed.

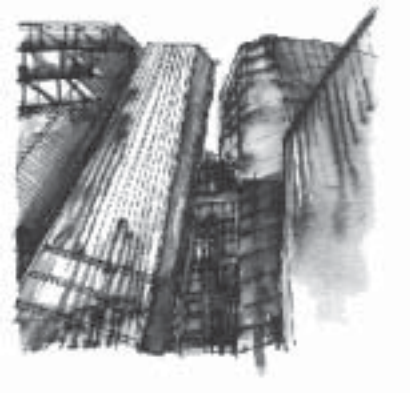
The resolution of the dispute, however, is dependent upon a proper construction of s 34(3) and not only on whether at common law a compromise ordinarily precludes the creditor from enforcing the original debt. What is necessary to decide is whether the creditor loses his protection under the subsection if, after the institution of proceedings, the contract on which the claim is based is amended or superseded by a subsequent agreement. The determining factor in each case is the closeness of the connection between the original agreement and the amending or subsequent agreement. It is, for instance, unthinkable that the mere reduction of the original contract price after the institution of proceedings to enforce the debt would result in the removal of the protection that a creditor had acquired under the subsection. Section 34(3) was intended, inter alia, *to benefit a vigilant creditor and not to penalise him for reducing his claim in order to resolve a festering dispute.*

WYNLAND EIENDOMME BK v POTGIETER

A JUDGMENT BY MOOSA J
(VAN REENEN J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
17 JUNE 1999

[1999] 3 All SA 567 (C)

Property



An estate agent must prove that it was the effective cause of a sale and that no intervening party was the cause thereof, in order to show that it fulfilled its mandate to sell the property.

THE FACTS

In March 1994, Potgieter gave Wynland Eiendomme BK a mandate to find a purchaser for her property, to be sold for R335 000. In October 1994, Wynland showed the property to a Mrs Durr who was attracted to the property but put off by certain defects in the bricks with which it had been built. The defects caused her to lose interest in the property.

In January 1995, upon the suggestion of her sister-in-law, Mrs Durr contacted Potgieter without the intervention of the estate agent, and inspected the property again. The parties concluded a sale agreement in February, the purchase price being R315 000. They also agreed that in the event of Potgieter being held liable for commission by Wynland, Mrs Durr would contribute a maximum sum of R5 000 in respect thereof.

Wynland brought an action against Potgieter for payment of commission of R21 546 on the sale of the property. It alleged that it had properly performed its mandate in that it had introduced Mrs Durr to the property and a sale had eventuated, it being the effective cause thereof. In consequence, it was entitled to payment of commission calculated at 6,84% of the price, ie R21 546.

THE DECISION

The intervention of Mrs Durr's sister-in-law represented the intervention of an agency other than Wynland in the conclusion of the sale. This intervention brought about the sale and was therefore the cause of it. Wynland was therefore not the effective cause of the sale.

In any event, Wynland did not substantially fulfil its mandate because the mandate was to sell the property for R335 000, giving Potgieter a net amount of R315 000. The property was in fact sold for R315 000 and if the commission of R21 546 was subtracted from that, Potgieter would receive less than the amount she had agreed to be satisfied with upon completion of the mandate given to Wynland, ie R293 454.

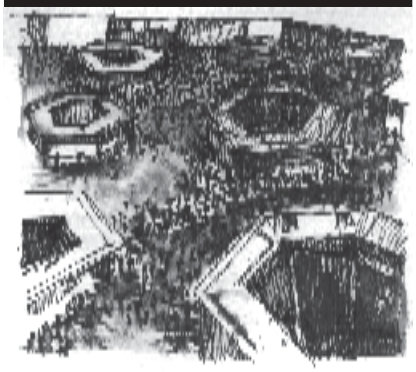
Wynland was therefore not entitled to payment of the commission it claimed.

JOSEPH FORMAN HOLDINGS (PTY) LTD v FORIM HOLDINGS (PTY) LTD

A JUDGMENT BY NAVSA J
(SOGGOTT AJ and MALEKA AJ concurring)
WITWATERSRAND LOCAL DIVISION
14 MAY 1999

1999 CLR 395 (W)

Companies



In deciding whether a curator ad litem should be appointed for the institution of proceedings by a company, a court is obliged to examine the allegations being made against the directors of the company, determine whether or not such grounds existed, and then determine whether or not the appointment of a curator was desirable or justified.

THE FACTS

Joseph Forman Holdings (Pty) Ltd held 14,7% of the issued share capital in Forim Holdings (Pty) Ltd ('the company'). The company was a successful company, being managed by M Gelbart and JE Forman firstly through a partnership and later as executive directors of the company.

In November 1990, a company wholly owned by Gelbart and Forman, Tyre Import Agencies (Pty) Ltd (TIA), purchased the shares in Kemtrade, a pharmaceutical company which was then in liquidation. In the following years, the company acquired the shares in TIA in order to obtain effective ownership and control of Kemtrade. It firstly acquired 65% of the shares, then acquired the remaining 35%. The second acquisition was paid for by the issue of further ordinary shares in itself. The pharmaceutical interests of the company proved to be extremely profitable.

Joseph Forman, a founding member and shareholder of Joseph Forman Holdings (Pty) Ltd ('Forman'), took the view that the acquisition of the shares in TIA was wrongful and the process by which Kemtrade was acquired and the shares in TIA transferred to the company constituted a breach of trust by Gelbart and JE Forman. He alleged that the price paid for the acquisition of the remaining 35% of the shares in TIA was unwarranted, was exacted at an expense to the company and constituted a wrong committed against the company.

Forman applied for an order in terms of section 266 of the Companies Act (no 61 of 1973) for the appointment of a curator ad litem to investigate an alleged claim to be instituted by the company against Gelbart and JE Forman. The company opposed the application.

THE DECISION

Section 266 of the Companies Act provides that where a company has suffered damages or loss as a result of any wrong committed by any director and the company has not instituted action for the recovery of such damages or loss, any member of the company may initiate proceedings on behalf of the company against such director notwithstanding that the company has ratified or condoned any such wrong. The section provides for such proceedings to be brought by a curator ad litem after the appointment of a curator. It requires that there be prima facie grounds for proceedings to be brought by the company and that an investigation into the desirability of instituting the proceedings is justified.

The wrong alleged to have been committed against the company was a breach of the fiduciary duty of Gelbart and JE Forman as directors of the company, in that they had not acquired for the company the full complement of shares in TIA but only 65% in the first instance.

The allegation in itself did not establish the prima facie grounds for proceedings to be brought against Gelbart and JE Forman—the court was obliged to examine the allegation, determine whether or not such grounds existed, and then determine whether or not the appointment of a curator was desirable or justified.

In examining the allegation, it became apparent that the acquisition of the shares was done with full disclosure of the interest of Gelbart and JE Forman in the transaction and with Forman's knowledge and apparent approval. The reason for the retention of the 35% interest in TIA was to ensure that Gelbart and JE Forman retained an incentive in ensuring the success of that

company. There was nothing wrong in this and it was not an indication that the directors had breached their fiduciary duties toward the company.

The acquisition of the pharmaceutical business being conducted by Kemtrade did not represent a corporate opportunity which was rightfully the company's. It had been an opportunity taken up by Gelbart and JE Forman in an area in which the company did not operate and which involved a speculative acquisition, the risk of which had not rested on the company. In any event, the opportunity had eventually been brought to the company. There had also been full disclosure of the interest of Gelbart and JE Forman, no material information having been withheld by them from the company.

No prima facie grounds having been shown for proceedings to be brought by the company, the application for the appointment of the curator had to fail.

KNIGHT FRANK SA (PTY) LTD v NACH INVESTEMENTS (PTY) LTD

A JUDGMENT BY GOLDSTEIN J
WITWATERSRAND LOCAL DIVISION
17 NOVEMBER 1998

1999 (3) SA 891 (W)

Where a party is induced to buy a property because an agent mandated to sell the property has found a buyer of the property and has notified that party of the buyer, the agent will be the effective cause of the sale of the property to that party.

THE FACTS

Nach Investements (Pty) Ltd gave Knight Frank SA (Pty) Ltd a mandate to sell its property. The property was occupied by Fulcrum Engineering (Pty) Ltd under a lease which gave Fulcrum the right of first refusal in the event of Nach wishing to sell its property. Knight Frank was aware of the right held by Fulcrum.

Knight Frank introduced a buyer to Nach. Fulcrum was advised of the offer and it exercised its right of first refusal.

Knight Frank contended that it was the effective cause of the sale and it claimed commission of R342 000 from Nach. Nach defended an action for payment on the grounds that the effective cause of the sale was the exercise of the right of first refusal held by Fulcrum in terms of its lease, its exercise thereof having been effected in order to retain its right of occupation of the property.

THE DECISION

A common sense view of the matter would point to the effective cause of the sale having been the exercise of Fulcrum's right of first refusal, which itself was effected as a result of the introduction of the buyer by Knight Frank. The introduction of the offer by Knight Frank thus induced the exercise of the right of refusal and hence the sale of the property. It was therefore the effective cause of the sale.

Were it not for the fact that Knight Frank knew of Fulcrum's interest in the property and approached Fulcrum with the offer it had secured from the buyer, it might not have followed that it was the effective cause of the sale. However, Knight Frank had in fact known of Fulcrum's interest and had approached it with the offer. This distinguished the situation from that where a sale to a buyer other than that introduced by the agent is brought about because of the buyer having been motivated by the agent having secured another buyer.

Knight Frank were the effective cause of the sale.

BODY CORPORATE OF GREENWOOD SCHEME v 75/2 SANDOWN (PTY) LTD

Companies

A JUDGMENT BY WEPENER AJ
WITWATERSRAND LOCAL DIVISION
30 NOVEMBER 1998

1999 (3) SA 480 (W)

Section 424 of the Companies Act (no 61 of 1973) also applies to the business of a company relevant to affairs other than financial affairs.

THE FACTS

The Body Corporate of Greenwood Scheme brought an action against 75/2 Sandown (Pty) Ltd and two other defendants for the payment of damages arising from its failure to construct buildings in a proper and workmanlike manner. The buildings were constructed as part of a sectional title development, and the body corporate was responsible for the control, administration and management of the common property pertaining thereto.

The action against the third defendant, the sole director of 75/2 Sandown, was based on section 424 of the Companies Act (no 61 of 1973) which entitles a court to declare any person knowingly a party to the reckless carrying on of the business of a company personally responsible for the debts of the company.

Two exceptions were raised against the claims, one of which was that section 424 of the Companies Act applies only to the financial affairs of a company and does not apply to a company's building activities.

THE DECISION

Section 424 was not limited to apply solely to the financial affairs of the company in question. It could apply to the carrying on of any business conducted by the company. The company's financial position might be sound and the company itself might still be carrying on business, at a time when the provisions of the section are applied to those to whom the section can be applied, usually its directors.

It was clear from past decisions on cases concerned with the section, that the purpose of the section has been considered to be to supplement the common law remedies available against a person who has engaged in reckless trading and to simplify the evidential requirements of a delictual claim. This object is achieved by applying the section to matters other than those relevant to the financial affairs of the company.

The exception was dismissed.

BOOKWORKS (PTY) LTD v GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL

A JUDGMENT BY CLOETE J
(HEHER JA and PRELLER AJ concurring)
WITWATERSRAND LOCAL DIVISION
6 AUGUST 1999

1999 CLR 437 (W)

A court considering an application for the furnishing of security for costs is required to exercise a narrow discretion in deciding whether or not to furnish such security. This means that court is required to decide upon the furnishing of security or otherwise in a judicial manner, ie not capriciously or upon a wrong principle or with bias. In doing so, the constitutional rights of the litigant must be considered, but there is no reason for the court to be predisposed to denying an application for security on the grounds that this would deny the litigant access to the courts.

THE FACTS

Bookworks (Pty) Ltd brought an action for damages against the Greater Johannesburg Transitional Metropolitan Council (GJTMC) and against the second respondent. Bookworks was ordered to provide security for costs in terms of section 13 of the Companies Act (no 61 of 1973) and Rule 47 of the Uniform Rules of Court.

Bookworks wished to appeal against the order and brought an application for condonation with regard to its prosecution of the appeal. The respondents opposed the application on the grounds that there were no prospects of success on appeal.

The order that security for costs be furnished was given after consideration of the argument presented by Bookworks that if security for costs was ordered, Bookworks would be unable to provide it, thus denying it the constitutional right of access to the courts. That court also took into account the fact that Bookworks was in a bad financial situation for the two years preceding the actions alleged to have been the cause of Bookworks' damages. It also considered that the action brought by Bookworks was ultimately for the benefit of the sole shareholder of the company and his father, both of whom had not been prepared to offer security for costs. On appeal, the sole shareholder offered to undertake suretyship obligations in his personal capacity for the costs of the action.

Bookworks contended that the order was given without a proper exercise of judicial discretion and that there were reasonable prospects of success in overturning the order on appeal.

THE DECISION

In deciding whether or not an appeal should be allowed, the test was whether or not the discretion given a court in terms of section 13 of the Act had been exercised judicially in the narrow sense of having not been exercised capriciously or upon a wrong principle or with bias. The discretion conferred by section 13 is a discretion so understood. The section provides that ...

A court's discretion in deciding whether or not to order that security be furnished is a narrow discretion because it concerns a matter of costs, involves a regulation by the court of its own procedures and requires the exercise of a value judgment.

The argument that the effect of the constitutional right of access to the courts was to impose on a court a predisposition to uphold that right could not be accepted. The court was bound to exercise its discretion under section 13 with due regard to the litigant's constitutional rights, but without a predisposition to deny an application for the provision of security for costs. The decision to grant the application for security for costs had been made without accepting that any predisposition was required, and had not been wrongly made for that reason.

The fact that the court took into account the bad financial situation of Bookworks in the two years preceding the events in respect of which it brought its action for damages indicated that the court had exercised its discretion after considering Bookworks' allegation that its inability to furnish security for costs was brought about by the conduct of those who had caused its damages.

The court might have misdirected itself in considering the father of the sole shareholder a person who would ultimately benefit from a successful action, but it remained true that the sole shareholder would benefit from a successful action. The suretyship offered on appeal could not assist him since the offer had not been made when the court was asked to exercise its discretion.

The appeal failed.

BAFOKENG TRIBE v IMPALA PLATINUM LTD

A JUDGMENT BY FRIEDMAN JP
BOPHUTATSWANA HIGH COURT
17 SEPTEMBER 1998

1999 (3) SA 517 (B)

Trusts

Beneficiaries of a trust may bring an action to recover loss sustained by the trust not only where the loss is caused by the trustee, but also where the trustee fails to take steps to recover the particular loss sustained by the trust.

THE FACTS

During the period 1871 to 1935, the Bafokeng tribe purchased 13 farms. It was then and thereafter held in trust for it by various parties as it could not be registered directly in its own name in view of the racial policies of the government of the day.

In 1977, a government official holding the land in trust for the tribe granted a mining lease over the land and the lease was ceded to Impala Platinum Ltd in the same year. At a later stage, the government official's position was superseded by the State President of Bophutatswana as trustee for the tribe and thereafter by the Minister of Land Affairs in whose name the land was then registered in his capacity as trustee.

In 1995, the tribe brought an action against Impala Platinum Ltd in which it sought a declaration that the registration of certain of its land in the name of the State President of Bophutatswana was invalid, and that a deed of cession and mining lease concluded by him in respect of the land in 1986 were void.

Prior to trial, the tribe sought to amend its particulars of claim. One of the amendments alleged that the Minister of Land Affairs was precluded from bringing the action or it would be improper for him to do so, having regard to conflicts of interest which would arise from his position as trustee and his position as Minister of State. It alleged that such a conflict of interests arose in regard to the action being brought by it against Impala.

Impala objected to the amendment on a number of grounds, one of which was that as beneficiary of the trust, the tribe did not have the right to sue, and that only the trustee of the trust could do so on its behalf.

THE DECISION

A beneficiary of a trust may bring an action to recover a loss sustained by the trust where a defaulting or delinquent trustee fails to do so. The action may either be brought on behalf of the trust or by the beneficiary in his own right.

This exception to the general rule that such an action should be brought by the trustee of the trust extends beyond actions against the trustee himself in cases where the action is founded on the trustee's breach of duty. In the present case therefore, where it was not certain that the Minister of Land Affairs made common cause with the previous trustee who, it was alleged, acted against the interest of the trust and its beneficiaries, an action could be brought by the beneficiaries based on allegations that the Minister failed to take action on behalf of the trust. The trustee's immobility gave as much a reason for the beneficiaries to bring an action on behalf of the trust as his having caused loss to the trust.

The Constitution also provided a reason to confer on the tribe the right to bring the action against Impala. Sections 7(4)(a) and 38 of the Constitution of the Republic of South Africa Act (no 200 of 1993) provide for the right to enforce a right in court. This was what the tribe sought to do in the present case.

The tribe therefore did have the right to bring the action against Impala.

GOLDEN LIONS RUGBY UNION v FIRST NATIONAL BANK OF SA LTD

A JUDGMENT BY SCHUTZ JA (HEFER JA, VIVIER JA, FH GROSSKOPF JA and MARAIS JA concurring)
SUPREME COURT OF APPEAL
26 MARCH 1999

1999 (3) SA 575 (A)

Contract

Although a provision in an agreement that the terms thereof are to operate in perpetuity is unusual, it is effective between the parties. The plain meaning of the provision will not be construed so as to destroy the effectiveness thereof by inferring a limitation on the duration of the right.

THE FACTS

In August 1987, First National Bank of SA Ltd agreed to lend R26,65m to the Golden Lions Rugby Union to allow the Union to obtain cession of a lease over its rugby stadium and the share capital of Ellis Park Stadium (Pty) Ltd (EPS) which managed the stadium. In terms of the agreement, the bank was given a preferential right to finance sales or leases of suites or seats at the stadium and the Union undertook to place all banking business with the bank.

In terms of clause 9.1 of the agreement, the Union was obliged to ensure that the bank's name was used in connection with all publicity campaigns and programmes, tickets and other documentation relating to the stadium and sporting activities taking place there, in such a manner as to convey the bank's close association with the stadium and the Union. Clause 9.2 provided that this promotion was to endure in perpetuity or until terminated by the bank. Clause 9.3 provided that the parties would procure that the area immediately above the TV screen at the stadium, as well as other specified areas, would carry free advertising of the bank's name.

In May 1988, the agreement was varied as a result of a decision that the Union would secure a listing for EPS on the Johannesburg Stock Exchange, thereby enabling an early repayment of the Union's indebtedness to the bank. Various provisions of the first agreement were amended but it was provided that the provisions of clause 9 would continue to apply, whether or not that agreement was cancelled. The EPS listing took place. Thereafter, the Union decided to buy back the shares which were had then been issued. The bank refused to supply the funds necessary for this and the Union turned to Trust Bank for this.

The Union contended that it was longer bound by the provisions of clause 9 as they did not survive the ending of the close association between it and the bank. The bank sought and obtained a declaration that the provisions did operate in perpetuity. The Union appealed.

THE DECISION

The Union contended that the right to publicity for the bank's name was a right which was to be exercised so as to convey the continuing business association between the Union and the bank. When that association ended, the right would similarly terminate.

This contention was inconsistent with the plain meaning of the words used in clause 9.2, ie that the right would endure in perpetuity. No reference to the continued association between the Union and the bank was made. To accept the contention would be to insert the words 'for so long as the close association lasts' in the terms of the clause. This would directly contradict the words 'in perpetuity'.

It was also clear that the parties intended the right to continue in perpetuity as the obligation to continue placing banking business with the bank terminated with the repayment of the loan. A termination date for the association between the parties was envisaged, yet the continuation of the publicity rights beyond that date was provided for. Furthermore, the agreement entered into in May 1988 clearly distinguished clause 9 of the original funding agreement as incorporating provisions which would continue to apply.

The provisions of clause 9.1 and 9.2 therefore survived the ending of the close association between the Union and the bank and were effective between the parties.

Clause 9.3 was however different in that it did not incorporate the words 'in perpetuity' and it did not refer to any close association between the parties. Its subject matter was also different from that of clauses 9.1 and 9.2. There was no reason to consider its application as continuing in perpetuity.

The provisions of clauses 9.1 and 9.2 were therefore effective between the parties but not those of clause 9.3.

CONSOLIDATED EMPLOYERS MEDICAL AID SOCIETY v LEVETON

A JUDGMENT BY SCHUTZ JA (VIVIER JA, HOWIE JA, ZULMAN JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 1998

UNREPORTED

As a member of a medical aid society in terms of a settlement agreement terminating his employment, Leveton asserted his rights to continuation as a member without being transferred to another medical aid society. It was held that in terms of the rules, Leveton was entitled to retain his existing membership without transfer and that the decision to transfer him had been taken unauthorisedly in the face of a decision of a disputes committee that the transfer was not acceptable.

THE FACTS

In terms of his employment agreement with Southern Life Association Ltd, Leveton was to remain a member of the medical aid schemes of which Affiliated Medical Administrators (Pty) Ltd (Ama) was a member. In terms of clause 12 of the agreement, it was agreed that on termination of the appointment, Leveton would remain a member of the medical aid and provident fund and be treated in this regard as if he had retired. Leveton became a member of Consolidated Employers Medical Aid Society (Cemas), and Ama, which was controlled by Southern, paid the employer's contributions to Consolidated. Rule 6.3 of the scheme provided for the retention of membership of the scheme in the event of a member retiring from the service of his employer.

In terms of a settlement agreement entered into between Leveton and Southern on 12 August 1991 ending Leveton's employment, it was provided that Leveton would be entitled to remain a member of the provident fund and medical aid scheme and would pay contributions applicable to a retired member after termination of his employment on 30 June 1992. Southern would honour all its obligations in terms of the employment agreement up to the date of termination. Thereafter, Ama paid Leveton's contributions as it had in the past.

In March 1994, Ama informed Leveton that it had decided to transfer its continuation members to the Southern Health medical aid. Leveton disputed its right to do so. He appealed to Cemas's disputes committee. That committee disagreed with the Cemas management committee's decision to transfer all continuation members to Southern Health medical aid and recommended rescission of the earlier decision. The Cemas management committee refused to do so. It contended that Leveton had left the service of his employer in 1992 and so became subject to the provisions of Rule 10.2 of the Cemas medical scheme rules. That rule provided that a member who left the service of the employer for any reason would cease to be a member and all rights of participation in the benefits under the Rules would thereupon cease.

Leveton then brought an application for an order that the decision

of the disputes committee was binding on Cemas and that he be readmitted to membership. He also claimed that the decision to transfer his membership be reversed as the transfer was a breach of the settlement agreement.

THE FACTS

Even if Leveton had left the service of his employer, thereby becoming subject to the provisions of Rule 10.2, he remained a member of the medical aid scheme. A 'member' was defined in the Medical Schemes Act (no 72 of 1967) as a person who has been enrolled or admitted as and is still a member of a scheme. Leveton had shown that he fell within this definition because he had shown his original certificate of membership and the continuation of his membership in terms of the settlement agreement.

Since he was a member of the scheme at the time of the purported transfer of membership to the Southern Health medical aid, he was entitled to challenge that transfer on the basis of his rights as they already existed and were provided for in the Cemas medical aid scheme. This included his right to remain a member and not be transferred to another scheme.

Leveton was also entitled to reinstatement of his membership of the Cemas medical aid scheme on the grounds that the finding of the disputes committee was binding on the management committee. The management committee had acted in a high-handed manner in ignoring or brushing aside the decision of the disputes committee. That decision was taken by a body which, in terms of section 20(1)(g) of the Act, was a tribunal independent of management and enabled to perform a function akin to that of an arbitration. It was a decision that the management committee was not entitled to ignore and one which it would have to apply for review of, should it wish to contest its decisions.

The decision of the disputes committee was binding on Cemas and Leveton was readmitted to membership.

KELVINATOR GROUP SERVICES OF SA (PTY) LTD v McCULLOCH

A JUDGMENT BY NUGENT J (SHABORT JA and GOODMAN AJ concurring)
WITWATERSRAND LOCAL DIVISION
7 JUNE 1999

1999 CLR 454 (W)

A tacit term will not be imported into an agreement where that term is in conflict with the other terms of the agreement. An assumption commonly held by the parties to an agreement which is incorrect nullifies the agreement only if the agreement is dependent on the common assumption.

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. It contended that it was a tacit term of the termination agreement that if the intended retrenchment was not required for operational reasons and McCulloch was offered continued employment with it, the agreement would lapse and be of no force or effect. In the alternative, it contended that the agreement was concluded on the basis of a common assumption that Kelvinator's business would be discontinued, and that because this did not take place the agreement was of no force or effect.

THE DECISION

A tacit term must be a term which both parties must have intended would have been included in their agreement, or would have intended it to be so included if they had turned their minds to that aspect. Such a term will therefore not be considered to be part of an agreement if it would be in conflict with the express provisions of the agreement.

In the present case, the term which Kelvinator contended should be seen as a tacit term was in conflict with the express provisions of the agreement. The reference to McCulloch's redundancy was no indication that the employment contract was to terminate only if it transpired that she did become redundant. That reference was an indication of the reasons for the agreement and not the establishment of a condition precedent for the conclusion of it.

As far as the alternative contention was concerned, the rule was that whatever the common assumption accepted by both parties to an agreement, those parties will be bound to the agreement unless the existence of the agreement was dependent on the common assumption. If the common assumption relates to a future state of affairs, different considerations do not apply: the agreement remains unaffected by the commonly held (incorrect) assumption so long as the existence of the agreement is not dependent on it.

The agreement was clear and unambiguous and there were no grounds for importing a term which would make it conditional.

a contract will fail only if it can be said that it was the parties' intention that the existence of the contract should be dependant upon the existence of the assumed state of affairs. Whether that was their intention will depend upon the construction to be placed upon the particular contract, seen in the context of any evidence of surrounding circumstances that might be admissible

MERVIS BROTHERS v INTERIOR ACOUSTICS

Contract

A JUDGMENT BY LEVESON J (FLEMMING DJP and BLIEDEN J concurring)
WITWATERSRAND LOCAL DIVISION
6 NOVEMBER 1997

1999 (3) SA 607 (W)

An arbitrator exceeds his powers where he gives an order for specific performance and the parties have appointed the arbitrator to make an award for the payment money. Although an arbitrator is entitled to make an award of specific performance in terms of section 27 of the Arbitration Act (no 42 of 1965) he may not do so where a court will not make such an order in the same circumstances.

THE FACTS

Interior Acoustics contracted with Mervis Brothers to perform certain works for the latter. A dispute arose between them regarding the performance of the works and Interior Acoustics proceeded against Mervis with an action in the High Court. Before the hearing of the matter, the parties agreed that the dispute would be determined by arbitration, the arbitrator to decide on the amount owing to Interior Acoustics. The second respondent drew up an agreement to arbitration which Mervis signed. Interior Acoustics also signed it, adding further terms to which both parties agreed.

The arbitrator directed the appointment of a third party to oversee specified remedial work and upon completion thereof, payment by Mervis. He did not assess the cost of the remedial work and completion thereof, but ordered Interior Acoustics to complete the works and Mervis to pay it thereafter.

The arbitrator's award was subsequently set aside by order of court. Mervis appealed against this order.

THE DECISION

The order setting aside the arbitrator's award was correctly given, in view of the fact that the arbitrator had been appointed merely to decide upon what amount was owing to Interior Acoustics. The arbitrator had in fact ordered that completion of the work was to take place, ie specific performance, and this meant that he had exceeded his powers. In terms of section 33(1)(b) of the Arbitration Act (no 42 of 1965), where an arbitration tribunal has exceeded its powers in making an award, the court is entitled to set the award aside.

In terms of section 27 of the Act, an arbitrator may order specific performance in circumstances where a court would have the power to do so. However, a court would not make such an order in the present case as it would be difficult for the court to enforce an order of specific performance of the works. The arbitrator's appointment of the third party to oversee the work did not overcome this difficulty as a court would not have exercise the power to do so, and in any event constituted an unauthorised delegation of the arbitrator's powers. Furthermore, the parties had never agreed that the arbitrator would be entitled to order the specific performance of the work.

Another objection to the award was that the arbitrator left undetermined the issues upon which the parties were in dispute, yet when the arbitrator gave the award, his functions were complete.

The appeal was dismissed.

TESORIERO v BHYJO INVESTMENTS SHARE BLOCK (PTY) LTD

Contract

A JUDGMENT BY WUNSH J
(SCHABORT J concurring)
WITWATERSRAND LOCAL DIVISION
1 JUNE 1999

1999 CLR 364 (W)

The contractual capacity of a person is determined by the law of the place where the contract is entered into, not the law of the matrimonial property regime to which the person's marriage pertains. Where it is clear that a contract is entered into by a person who knows and understands the meaning of the contract, there will be no ground for a finding that the contract was entered into by mistake.

THE FACTS

Tesoriero signed a deed of suretyship in favour of Bhyjo Investments Share Block (Pty) Ltd in respect of the debts of a close corporation, Sellavie Clothing CC, which she operated as a business concern manufacturing clothing and selling to boutiques. At the time, she was married according to the matrimonial property regime of Argentina which she said was the same as that of South Africa.

Tesoriero was Spanish-speaking and did not have a good command of the English language. At the time when she signed the deed of suretyship, she asked questions concerning the nature of the agreements she was concluding including the terms of the lease giving rise to the principal indebtedness. She depended on the other member of the close corporation to explain to her the nature of the contracts she was then entering into.

Bhyjo brought an action for payment under the deed of suretyship. Tesoriero appealed against the judgment given against her on the grounds that being married in community of property, she had lacked the contractual capacity to enter into the deed of suretyship, alternatively that she had not understood the nature of the transaction she had entered into.

THE DECISION

The law applicable to the determination of contractual capacity is the law of the place where the contract is concluded. In the present case, this was South Africa. The law pertaining to the matrimonial property regime was not relevant.

In terms of sections 11 and 14 of the Matrimonial Property Act (no 88 of 1984) Tesoriero had contractual capacity. In terms of section 15(2)(h) of that Act, she could not bind herself as surety without her husband's consent except where the suretyship was signed in the ordinary course of her profession, trade or business (an exception provided for in section 15(6) of the Act).

It was true that no discussion of this exception had taken place in the trial proceedings, but the evidence presented did make it possible to determine whether or not the section applied. It was clear that Tesoriero had entered into the deed of suretyship as part of her activities in a profession, trade or business.

The deed of suretyship had also been entered into without any mistake on her part as to the nature and content thereof. It had been entered into in conjunction with a lease. It was not a complicated document and stood separately from the lease and Bhyjo's representative had done nothing to encourage a misunderstanding of the document on her part.

The appeal was dismissed.

BOE BANK BPK v VAN ZYL

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
19 APRIL 1999

1999 (3) SA 813 (C)

Duress which vitiates the formation of a contract may be exercised by one party as against another subtly and by implication, as when one party raises the possibility of criminal sanction which can be applied against the one and this induces the other party to enter into the contract. In such circumstances, the application of the duress will be unlawful and contra bonos mores, and a basis upon which the contract will be avoided.

THE FACTS

BOE Bank Bpk and Karsten entered into a floor plan agreement in terms of which BOE facilitated Karsten's second-hand motor vehicle business by financing the sale of motor vehicles which were sold by Karsten in the course of that business. The bank discovered that certain vehicles owned by it and which it thought were still in Karsten's possession had been sold by Karsten or lost by him without it being paid the amount due to it under the financing agreement. It issued a demand for payment of this amount, R200 000, and terminated his overdraft facility of R100 000.

A meeting then took place between Karsten's father-in-law, Van Zyl, and two officials of the bank. (Karsten was married in community of property.) At the meeting, the bank posited various options available to the parties, one of them being to sequestrate Karsten's estate, another being to bring criminal charges of theft and fraud, and another to give a capital injection into the business with the addition of further security by way of a suretyship undertaking given by Van Zyl. The meeting terminated with the decision to await the discharge of Karsten himself from hospital and restore the overdraft facility in the meantime.

After a second meeting had taken place, the bank increased Karsten's overdraft facility by R200 000 to be used to settle the amount it claimed as owed under the floorplan agreement, and obtained a suretyship undertaking by Van Zyl limited to the extent of R200 000 and effective only after Karsten's indebtedness were to exceed R100 000.

The bank alleged a further default by Karsten under the floorplan agreement and it demanded payment of the outstanding amount from him and from Van Zyl as surety. It brought an action against Van Zyl claiming the amount by which Karsten's liability exceeded R100 000. Van Zyl defended the action on the grounds that he had been induced to sign the deed of suretyship by duress and that accordingly the deed was of no force or effect between the parties.

THE DECISION

In order to prove that duress has taken place in the formation of a contract, it must be shown that the fear experienced by the one party vis-a-vis the other was a reasonable fear, was caused by the threat of some considerable and imminent evil, the threat was unlawful and the moral threat must have caused damage.

In the context of the present case, after the bank first discovered that Karsten had not adhered to the floorplan agreement properly, it could exercise the right to demand repayment of all debts due to it, sequestrate Karsten's estate, attempt to regain possession of the sold motor vehicles and bring criminal charges of theft and fraud against Karsten. Both the bank and Van Zyl were aware of these things when the deed of suretyship was signed. Van Zyl was therefore influenced by the pressure of these circumstances when he signed the deed of suretyship, but he had to show that the bank officials exercised pressure on him which was both unlawful and contra bonos mores.

The pressure which was exercised by the bank was expressed subtly and by implication. At the meeting attended by the bank, it as well as the other parties, knew that the criminal sanction for Karten's dishonesty was a prison term without the option of a fine. Van Zyl was aware of the negative implications of this for his daugh-

ter and her children. The possibility of criminal sanction therefore constituted pressure put upon him by the bank when it insisted on his signing the deed of suretyship. This was pressure which could be considered unlawful and contra bonos mores.

This duress was a basis upon which the deed of suretyship could be set aside. The deed of suretyship was void and ineffective.

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

A JUDGMENT BY OLIVIER JA (VAN HEERDEN DCJ, VIVIER JA and HOWIE JA concurring, FARLAM AJA dissenting)
SUPREME COURT OF APPEAL
9 JUNE 1999

[1999] 3 All SA 529 (A)

Shipping

An admiralty action lapses in terms of section 1(2)(b) read with section 3(10)(a) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) where security for the action is furnished after commencement of the action.

THE FACTS

The owners of certain liquid cargo which was carried from Rotterdam to Durban under a Tanker Bill of Lading by the *Cape Spirit* brought an action in rem against the ship alleging that the cargo was contaminated by cashew nut shell oil during the voyage, and claiming damages. This was done by the issue of summons on 18 January 1995, and the issue of a warrant of arrest. On 15 February 1995, the ship was released after it furnished security for the claim brought against it.

Nothing further was done to pursue the action and some two years later, the ship began proceedings for a declaration that the security which had been furnished had lapsed and that the action had lapsed. These proceedings were based on section 1(2)(b) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) which provides that an admiralty action shall lapse if property taken as security upon the commencement of the action is deemed to have been released and discharged in terms of section 3(10)(a)(ii) of the Act. That section provides that property deemed to have been arrested shall be deemed to have been released if no further step in the proceedings is taken within one year of the giving of security.

The owners opposed the application on the grounds that the ship was in fact arrested, and therefore not deemed to have been arrested. Since Section 3(1)(a)(ii) dealt only with property deemed to have been arrested, it was not applicable in the present case where the ship had in fact been arrested.

THE DECISION

The plain meaning and intention of section 3(1)(a) is that property deemed to have been arrested is suspectible to release as much as property which has actually been arrested, where the action has commenced with the furnishing of security as provided for in section 1(2)(a). The section incorporates no distinction between property deemed to have been arrested and property actually arrested.

The correct interpretation of

section 3(1)(a) was to understand property deemed to have been arrested or attached as any property which had been arrested or attached, whether because it was deemed to have been arrested or attached or because it actually had been arrested or attached. When the second part of the section referred to the first part, in included within it the description of the property as given in the first part and thereby made no distinction between the two cases.

Were there to be a distinction, the release and discharge mechanism provided for in section 3(10)(a)(ii) would operate where security is given for a ship a day before its arrest but not where it was given a day after its arrest. That nuance would be of no practical concern to the parties and could not have been a distinction the legislature contemplated when enacting the section.

The admiralty action brought by the cargo owners had therefore lapsed.

COMMISSIONER OF CUSTOMS AND EXCISE v CONTAINER LOGISTICS (PTY) LTD COMMISSIONER OF CUSTOMS AND EXCISE v RENNIES GROUP LTD

A JUDGMENT BY HEFER JA (VIVIER JA, NIENABER JA, PLEWMAN JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
28 MAY 1999

1999 (3) SA 771 (A)

The Commissioner of Customs and Excise is obliged to satisfy himself that an importer or exporter has not taken all reasonable steps to prevent non-fulfilment of payment of customs duty before he may impose liability for payment on the agent of the clearer in terms of section 99(2)(a) of the Customs and Excise Act (no 91 of 1964).

THE FACTS

Container Logistics (Pty) Ltd and Rennies Group Ltd attended to the clearance of goods through Durban harbour upon instructions being given to them by two companies, Access Freight and Anglo Dynamic. They did so, signing the relevant bills of entry as agent for the remover or exporter. The goods were destined for a neighbouring country and were therefore entered for removal in bond. The effect of this was that liability for payment of customs duty imposed by the Customs and Excise Act (no 91 of 1964) would be conditional on proof that the goods had been duly taken out of the common customs area.

In due course, the bills of entry were presented to the Controller of Customs and Excise duly signed and stamped by an official at a border post showing that the goods had been removed from the common customs area. It later appeared that the stamps and signatures thereon were counterfeit and the goods had never left the common customs area. The circumstances of the forgery and the cause thereof remained unknown to all the parties to the ensuing litigation.

The Commissioner of Customs and Excise then demanded from Container Logistics and Rennies payment of duties and other charges alleged to be due in respect of the goods. The two parties' attorneys then requested the Commissioner to withdraw the demand. The Commissioner invited representations in regard to the request, listing documents he required in support of the application. The list did not include the licences held by the parties in terms of which they were entitled to clear goods. The Commissioner rejected the applications.

Later, the Commissioner indicated that he was required to consider the applications upon the basis of section 99(2)(a) of the Act and invited further representations this time taking into account the licences in terms of which the parties cleared goods. The Com-

missioner again rejected the applications, citing the absence in the applications of any reference to the relationship of trust between the parties and himself which had convinced him that any effort was expended by them to ensure that the bills of entry were correct.

The parties contested the Commissioner's decision to reject their applications.

THE DECISION

Section 99(2)(a) of the Act provides that an agent of an importer or exporter will be liable for the fulfilment of payment of customs duty and charges unless he proves to the satisfaction of the Commissioner that he was not a party to the non-fulfilment of payment, notified the Commissioner as soon as he became aware of the non-fulfilment, and took all reasonable steps to prevent such non-fulfilment.

The Commissioner was satisfied as to the first two requirements, but not the third. It appeared however, that in deciding that he was not satisfied as to the third, the Commissioner had not applied his mind properly to the second applications made by the parties. In bringing into account the relationship of trust, the Commissioner had shown no change in his assessment of the applications but had merely repeated the same assessment as had been given of the first. This showed that the Commissioner had merely decided that they were obliged to fulfil their obligations as defined in section 99(2)(a) and had not determined whether the third of the proviso requirements of that section had been fulfilled, ie whether the parties had taken all reasonable steps to prevent the diversion of the goods. Such a determination would involve determining what reasonable conduct would be in the context of the clearing and forwarding industry. No mention was however made of this in the Commissioner's decision. The Commissioner had also not required the furnishing of documentation such as invoices and confirmations of sale which might indicate whether or not the parties had taken all reasonable steps to prevent the diversion of the goods.

Since the Commissioner had not properly applied his mind to the parties application, the decision to reject it was set aside.

TOSEN ENTERPRISES CC v COMMISSIONER OF CUSTOMS AND EXCISE

A JUDGMENT BY THIRION J
DURBAN AND COAST LOCAL DIVISION
18 DECEMBER 1998

1999 (3) SA 432 (D)

Evidence that an importer executes an order for goods from a party in a foreign country, being invoiced for the goods by the exporter, the place of delivery being the place where the importer resides, indicates that the importer has purchased the goods and become the owner of them, despite the fact that it has charged the ultimate buyer a commission on the goods. Goods in transit may be considered to be imported goods for the purposes of the application of section 114 of the Customs and Excise Act (no 91 of 1964).

THE FACTS

Tosen Enterprises CC received two orders for clothing and fabric from a firm in Malawi acting for two firms in Tanzania. It confirmed the orders with the two firms in Tanzania and stipulated that payment was to be made in advance and delivery would take place '14 days from despatch from our bond'. Charges ex bond store would be for the buyer's account and commission at 3% would be charged on the goods.

Tosen then ordered the goods from Spectra Exim PTE Ltd in Singapore. Spectra invoiced the goods to Tosen and showed their destination as Durban. Tosen instructed Sealandair, shipping and forwarding agents in Durban, to clear one consignment of goods for warehousing in South Africa. Sealandair cleared the goods under a bill of entry which reflected Tosen as the importer and warehoused them with DTB Warehousing Co. Tosen instructed Evergreen Shipping CC to clear another consignment of goods for warehousing for export. Evergreen did so, removing them in bond from Durban harbour and warehoused them in the warehouse of Containerlink. The bill of entry showed the destination of the goods as South Africa and the purpose of entry for warehousing for export.

Shortly afterwards, on 7 September 1995, both consignments were detained by the Controller of Customs and Excise, Durban, under section 88(1) of the Cus-

toms and Excise Act (no 91 of 1964) and removed to the State warehouse. The Controller alleged that earlier in the year, certain goods imported by Tosen were not exported to Tanzania as alleged by Tosen, that an indication on a bill of entry that they had been was a misstatement of the truth and that the goods had been distributed in South Africa. As a result, Tosen was liable for the payment of customs duty in respect of those goods, and VAT thereon. Tosen asserted that the goods were exported to Tanzania, and brought an application for an order declaring that the detention and seizure of the consignments was unlawful and for an order for their release.

On 9 January 1996, the Controller withdrew his opposition to the application and agreed to the release of the containers. On 16 January 1996, he served a notice on Tosen that the goods were detained in terms of section 114 of the Customs and Excise Act.

Tosen applied for an order setting aside the detention of the goods as unlawful. The dispute between the parties as to whether or not the goods were exported to Tanzania was referred to the hearing of oral evidence. The question whether or not the Commissioner was entitled to detain the containers under section 114 at all was then decided upon.

THE DECISION

Tosen argued that the agreement to allow the release of the goods which was concluded on 9 January 1996 incorporated an implied term that the Commissioner would not detain the goods again. However, the withdrawal of the opposition to Tosen's first application did not carry such an implication and the second detention of the goods was a new cause of action with which Tosen was obliged to deal.

Section 114 entitles the Commissioner to detain (i) goods in a Customs and Excise warehouse belonging to a person who owes duty, (ii) goods afterwards imported or exported by that person, (iii) imported goods in the possession or under the control of that person, and (iv) imported goods on any premises in the possession of or under the control of that person.

The first question was whether or not the goods belonged to Tosen, ie whether it owned them. Despite the fact that Tosen imposed the charge of a commission on the goods, the true nature of the transaction between the Tanzanian firms, Tosen and Spectra was that the goods were purchased from Spectra by Tosen, which then sold them to the Tanzanian firms. This was evident by the fact that the goods were invoiced by Spectra to Tosen and their destination was given as Durban. The orders from the Tanzanian firms also gave no indication other than that Tosen was the seller of the goods. Tosen therefore became the owner of the goods by the time of their delivery in Durban.

The second question was whether or not the goods were in a Customs and Excise warehouse at the time of their detention. There was some doubt as to whether the goods were being held lawfully during the period 9 January to 16 January since at this time, the Controller had agreed to their release and was therefore holding them without lawful cause. This was a matter that had to be decided by recourse to oral evidence.

The question whether or not the goods were 'afterwards imported' depended on whether or not they could be considered to have been imported despite the fact that they were in transit at the time of their detention. The term 'imported' as used in section 114 followed the term as used in section 18(1)(a), ie included within its ambit goods in transit. The purpose of this was to ensure that the object of the Act, the control of the movement of goods in and out of the country, was achieved, and that an opportunity for avoiding the payment of duty by making an import appear to be a temporary transit, was minimised.

The goods in question were therefore, properly considered, imported goods within the meaning of the phrase in section 114 and were liable to be detained in terms of that section.

FAZENDA N.O. v COMMISSIONER OF CUSTOMS AND EXCISE

Shipping

A JUDGMENT BY STAFFORD J
TRANSVAAL PROVINCIAL DIVISION
22 MAY 1998

1999 (3) SA 452 (T)

A vehicle which is detained in terms of section 87(1)(c) of the Customs and Excise Act (no 91 of 1964) must be released where it is shown that the owner of the vehicle did not give consent to the use of the vehicle in the carriage of goods liable to forfeiture. This is so even if the person lawfully in possession of the vehicle was aware of the carriage of such illicit goods.

THE FACTS

On 10 August 1997, a driver of a vehicle owned by Fazenda, and who had been employed by Fazenda for a period of two weeks, crossed the border into South Africa when returning from a job delivering goods in Mozambique. The vehicle included a manhorse, trailer and container in which 160 cartons of Peter Stuyvesant cigarettes were hidden. The driver intended to smuggle the cigarettes into South Africa and sell them at a profit, but they were discovered by a controller appointed as such under the Customs and Excise Act (no 91 of 1964). Under section 88(1)(d) of the Act, the controller attached and seized the cigarettes as well as the vehicle.

On 25 August 1997, the executor of Fazenda's deceased estate informed the Commissioner of Customs and Excise that the estate was the owner of the vehicle, that the driver had been under strict instructions to return from Mozambique with an empty vehicle and that she had had no knowledge of the cigarettes found on the vehicle and hidden in the compartment.

On 29 September 1997, the Director of Legal Services, Customs and Excise, acting in terms of section 87(2)(a) of the Act, decided not to return these items. This section provides that any ship or vehicle used in the removal or carriage of goods liable to forfeiture under the Act is liable to forfeiture unless it is shown that the ship or vehicle was so used without the consent or knowledge of the owner of the ship or vehicle or other person lawfully in possession thereof. The Director alleged that the container had been found to have been adapted by the provision of the hidden compartment for the purposes of concealment of the illicit goods.

After making this decision, the Director considered an affidavit made by the driver in which he stated to the police upon his arrest that his employer had no knowledge that he was transporting the cigarettes. The Director nevertheless decided again that the vehicle would not be returned to the owner. The Director stated that he did not accept that Fazenda was unaware of the adaptation of the vehicle to conceal goods, and that he did not accept that the driver did not have knowledge of this.

Fazenda's executrix then brought an application for an order reviewing and setting aside the decision not to return the seized items.

THE DECISION

The reasoning put forward by the Director in making the decision not to release the vehicle was that since the driver knew of the cigarettes, the vehicle was to be forfeited. This assumed that so long as the driver knew of the goods being illegally brought into the country, the owner's lack of consent or knowledge in regard thereto was irrelevant. However, section 87(2)(a) clearly referred to the lack of consent or knowledge of either the owner or the person lawfully in possession of the vehicle. Where either person did not have the consent or knowledge referred to, the proviso of the section became effective.

The purpose of the section is to protect the rights of innocent owners of goods which would otherwise be liable to forfeiture in terms of the Act. It does not require that the owner also show that the person lawfully in possession of the vehicle did not consent to or had no knowledge of the use of the vehicle for smuggling purposes.

Since the Director interpreted the section improperly, he performed

his duty and exercised his discretion improperly and failed to apply his mind to the issue before him in accordance with the provisions of the Act. The decision not to release the vehicle was therefore to be rescinded and set aside and the vehicle was to be returned to Fazenda forthwith.

OWNERS OF THE MV URGUP *v WESTERN BULK CARRIERS (AUSTRALIA) (PTY) LTD*

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
4 FEBRUARY 1999

1999 (3) SA 500 (C)

Section 5(5)(a)(i) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) must be applied so as to preserve evidence relevant to a maritime claim and not so as to enable one party to determine whether or not it has a sustainable claim against the other.

THE FACTS

Western Bulk Carriers (Australia) (Pty) Ltd arrested the MV *Urgup* in terms of section 5(3)(a) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) for the purposes of obtaining security for a claim to be brought against Margem Chartering Co Inc. The claim was for the balance of freight and demurrage alleged to be due by that company to Western Bulk arising out of a voyage charterparty in respect of the MV *Muzeyyen Ana*.

Western Bulk alleged that the *Muzeyyen Ana* was an associated ship of the *Urgup* because the two shareholders and directors of the company which owned the *Urgup* also owned 75% of the shares in Margem. It alleged that because the *Urgup* was an associated ship, it was entitled to arrest the ship in respect of its claim against the *Muzeyyen Ana*. It determined the ownership of the two companies from an examination of the Registry of Commerce in Istanbul.

Two other parties also arrested the *Urgup* on the basis of other claims made against its owners, alleging that other ships were associated with the *Urgup* for this purpose.

The owners of the *Urgup* then applied for the setting aside of the arrests. They disputed that the *Urgup* was an associated ship as alleged by Western Bulk and the other respondents. They alleged that by the time of the arrest, 99% of the shares in itself were owned by someone other than the shareholders of Margem.

Prior to the hearing of the application, the respondents applied for an order that the applicant make discovery or otherwise make available to them, documents relating to and proving the transfer of shares in the owners of the *Urgup*. For this application, the respondents relied on section 5(5)(a)(i) of the Act, alternatively Admiralty Rules 15 and 25 and Uniform Rule 35. The court considered the respondents' application.

THE DECISION

Section 5(5)(a)(i) provides that in the exercise of its admiralty jurisdiction, a court may make an order for the examination, testing or inspection of any ship cargo, document or any other thing and for the taking of evidence. The purpose of the section is, like the purpose of an *Anton Piller* order,

to preserve evidence which is known to exist and which constitutes a vital substantiation of a known cause of action. Its purpose is not to provide an opportunity for a party to compel another to disclose the existence of documents and produce them. The section was therefore not a basis upon which the respondents could obtain the order of discovery they sought.

Admiralty Rule 25 provides that the court may give any direction which it considers proper for the disposal of any matter before it. While that, like section 5(5)(a)(i), gave the court a wide discretion, it did not authorise an order which would give a party the right to search through the documents of another party in order to determine if there was sufficient evidence to substantiate a case against that party. It could not provide a basis for the order sought by the respondents in this case.

As far as Uniform Rule 35 was concerned, the discovery procedures authorised by it were to be used in application proceedings only in exceptional circumstances, ie where there were reasonable grounds for doubting the correctness of allegations made by one of the parties. There were aspects of the allegations made by the owners of the Urgup in the present case which excited a measure of suspicion, there were not reasonable grounds for doubting its allegations. The respondents were therefore not entitled to the order they sought on this basis either.

The respondents' application was dismissed.

MANLEY APPLEDORE SHIPPING LTD v OWNERS OF THE MV RIZCUN TRADER

A JUDGMENT BY KNOLL AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
26 APRIL 1999

1999 (3) SA 956 (C)

The party which has arrested a ship may not obtain discovery of documents alleged to be necessary to prove that the arrested ship is an associated ship of the ship against which it has a claim unless exceptional circumstances exist. Such circumstances will not exist where the arresting party bears the onus of proving that the arrest was justified and not all of the affidavits necessary to determine the competency of the arrest have been filed.

THE FACTS

Manley Appledore Shipping Ltd arrested the MV *Rizcun Trader* as security for a claim it intended to bring against Ikhlas Offshore Shipping Co Ltd. The claim was to be brought by arbitration proceedings in London for payment of US$1 028 535, the claim arising from the time charter of the *Manley Appledore* to Ikhlas. Manley alleged that the *Rizcun Trader* was an associated ship of the *Manley Appledore*.

The *Rizcun Trader* furnished security for its release, and then applied for the setting aside of its arrest on the grounds inter alia that it was not an associated ship of the *Manley Appledore*. Its owner admitted that the *Rizcun Trader* had been transferred to a third party following its arrest, and alleged that it held no control over Ikhlas at the time of its arrest.

Manley then applied for an order that the alleged owners of the *Rizcun Trader* discover documentation relating to the ownership in the companies thought to be in control of the ships which would reveal whether or not they were associated ships. The owners of the *Rizcun Trader* opposed the application.

THE DECISION

Discovery of documents was to be granted if there was reasonable doubt as to the correctness of the allegations made in the application for the arrest of the *Rizcun Trader*. However, discovery was to be ordered only if exceptional circumstances existed, and would not normally be ordered where

the parties had not filed all the affidavits necessary to determine the dispute. It was significant that the owners of the *Rizcun Trader* had not filed their answering affidavit, and that the onus of proving that the arrest was warranted rested on Manley. Both were factors militating against granting an order of discovery in its favour. To order discovery would be to give Manley an opportunity to seek out evidence which it needed to make its case for the arrest—a purpose for which the discovery procedure was not created.

The application for an order for discovery was refused.

MANLEY APPLEDORE SHIPPING LTD v OWNERS OF THE MV RIZCUN TRADER *(2)*

A JUDGMENT BY KNOLL AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
26 APRIL 1999

1999 (3) SA 966 (C)

In exercising its admiralty jurisdiction in deciding whether or not to order that security for costs be furnished by a party applying for the setting aside of an arrest of a ship after full security for the release of the ship has been given, the court may direct such an order at the person who has taken up the defence of the ship, where the ship is the applicant in the application to set aside the arrest. A court may take into account common law principles applicable in such an application and should exercise its discretion with the requirement that the need for security be genuine and reasonable.

THE FACTS

Manley Appledore Shipping Ltd arrested the MV *Rizcun Trader* as security for a claim it intended to bring against Ikhlas Offshore Shipping Co Ltd. The claim was to be brought by arbitration proceedings in London for payment of US$1 028 535, the claim arising from the time charter of the *Manley Appledore* to Ikhlas. Manley alleged that the *Rizcun Trader* was an associated ship of the *Manley Appledore*.

The *Rizcun Trader* furnished security for its release to the full value of the ship, and then applied for the setting aside of its arrest on the grounds inter alia that it was not an associated ship of the *Manley Appledore*.

Manley then applied for an order directing the *Rizcun Trader* to furnish security for costs of the application brought by *Rizcun Trader* for the setting aside of its arrest. It did so in terms of section 5(2)(b) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983).

THE DECISION

Section 5(2)(b) of the Act provides that in the exercise of its admiralty jurisdiction, a court may order any person to give security for costs. This section is to be distinguished from section 5(3) which authorises an order for the arrest of any property for the purpose of providing security for a claim. Where the former section is employed, and the object of the arrest is not a person but a ship, it is appropriate to consider the person who causes the defence to be entered or application to be brought on behalf of the arrested ship, such as the owner of the ship, to be the person against whom security for costs may be claimed.

However, in the present case, Manley sought an order for security for costs against the ship itself and not the person who had defended the ship against its arrest. In such circumstances, the question arose whether Manley was entitled to more security than that provided for the release of the ship, ie the full value of the ship.

Assuming that it would be permissible to order that the person who had defended the ship in the present case furnish security for costs, the discretion which a court could apply in doing so was not an unlimited discretion. In exercising this discretion, the court could have regard to common law principles regarding the furnishing of security, and was entitled to

require that—as in the case of security ordered in terms of section 5(3)—the need for security be genuine and reasonable. Taking into account factors such as that a foreign ship had been arrested by a peregrine applicant, that the purpose was to provide security for a claim to be brought in a foreign jurisdiction, that the claim was against a peregrine third party, that the court's jurisdiction was based on the challenged allegation that it was an associated ship, that the arrest was made by an ex parte application and that the full value of the ship had been put up as security, the need for security was not genuine or reasonable in the present case.

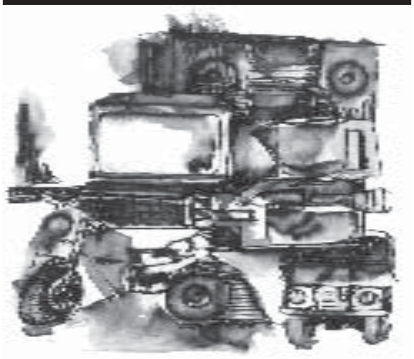
The application was dismissed.

KIA MOTORS (SA) (EDMS) BPK v VAN ZYL

A JUDGMENT BY PRETORIUS AJ
ORANGE FREE STATE PROVINCIAL DIVISION
11 FEBRUARY 1999

1999 (3) SA 640 (O)

Credit Transactions



An owner of property is estopped from asserting its rights of ownership where it has made a representation to a third party that another person is entitled to dispose of the property or assert the right to dispose of it.

THE FACTS

On 14 December 1998, Van Niekerk sold a motor vehicle to Van Zyl for R137 500. Van Niekerk was a motor car dealer and he sold the vehicle in the course of his business activities as such.

Van Niekerk had obtained the vehicle from Kia Motors (SA) (Edms) Bpk, and he purchased the vehicle from Kia on 21 December 1998. At the time of this sale, Kia knew of the previous sale to Van Zyl. The sale agreement recorded that ownership of the vehicle would remain with Kia. Kia took a cheque from Van Niekerk in the amount of R125 000 in payment of the purchase price. The cheque was postdated to 5 January 1999. It was presented for payment but dishonoured.

Kia then brought an application for the delivery of the vehicle, basing its claim on the rei vindicatio, the owner's right of recovery of its property. Van Zyl opposed the application on the grounds that Kia was estopped from relying on its rights of ownership.

THE DECISION

Kia's right of recovery as owner of the vehicle was subject to the qualification that it should be estopped from recovering its property if it delivered the vehicle to Van Niekerk knowing that he was a motor dealer and sold to the general public vehicles such as that delivered to him, and Kia did nothing to inform the general public of its interest in such vehicles.

Kia had known that Van Niekerk operated as a motor dealer. The vehicle had been displayed along with other vehicles for sale at Van Niekerk's premises and had been shown to Van Zyl with a view to it being sold to him. The impression had been given that Van Niekerk's business owned the vehicle or held the right to dispose of it and Kia had taken no steps to warn the general public that it was the owner of the vehicle.

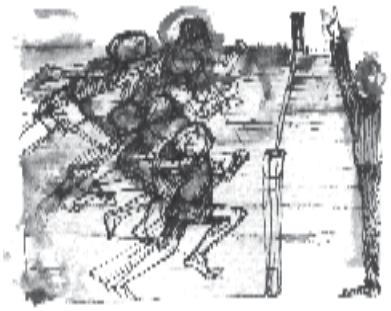
Under these circumstances, Kia should be estopped from asserting its rights of ownership in respect of the vehicle. The application was dismissed.

ABBOTT LABORATORIES v UAP CROP CARE (PTY) LTD

A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
10 DECEMBER 1998

1999 (3) SA 624 (C)

Competition



Comparative advertising constitutes an infringement of trade mark rights where the trade mark rights of a competitor are used unauthorisedly in the course of trade in relation to goods in respect of which the trade mark is registered.

THE FACTS

Abbott Laboratories was the registered proprietor of two trade marks, 'Promalin' in respect of agricultural chemicals, and 'Abbott' in respect of chemical products used in agriculture, horticulture and forestry. The second respondent was the applicant of the trade mark 'Perlan' in respect of chemical products for use in agriculture and horticulture and related activities. It and Abbott were competitors in the sale of products to which their trade marks were attached.

The second respondent produced a colour brochure in which its products were compared with those of Abbott and Perlan stated to be a better product. The trade marks of both parties were used in the brochure. Copies of the brochure were handed to employees of UAP Crop Care (Pty) Ltd at a training session held for the purpose of acquainting them with the second respondent's products. UAP was the second respondent's distributor in South Africa. Abbott's trade marks were used without its permission.

Abbott contended that the use of its trade marks constituted a trade mark infringement in terms of section 34(1)(a) of the Trade Marks Act (no 194 of 1993). It applied for an interim interdict preventing UAP and the second respondent from infringing its trade mark rights, ordering them to deliver up all printed material containing its trade marks and restraining them from comparing their respective products, pending an action to be brought for a final interdict and the determination of damages.

THE DECISION

The use of Abbott's trade marks constituted comparative advertising. The question was whether or not section 34(1)(a) of the Trade Marks Act (no 194 of 1993) prohibited such use of a trade mark.

Section 34(1)(a) of the Act provides that the rights acquired by registration of a mark are infringed by the unauthorised use in the course of trade in relation to goods or services in respect of which the trade mark is registered, of an identical mark or a mark so nearly resembling it as to be like to deceive or cause confusion.

UAP argued that because Abbott's trade marks had not been used in relation to goods other than Abbott's, there had been no infringement of its trade mark rights. While it was true that the use of a trade mark in relation to the trade mark owner's goods could not constitute an infringement of the rights of the trade mark owner, all of the requirements of section 34(1)(a) of the Act had been met. UAF had unauthorisedly used Abbott's trade marks in the course of trade in relation to Abbott's products. It had done so as part of a comparative advertising effort, and thereby infringed Abbott's trade mark rights as provided forin section 34(1)(a).

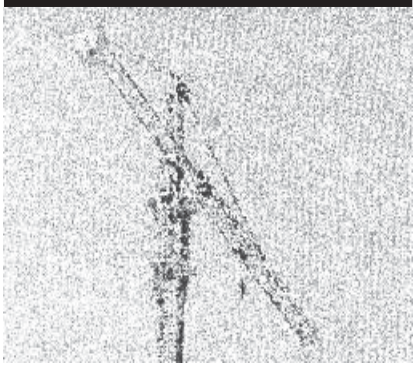
The interim interdict was granted.

MINISTER OF PUBLIC WORKS AND LAND AFFAIRS v GROUP FIVE BUILDING LTD

A JUDGMENT BY SCHUTZ JA (HEFER JA, NIENABER JA and MARAIS JA concurring, PLEWMAN JA dissenting) SUPREME COURT OF APPEAL 28 MAY 1999

1999 (4) SA 12 (A)

Construction



An employer under a construction contract is entitled to claim against the contractor proper performance of a subcontractor's work where the contractor has undertaken to carry out and complete the work to the satisfaction of the employer.

THE FACTS

The Minister of Public Works and Land Affairs entered into a contract of construction with Group Five Building Ltd in terms of which Group Five undertook to convert the Roeland Street gaol into a State archive. Group Five undertook to deliver the works when completed 'fit for occupation and complete in every particular'.

The contract provided that a fire-alarm system to be installed by a nominated subcontractor would be part of the works in accordance with the drawings, specifications, bills of quantities and conditions of contract. The Minister, represented by the director-general of his department, was entitled to nominate a subcontractor but this would not create privity of contract between the director-general and the nominated subcontractor. The contract provided that Group Five as contractor would enter into a contract with a nominated subcontractor in respect of the work for which he was nominated. Group Five was obliged to ensure that the nominated subcontractor carried out and completed the work to the director-general's satisfaction and was entitled to enforce completion of such work or payment of damages in the event of default. The director-general was entitled to take cession of any such claim as part of the remedies available to him.

The subcontractor nominated to install the fire alarm system gave defective performance, including the installation of field wiring with joints which should have been continuous. This led to a claim for damages by the Minister against Group Five being the cost of remedying the defective work. The Minister had also earlier taken cession of Group Five's rights against the subcontractor.

Group Five defended the claim on the grounds that it was not liable for work done under a sub-contract which was separate from the construction contract entered into between it and the Minister.

THE DECISION

A distinction between work done under the main contract and work done under a subcontract was recognised in the conditions of contract. However, were the work done by subcontractors not considered part of the works as a whole, certain clauses in the main contract would become unworkable. Clause 6(7) entitling the employer's engineer to instruct the contractor to remove any part of the works could not be enforced were the subcontract works considered separate from the main works. Clause 9 entitling the engineer to be notified by the contractor whenever a portion of the works subject to measurement is to be covered up would be unworkable were the subcontract works to be excepted. What Group Five had to deliver was work which included a fire-alarm system.

Accepting that Group Five had to deliver the work including a fire-alarm system, there was no reason to exclude the supervision of this work from the duties imposed on Group Five in terms of the contract. The contract expressly included the duty to co-ordinate the nominated subcontractor's work and to ensure that the nominated subcontractor carried out the work to the director-general's satisfaction. This was a duty imposed on Group Five

and given the force of law by Group Five's right to enforce performance as against the subcontractor. Group Five would not have been entitled to consider its duty discharged merely upon advising the Minister of the subcontractor's default, wherever this might have taken place. It was obliged to deliver the works with sub-contract work completed satisfactorily as required by the main contract.

The fact that there was no provision for 'technical supervision' in the bills of quantities was no indication that technical supervision was not required.

The cession which the Minister had taken of Group Five's rights agains the subcontractor did not prevent the Minister from enforcing his rights against Group Five. The effect of the cession was not so drastic as to terminate all of the Minister's remedies against Group Five as provided for in the contract.

The Minister was entitled to damages as against Group Five in respect of the defective performance rendered by the subcontractor.

The entire machinery [the nominated sub-contract], evolved over many years, is designed to avoid privity between the employer and the nominated sub-contractor, whilst retaining substantial control over the sub-contract works in the employer's hands. Anyone who has had experience of the electrician driving a hole through the wall after the plasterer has completed his work, or the installer of the alarm lights putting nails into the handiwork of the waterproofer, will understand the frustrations caused by everybody blaming someone else, in the absence of a single contractor to whom one may look to sort out such matters. This is the main motive behind the avoidance of privity with sub-contractors. But the machinery does have disadvantages for the contractor, who has to put up with a sub-contractor whom he might not himself have selected. In more recent times forms of contract have been evolved which press less heavily upon the contractor, but the contract with which we are concerned in this case is of the traditional kind, and I think that my general description is appropriate to it.

HOLLARD INSURANCE CO LTD v LECLEZIO

A JUDGMENT BY HURT J
(HOWARD JP and LEVINSOHN J concurring)
NATAL PROVINCIAL DIVISION
12 FEBRUARY 1999

1999 (4) SA 132 (N)

Insurance

An insurer which proposes new terms to an insurance policy applicable upon renewal of the policy proposes a new contract to be entered into between it and the insured. If the insured fails to comply with the terms so proposed, no insurance cover becomes applicable between the parties.

THE FACTS

Leclezio effected a policy of insurance with Protea Insurance Co Ltd, covering himself for damage caused to his motor vehicle.

Simultaneously, Leclezio effected a policy of insurance with Hollard Insurance Co Ltd, the purpose of which was to cover the possibility of Protea justifiably repudiating the policy covering possible damage to the vehicle. This policy provided that Hollard would provide cover in circumstances where the vehicle was damaged, written off or stolen during the period of insurance, and a policy condition of the underlying (Protea) insurance policy was violated resulting in repudiation of liability for a claim by the insurance company. This policy also contained a provision that Leclezio was obliged to continue comprehensive insurance of the vehicle for its full market value in terms of the underlying policy, and failure to do so would result in forfeiture of all benefits under the policy.

Prior to expiry of cover applicable during 1995/6, Protea sent Leclezio a notice that it invited renewal of insurance cover subject to confirmation that the vehicle was protected by an anti-theft device. The notification also stated that cover would not be extended where an anti-theft device had not been fitted to the vehicle.

The premiums on both policies were payable annually, and Leclezio paid the premium due for 1996/7 on 1 May 1996. He did not however, fit an anti-theft device to his vehicle. On 19 July 1996, the vehicle was stolen. Protea repudiated a claim for indemnity under the policy on the grounds that no anti-theft device had been fitted. Leclezio then claimed against Hollard in terms of the policy of insurance entered into with it. Hollard repudiated the claim on the grounds that Leclezio had not comprehensively insured the vehicle as required by the policy.

Leclezio brought an application for an order that Hollard was obliged to indemnify him.

THE DECISION

The endorsement added to the policy by Protea prior to expiry of the cover applicable during 1995/6 did not amount to an exclusionary provision. Provisions designed to exclude cover during the currency of the policy formed part of an existing policy and would not, if applicable, entitle Hollard to contend that Leclezio had not continued comprehensive insurance cover in respect of the vehicle. These differed from an endorsement whose terms had to be accepted if the policy was to continue at all. This was the position in the case of the endorsement regarding the anti-theft device which was notified by Protea.

The endorsement contained a clear notification of intention not to insure Leclezio against theft if his vehicle was not fitted with an anti-theft device. Each renewal of the policy constituted a new contract between Leclezio and Protea. The renewal which Protea sought to effect incorporating the endorsement had therefore not been effected.

The application was dismissed.

ANOOP v IGI INSURANCE CO LTD

A JUDGMENT BY LEVINSOHN J
(PILLAY J concurring)
DURBAN AND COAST LOCAL
DIVISION
20 OCTOBER 1999

1999 CLR 555 (D)

If an insurer's rights of subrogation are prejudiced by its insured having signed a Release purporting to absolve a party of all liability in respect of a claim arising by another party the insurer claiming against its insured as a result of having signed the Release must show that it would have been successful in the claim for damages against the third party and would have recovered at least the amount by which it indemnified its insured.

THE FACTS

IGI Insurance Co Ltd insured Anoop for damage caused to his vehicle. The policy included clause 9(ii) which provided that IGI would be entitled to take over and conduct in the name of the insured the defence or settlement of any claim and pursue in the name of the insured for its own benefit any claim or damage or otherwise. It further provided that no admission, statement, offer, promise, payment or indemnity would be made by the insured without the prior written consent of IGI.

Anoop's vehicle was damaged in a motor collision and he claimed an indemnity against IGI in terms of the policy. In settlement of his claim, IGI replaced Anoop's vehicle. It advised him to claim against the third party with whom he was involved in a collision for the loss of certain improvements to his vehicle which he had effected prior to its collision and for which he did not receive any indemnity from IGI

Anoop claimed against the third party, who paid him the sum of R16 634 in settlement of this claim and received a Release from Anoop. In terms of the Release, Anoop released and discharged the third party from all claims arising from the collision in which his vehicle had been damaged.

IGI claimed against the third party payment of the amount it had paid to Anoop in settlement of his claim. The third party then produced the Release. IGI was unable to proceed against the third party. It brought an action against Anoop claiming payment of R16 634 as damages for breach of contract.

THE DECISION

IGI had not indemnified Anoop for the full amount of his damages. It could have done so under its rights of subrogation as provided for in the insurance policy, and had it done so, the problem it faced with the Release would not have arisen.

IGI was, in any event, not entitled to recover damages against Anoop because it had not proved that it would have been successful against the third party in an action for recovery of Anoop's damages, and would have recovered at least the amount it paid out to Anoop.

Even if IGI were considered to have proved its damages, it had not shown that the Release presented a complete answer to any claim it might have brought against the third party. The evidence showed that the Release was signed by the third party in the knowledge that Anoop had a greater claim which was settled with IGI. The possibility therefore existed that the Release mistakenly referred to all claims arising from the collision and not just the claims in respect of the extras effected to the vehicle. If that possibility were shown to be real, IGI would have had an answer to the defence that the Release prevented a successful action for damages against the third party.

IGI had not shown that any action instituted against the third party would have failed. The action failed.

BELING v SOUTHERN LIFE ASSOCIATION LTD

Insurance

A JUDGMENT BY JONES J
(MELUNSKY J concurring)
EASTERN CAPE DIVISION
25 SEPTEMBER 1997

UNREPORTED

A policy of insurance constitutes a contract between insurer and insured and without a reasonable interpretation thereof showing an intention to be a contract for the benefit of a third party, does not confer a benefit on any third party.

THE FACTS

The Southern Life Association Ltd issued a policy of insurance to the Johnson and Johnson Provident Fund in terms of which Southern Life undertook to provide risk benefits for members of the Fund, including disability cover. The policy provided that payments would be made to the Fund upon satisfaction of the provisions of the rules established by the policy.

Beling brought an action against Southern Life claiming payment under the policy. He alleged that he had been a member of the Fund and that while he was a member, had become permanently disabled thus entitling him to payment of the benefits specified in the policy.

Southern Life excepted to the claim on the grounds that the policy between it and the Fund provided no basis for a claim by a member of the Fund against it. Beling appealed against the upholding of the exception.

THE DECISION

The policy could not be understood to constitute a contract for the benefit of a third party conferring rights on Beling by agreement between Southern Life and the Fund, which he could accept in order to enjoy their benefits. It was merely a contract between Southern Life and the Fund and was not intended to confer any benefits on another person.

The fact that the policy stated that it provided risk benefits to members in accordance with its rules and conditions was no indication that the policy did intend to confer any benefit on a third party. That provision created no ambiguity and was no reason to accept that the policy's intention was to confer any such benefit.

SINGH v FUTURE BANK LTD

A JUDGMENT BY LEVINSOHN J
NATAL PROVINCIAL DIVISION
20 OCTOBER 1999

1999 CLR 547 (N)

Contract

If one party induces a mistake in the mind of the other party to a contract, the other party is entitled to consider the contract voidable and unenforceable.

THE FACTS

Singh obtained a loan from Future Bank Ltd for the purchase of a motor vehicle. Prior to concluding the loan agreement, Singh requested the bank to attend to insurance of the vehicle and it undertook to do so.

When Singh signed the documentation recording the loan agreement, he noticed that it included provision for a 'backstop premium'. A bank official explained to him that this was a premium which insured for cover in the difference between the market value of the vehicle and the book value of it at the time any loss took place, and could not exist independently of a primary insurance policy. Singh signed the documentation and the vehicle was released to him. He believed that at that point, the vehicle had been insured.

Clause 5.1 of the agreement provided that Singh was obliged to insure the vehicle. Clause 13 provided that no variation of its terms would be of any force or effect unless in writing and signed by the parties thereto.

A little more than a month later, the vehicle was stolen. The bank claimed the full purchase price from Singh and brought an action to enforce its claim. Singh contended that the agreement upon which the bank depended was voidable because of a misrepresentation made by the bank regarding the insurance cover.

The bank denied that any representations regarding insurance had been made and it averred that clause 13 prevented Singh from relying on terms other than those contained in the agreement.

THE DECISION

Because the bank had undertaken to insure the vehicle, it had represented to Singh that it had done this by the time the loan documents were signed. The belief that the bank had insured the vehicle was reinforced by the explanation of the backstop insurance given to him by the bank.

The bank ought to have been aware of the real possibility that Singh was signing the agreement under a misapprehension and was acting in error. It was therefore under a duty to alert Singh to the true position and remove any misapprehension from his mind. Because it had not done so, Singh made an error when signing the agreement which was excusable.

The action against Singh was to be dismissed.

BERNSTEIN v SMART TAG INTERNATIONAL (PTY) LTD

Contract

A JUDGMENT BY PINCUS AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
3 SEPTEMBER 1996

1999 CLR 532 (C)

An agreement providing that a third party will perform some obligation cannot be enforced against the third party until such time as that party is a party to the agreement. Enforcement of the agreement will not be ordered where this would amount to the enforcement of specific performance in circumstances where a court would alternatively order the payment of damages.

THE FACTS

Bernstein and the second respondent agreed to become 50% shareholders in a company to which Smart Tag International (Pty) Ltd would sell all of its assets. They further agreed that the company to be formed would later ratify the agreement to sell Smart Tag's assets to it.

Some months later, Smart Tag's attorney informed Bernstein that it intended selling all of its assets to an off-shore company. Bernstein then applied for an interim interdict restraining Smart Tag from selling, transferring or in any other way dealing with or alienating any of Smart Tag's assets pending the institution of an action for final relief. An action for final relief was brought some three months later. In the action, Bernstein sought an order that a new company be formed in which he and the second respondent would be 50% shareholders and the assets of Smart Tag transferred to it.

THE DECISION

The question was whether or not Bernstein had made out a case requiring Smart Tag to transfer its assets as allegedly agreed.

Smart Tag was not a party to the agreement. There was no connection between it and Bernstein. Accordingly, there were no grounds upon which an order against Smart Tag restraining it from transferring its assets could be made.

Another ground for refusing the order was that there was no basis of trust between the parties, which would be required in order for the proposed new company to function properly. An order requiring the formation of such a company would be an inappropriate order of specific performance. A company formed on such a basis would probably result in the shareholders approaching court for its dissolution on the grounds that there was a lack of confidence between the members which was required for the proper functioning of the company.

The delay in bringing the action was another reason to refuse the interim relief now sought.

The application for the interim interdict was refused.

TEK CORPORATION PROVIDENT FUND v LORENTZ

A JUDGMENT BY MARAIS JA (VAN HEERDEN DCJ, SMALBERGER JA, GROSSKOPF JA and HOWIE JA concurring)
SUPREME COURT OF APPEAL
3 SEPTEMBER 1999

1999 CLR 491 (A)

An employer is not entitled to the surplus of a pension fund created during the existence of the fund, but may enjoy the benefit of it to the extent of not having to make contributions to the fund as long as the surplus exists. If a pension fund's rules fail to provide for how a surplus is to be dealt with upon the transfer of members of the fund to a newly established fund then no power to transfer the surplus from one fund to another can be inferred in the rules.

THE FACTS

Tek Corporation Pension Fund was established on 1 January 1991. In terms of its rules, the employees were obliged to pay recurring fixed contributions. The employer was obliged to pay an amount to be agreed with the fund's trustees, but not less than an amount calculated as necessary to ensure the financial soundness of the fund.

A substantial surplus of assets over liabilities accumulated, with the consequence that after 1 December 1991, Tek was obliged to make no further contribution to the fund and did not do so. This was termed a 'contribution holiday'.

On 1 June 1993, the Tek Corporation Provident Fund was established. An overwhelming majority of employees transferred from the pension fund to the provident fund, taking with them the actuarially assessed value of their interest in the pension fund. The surplus remained in the pension fund. Tek nevertheless took the contribution holiday in respect of the provident fund, thinking that a transfer of the surplus would have been permissible.

As a result of the sale of the Defy division of Tek to Malbak, on 1 April 1994 Tek employees became members of the Malbak provident fund and took with them into the fund the full amount of the credit which they then held. They then contended that the surplus which should have been transferred to the Tek provident fund should be transferred to the Malbak provident fund. The chairman of the board of trustees of the Tek pension and provident funds rejected the contention and declined to give an undertaking that should the surplus be used for the enhancement of Tek employee benefits, Defy ex-members of the fund would benefit proportionally.

Lorentz, one of the affected employees, then brought an application for orders that (i) the trustees of the pension fund were not entitled to use the surplus in the pension fund to enable Tek to avoid paying contributions to the provident fund, (ii) the trustees were to determine the portion of the surplus to be transferred to the provident fund and effect payment thereof, (iii) the trustees were to determine the manner in which the funds were to be used for the purpose of increasing the benefits payable to the provident fund to those who became members in 1993.

These orders were granted and the provident fund appealed.

THE DECISION

No rule of common law entitled Tek to claim the surplus which was an integral part of the fund. If it had any such entitlement, this would have emanated from the rules of the fund itself. Rule 19.5.2 provided that if a valuation disclosed a substantial surplus or a deficit which required to be funded, the manner of dealing with either was to be considered by the trustees and recommendations were to be made to the employer for a decision. This showed that the employer did not have an unfettered power in regard to a surplus, but there was a potential for the employer to benefit from the surplus, for example in not having to make contributions while the surplus persisted.

The employer may enjoy the benefit of a surplus by not having to make a contribution in those circumstances irrespective of how the surplus arose, ie whether it arose from past overcontributions or not, provided the pension fund is not a defined benefit scheme in which the employer is obliged to make a fixed contribution.

While these were the obligations under which the employer was obliged to function, the relief sought by Lorentz depended not so much on any such obligations but on an assertion of the rights of employees. The question was whether or not the Rules provided any basis for asserting these rights. The Rules however, were silent on the point. They conferred no power on the trustees to transfer any surplus from the fund to another fund and no power to do so could be inferred from analagous provisions contained in them. Rule 16.4 provided for the situation where the employer ceased to be liable to contribute to the pension fund as a result of a decision to establish or participate in another pension fund. However, this had not happened and the provisions of the rule could therefore not apply.

Hindsight indicated that the problem which had arisen between the parties was a result of their common but incorrect assumption, at the time when the transfer to the provident fund took place, that what had to be done with the surplus was a matter entirely in the hands of Tek. Because of that, the problem of what had to be done with the surplus had not been dealt with. The result was that the surplus had to remain in the pension fund, its benefits out of reach of both the employees and Tek.

The employees were entitled to the first order they sought as the employer's obligations prevented it from using the surplus in the pension fund for the purpose of enabling an avoidance of the need to pay contributions. However, they were not entitled to any other of the orders they sought.

TRIDENT INSURANCE BROKERS (PTY) LTD v ELLWOOD

A JUDGMENT BY LABE J
WITWATERSRAND LOCAL DIVISION
20 DECEMBER 1996

1999 (4) SA 455 (W)

A restraint preventing a former employee from communicating with clients of an employer following the termination of employment does not prevent the employee from communicating with such clients where the intention of the communication is not to solicit the business of the client.

THE FACTS

Trident Insurance Brokers (Pty) Ltd employed Ellwood as a director of the company with the duty to manage its client services department as well as its marketing division. Ellwood undertook, for a period of 24 months after leaving the company, not to communicate with any of the company's clients nor solicit business from them, either directly or indirectly.

Ellwood's employment with Trident terminated. Within the subsequent 24-month period, Trident received an instruction to terminate an existing insurance policy and was informed that a company which then employed Ellwood, Bannockburn Financial Services (Pty) Ltd, had assumed the position of Trident's broker. The instruction came from an existing client of Trident who had been introduced to the company by Ellwood. After leaving the service of Trident, Ellwood had met the client socially and had informed him that he had left Trident. The client then requested Ellwood to transfer his insurance business to Ellwood.

In other cases, clients of Trident contacted Ellwood in order to transfer their insurance business to him and had done so, in each case, of their own accord and without initiation of the contact from Ellwood.

Trident then brought an application that Ellwood be restrained from communicating with any of its clients.

THE DECISION

'Communicate with clients' as recorded in the agreement meant a positive act performed by Ellwood with the hope or intention of obtaining business. 'Solicit' connoted a positive act of solicitation.

This meant that the prohibited communication would include Ellwood telling a client of Trident that he had left Trident's employ and was working for another person in the hope that the client would give him business. The intention of the communication would be to inform the client that Ellwood was then with another entity.

The evidence did not show that Ellwood had communicated in this manner. That he was entitled to communicate with former clients without having the intention of informing them of his change of employment or of persuading them to switch their business to himself, was apparent from the fact that the restraint upon him did not include a restriction on him trading for himself or another entity in the same capacity in which he had traded for Trident.

The application was dismissed.

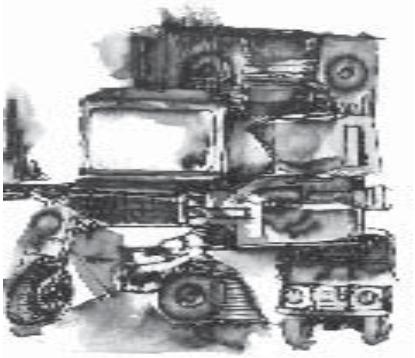
Whatever else it may mean, `communicate' cannot mean that the respondent is not entitled to communicate with clients otherwise than in relation to insurance. If there were so it may well be that the clause is invalid.

COURTIS RUTHERFORD AND SONS CC v SASFIN (PTY) LTD

A JUDGMENT BY VAN ZYL J
(MOTALA J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
5 AUGUST 1999

1999 CLR 514 (C)

Credit Transactions



A party to a contract alleging that the other party ought to have mitigated its damages resulting from the first party's breach of contract must prove that the innocent party failed to take steps which might reasonably have been taken to mitigate its damage. A clause in a leasing transaction entitling the credit grantor to cancel such a transaction where the credit receiver is in default, and claim as damages arrear rentals as well as future rentals which would have been paid had the agreement not been cancelled is not in itself a penalty stipulation which can be avoided in terms of the Conventional Penalties Act (no 15 of 1962).

THE FACTS

Courtis Rutherford and Sons CC and Sasfin (Pty) Ltd entered into a rental agreement in terms of which Sasfin leased to Courtis a PABX telephone system. In the event of default by Courtis, Sasfin would be entitled either to claim immediate payment of all amounts payable in terms of the agreement, or terminate the agreement and take possession of the goods, retain all amounts so far paid and claim all outstanding rentals and, as agreed pre-estimated liquidated damages, the aggregate of all rentals which would have been payable had the agreement continued until expiry.

Courtis failed to pay certain rentals due in terms of the agreement, and Sasfin cancelled the agreement and claimed return of the goods.

Courtis informed Sasfin that it wished to find a substitute as lessee under the lease agreement. Sasfin replied that it could do so but any substitute user would be subject to the normal credit approval conditions applied by it in respect of its debtors. Courtis proposed a substitute user, but nothing further was done to establish the substitute as debtor under the lease agreement. Courtis alleged that this was a result of Sasfin being unresponsive in its attempts to do so, but Sasfin alleged that Courtis had taken no serious steps in bringing this about.

Sasfin cancelled the lease agreement and brought an action for payment of arrear rentals and payment of future rentals as pre-estimated liquidated damages.

Courtis defended the action on the grounds that Sasfin had failed to mitigate its damages by accepting the substitute user and that the result of this was that it was not entitled to claim future rentals. Courtis also contended that Sasfin's claim for pre-estimated liquidate damages amounted to the enforcement of a penalty contrary to the provisions of the Conventional Penalties Act (no 15 of 1962).

THE DECISION

A breach of contract entitles the party not responsible for the breach to claim damages, subject to the proviso that he must mitigate such damages. The duty to mitigate damages was a duty which would rest on Sasfin in the present case, which was the party that had experienced the breach of contract by the other party. The other party is obliged to prove that such damages had not been appropriately mitigated.

In the present case, Sasfin had indicated that it was willing to accept a substitute user, subject to its normal credit conditions. The substitute user which had been proposed did not in fact become the substitute user and there was nothing to indicate that this was a result of any reluctance on the part of Sasfin. If there were any steps which should have been taken by Sasfin to obtain a substitute user, it was not apparent what should have been done in this regard as no evidence as to what might reasonably have been done was led by Courtis. It had also not shown that Sasfin could have found another user to assume Courtis' obligations under the agreement. Failure by Sasfin to mitigate its damages had not been proved.

As far as the allegation of a penalty was concerned, it was true that section 3 of the

Conventional Penalties Act enabled a court to reduce an excessive penalty, ie where the penalty is out of proportion to the prejudice suffered by a creditor, and this would be applied where necessary to ensure that justice is done between the parties to a contract. However, the party alleging that an excessive penalty has been imposed must prove that, and the amount by which the penalty should be reduced. Courtis had not done so in the present case.

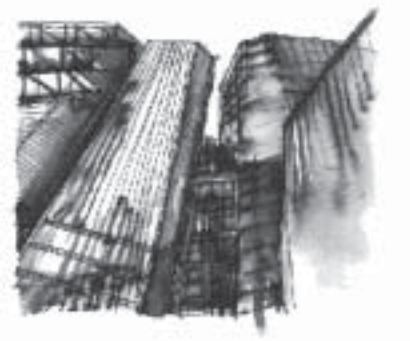
The action succeeded.

McCARTHY v CONSTANTIA PROPERTY OWNERS' ASSOCIATION

A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
13 JULY 1999

1999 (4) SA 847 (C)

Property



A party having a direct and substantial interest in a matter has the right to enforce compliance in accordance with its interest despite the fact that it has no rights established by private law obligation as against the party against which it asserts those rights, provided the right can be considered the enforcement of constitutional rights.

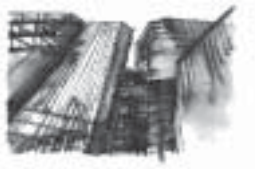
THE FACTS

Alphen Park Trust registered servitudes over its property in favour of the Constantia Property Owner's Association (the CPOA). The servitudes limited the construction of buildings and structural improvements to the property as well as the extent of such improvements.

Construction work began on the property, but it exceeded the limitations imposed by the servitude. Alphen justified this on the grounds that earlier, there had been two land swap agreements between itself and the CPOA which amended the terms of the servitude. The agreements were concluded following a meeting of CPOA at which the member mandated the committee to proceed with negotiations regarding development of the property to sign a formal agreement. A resolution was then passed for 'continued negotiations to secure the future of Constantia's commercialisation'. Later, members were requested to approve an agreement with the developers of the property which modified alterations to the existing building works allowing for extension and a new servitude to be registered reflecting the change. This resolution was voted down.

McCarthy and other members of the CPOA contended that in allowing the amendment, the CPOA had failed to uphold its own objectives. The CPOA, a voluntary association, had the objective of promoting and safeguarding the interests of the registered property owners in the Constantia Valley. They applied to court for an order that the agreements concluded between the CPOA and Alphen were void, having been concluded on behalf of the CPOA without proper authority, and that the servitudes were of full force and effect. McCarthy and the other applicants were property owners in Constantia.

The CPOA contested McCarthy and the other applicants' right to bring the application, on the grounds that they enjoyed no rights under the servitudes. The applicants contended that CPOA did not have the authority to agree to the amendment of the terms of the servitude upon which Alphen had contended the building limitations had been exceeded.



THE DECISION

An application of public law principles to the question of locus standi, ie the right to bring an action, would provide a basis for a party's right to sue, where that party has a direct and substantial interest in the matter in regard to which it sues, even if that party has no personal right which it may enforce against its defendant. In the present case, the applicants did not have personal rights enforceable against the CPOA or Alphen because the servitude conferred rights not on them but on the CPOA. It followed that although the applicants had a direct and substantial interest in the case, they did not have the right to enforce their interests as against the CPOA because there was no public law basis for this.

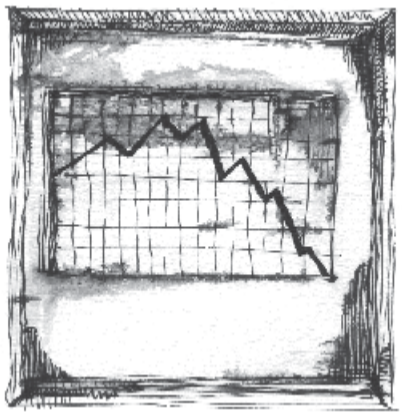
The question of locus standi could however, not be examined without regard to the Constitution. The Constitution affords extensive rights of access to the courts and intends to protect the environment. Power exercised by persons in a private capacity is as subject to the application of the Bill of Rights as is power exercised by bodies established to perform public functions. The old distinction between public law and private law applications of the locus standi principle are no longer applicable and could serve no basis for disallowing the applicants from proceeding against the CPOA. Having applied to preserve the environmental fabric of their suburb, the applicants had the right to enforce the same in the present application.

As far as the lack of authority was concerned, it was clear from the constitution of the CPOA that the management of the association was to be conducted by an executive committee. This however, provided no basis upon which an agreement for the alienation of property could take place without the express authority of member of the association as the alienation of property could not be considered part of the management of the association. No express mandate to amend the servitude had been given.

The Turquand rule, which entitles a third party to hold a body corporate bound to a contract despite the lack of authority of that body's representatives, was not applicable in the present case because the developers knew of the lack of authority of the representatives of CPOA.

DEUTSCHE BANK AG v MOSER

Insolvency



CAPE OF GOOD HOPE PROVINCIAL DIVISION
25 NOVEMBER 1998

1999 (4) SA 216 (C)

A court will grant a provisional order of sequestration against a foreigner where it appears that the implementation of the sequestration will be best secured in this country rather than in the country in which the debtor resides.

THE FACTS

Deutsche Bank AG brought an application for the provisional sequestration of the estate of Moser. Moser was a German citizen and permanently resident in Germany, but owned property in Plettenberg Bay.

Moser opposed the application on two grounds, one of which was that it was not convenient nor equitable that his estate should be sequestrated in South Africa and that the bank should have sought sequestration against him in Germany.

THE DECISION

The provisions of the Insolvency Act (no 24 of 1936) applicable to the procedures attendant upon the administration of a sequestration might be inconvenient to apply and involve considerable expense, but that had to be considered against the convenience of dealing with the only relevant asset of the sequestrated estate, ie the fixed property.

Once the order of sequestration was granted, the implementation of the order by securing the sale of the property could be attended to far more expeditiously in South Africa.

The order was granted.

PREMIER TRADING COMPANY (PTY) LTD v SPORTOPIA (PTY) LTD

A JUDGMENT BY NIENABER JA (HEFER JA, SCHUTZ JA, PLEWMAN JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 1999

Competition

An importer of a product on which there is a manufacturer's trade mark will not normally be able to prove that it has acquired a reputation in relation to the product which would entitle it to establish a case of passing off against a competitor since that mark is not its mark but that of the manufacturer and as such likely to have established a reputation in favour of the manufacturer alone.

THE FACTS

In September 1993, Sportopia (Pty) Ltd and Australian Power Brands (Pty) Ltd (APB) concluded an agreement giving Sportopia the exclusive right to use the trade mark 'Bladeline' in South Africa, and conferring on it marketing and distribution rights in respect of the roller skates with which the mark was associated. Sportopia then applied for the registration of the mark 'Bladeline'. 'Bladeline' was the brand name applied to roller skates manufactured by APB.

In the same year, Premier Trading Company (Pty) Ltd acquired the assets and goodwill of Jokari (SA) (Pty) Ltd whose stock included 312 pairs of Bladeline inline skates. These skates had been obtained from Ellen East Company Ltd, a Taiwanese exporter. They resembled the roller skates manufactured by APB but included the name 'Jokari' on them and depicted the name 'Bladeline' on their wheels instead of on the side of the heel. They were packaged in boxes which were exact copies of the boxes in which APB packaged its roller skates. Ellen East applied for the registration of the trade mark 'Bladeline' in Taiwan in the same year.

In the following years, Premier continued to import the skates from Ellen East and took formal assignment of the Jokari trade mark on 11 April 1995.

In 1993, Sportopia noticed that the skates emanating from Ellen were being sold in retail outlets. It objected to the sale of the Bladeline skates, and claimed all rights to that trade mark. It also objected to the similar packaging used by Premier. Premier claimed that its use of the trade mark predated Sportopia's application for registration of the mark, redesigned its packaging and the manner in which the word 'Bladeline' appeared on the wheels of the skates.

In 1994, Sportopia began marketing its Bladeline skates in the South African market. Premier alleged that Sportopia was passing off its roller skates as its own, and applied for an interdict restraining Sportopia from dealing in roller skates bearing the trade mark 'Bladeline'. It also applied for an interdict restraining Sportopia from interfering in its business by stating to Premier's customers that Premier was not entitled to use the 'Bladeline' trade mark and threatening legal proceedings against such customers and/or Premier on the grounds that it held the exclusive right to use the trade mark 'Bladeline'.

The application for an interdict restraining Sportopia from dealing in roller skates bearing the 'Bladeline' trade mark was refused. Premier appealed.

THE DECISION

In showing that it is entitled to an interdict to prevent the passing off of its product for that of another, an applicant must prove its own reputation in relation to the product, and that the public has been deceived or confused as to the origin of the product or its trade connection, and would probably have been influenced in its decision to buy the product.

Premier had given evidence of limited sales of its product by the time Sportopia entered the market, and of the advertising and other methods of marketing it had employed. This was just sufficient for it to have established that it possessed

some reputation in relation to the roller skates, but it left open the question what that reputation consisted in, in what capacity it enjoyed that reputation and with whom.

Premier did not manufacture the roller skates. It was the distributor of them. The manufacturer from which it acquired the skates had established, as a manufacturer's mark on the skates, the Bladeline trade mark. This mark had not been established by Premier which had established only the Jokari mark as the mark of the importer and distributor. In that capacity, Premier could establish a reputation, but this would relate only to its own mark and would not relate to the Bladeline trade mark. The evidence itself pointed to this, since the buyers of the roller skates for retailers had referred to the 'Jokari brand'. The dominant mark was the Jokari trade mark and not the Bladeline trade mark.

It was possible to conceive of the two marks as functioning together to provide the reputation established by the roller skates product, but in this case, the two marks did not operate co-operatively in this fashion.

The appeal was dismissed.

The notion of a conjoined or composite mark may be perfectly feasible as a proposition of law; in this case, as a proposition of fact, it fails. The two marks simply did not function in that fashion. Nowhere, on the boot or on the package, do they appear in the form "Jokari-Bladeline". On the boot itself Jokari is affixed on the heel and Bladeline is printed on the wheels. Merely as a matter of physical appearance the two words consequently are not linked or articulated. On the package, in its redesigned form, Bladeline appears on the box, with the letters B, E and E in bright and the remaining letters in subdued colours, removed from a separate insert on which the words "Jokari: World of Sport" appear in much smaller print.

WATT v SEA PLANT PRODUCTS LTD

A JUDGMENT BY TRAVERSO J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
15 MARCH 1999

1999 (4) SA 443 (C)

Companies

The fact that a person is obliged to pledge shares to a company as security for payment of the purchase price of the shares indicates that that person owns the shares. An order of court under section 97 of the Companies Act (no 61 of 1973) authorising an increase of the authorised share capital of a company may be given so as to have retrospective effect and may consequently affect contractual relations already entered into.

THE FACTS

Sea Plant Products Ltd appointed Watt as its general manager. In terms of the agreement, Watt was entitled to purchase 200 000 shares of the company at a price of 70 cents per share, entitling him to a final dividend for the current financial year to be declared towards the end of 1989. The shares were to be purchased from the SPP Share Trust which served as a vehicle by which employees of the company could obtain shares in the company.

Watt exercised the option to acquire the shares and a share certificate was issued to him upon transfer of the shares. Watt paid for the shares by securing a loan from the company which was itself repaid by the dividends declared in respect of the shares. At the time the shares were issued to Watt, trustees were appointed under the trust deed, but they did not enjoy the authorisation of the Master to act as such as required by section 6(1) of the Trust Property Control Act (no 57 of 1988).

It subsequently appeared that the company did not have sufficient authorised share capital to have issued the shares to Watt. A meeting of shareholders then resolved to increase the share capital of the company in terms of section 97 of the Companies Act (no 61 of 1973). The company applied to court for an order increasing its share capital, and this was done, the order validating the increase retrospectively to a date prior to the agreement entered into between the company and Watt.

The trustees of the SPP Share Trust also resolved that all shares issued to employees were authorised with retroactive effect.

In terms of clause 5 of the trust deed, shares purchased by a participant in the share ownership scheme were to be pledged as security for the payment of the transfer price and were to be held in pledge by the trustees until release to the participant. Clause 6 provided that after payment of the transfer price, a participant was entitled to release of the shares, but not until after the lapse of defined periods ranging up to 12 years after purchase thereof, unless the board, in its absolute discretion, determined otherwise.

Watt brought an action for an order that he was the owner of the 200 000 shares in the company which had been issued to him. The company resisted the action on the grounds that the trustees did not have authority to issue the shares to Watt, and that this could not be retrospectively validated.

THE DECISION

The retrospective validation of the allotment of the shares to the trust not only effectively increased the number of shares available for issue to employees such as Watt, but also authorised the trustees to issue the shares to him. The trust deed had been validly amended to reflect this intention. There was therefore no basis upon which the effectiveness of the allotment of the shares to Watt could be challenged. Even if it could be said that the order made under section 97 interfered with the contractual relationship between the parties, the issue of the shares remained valid.

The company contended that

in view of the restrictive provisions of clause 6, Watt could not claim that he was the owner of the shares. However, it was clear from the provisions of clause 5 that Watt could be the owner of the shares, as it was impossible for him to pledge the shares without being the owner of them. In any event, because payment for the shares had taken place through the crediting of a loan account with the dividends payable to the shareholder by the company, and this had taken place with the participation of the company, it could be said that the board of the company had 'in its absolute discretion' determined that the restrictive provisions of clause 6 would not apply.

Watt was accordingly the owner of the shares and was entitled to their transfer and registration in his name.

SIMPEX (PTY) LTD v VAN DER MERWE

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
25 SEPTEMBER 1998

1999 (4) SA 71 (W)

Trusts

A trustee may be personally liable for his actions in circumstances where property is placed under his possession and control when acting as trustee.

THE FACTS

Simpex (Pty) Ltd sold fixed property to Van der Merwe and the other defendants acting as trustees for the G&H Trust. The sale was declared invalid by order of court on the grounds that it was concluded before the trustees were authorised to conclude it. The trustees then vacated the property.

Simpex then brought an action for damages against Van der Merwe and the other trustees, claiming that the property had been damaged, or suffered a diminution in its value while it was under their control. It alleged that the loss had been occasioned by the negligence of the trustees in failing to ensure that the property was protected against third party access.

The trustees defended the action on various grounds, including a special plea that they could not be held personally liable for actions done in their capacities as trustees. Simpex excepted to the special plea on the grounds that a trustee which holds property in his capacity as trustee and causes damage to the property is personally liable for such damage provided the elements of delictual liability are satisfied.

THE DECISION

The personal liability of directors and trustees when acting in their representative capacities was a matter of some obscurity in legal discussion of the question. Whatever the exact position, it could not be said that a trustee was never personally liable for his actions when acting in his capacity as trustee.

A trustee may be personally liable for his actions in circumstances where property is placed under his possession and control when acting as trustee. To exclude that possibility would be going too far as the trustee's duty of care might extend to such facts and circumstances.

The exception was upheld.

SHERIFF, DISTRICT OF THE CAPE v SOUTH SEAS DRILLER

A JUDGMENT BY DONEN AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
15 MARCH 1999

1999 (4) SA 221 (C)

Shipping

A sheriff who has arrested a ship in terms of a court order authorising him to do so is not entitled as of right, nor in terms of the Admiralty Rules, to institute a claim against a party which causes damage to the ship where it is not clear that his claim as well as that of creditors of the ship will not be met from the proceeds of the sale of the ship. The sheriff may proceed for satisfaction of his claim or that of creditors on whose behalf he arrested the ship, against the proceeds of the sale of the ship.

THE FACTS

The sheriff for the magisterial district of the Cape arrested the *Limb* in terms of a court order authorising him to do so and retained the ship in his custody in terms of Rule 21 of the Admiralty Rules. The order authorised the sheriff to administer and manage the continued operation of the ship and act in any manner which best preserved the value of the ship.

While the ship was under the custody of the sheriff, an oil rig, the *South Seas Driller*, broke its moorings and collided with a number of ships including the *Limb*. The *Limb* sustained damage. The cost of repairing the damage was approximately US$140 000.

The sheriff then brought an application for an order that he was entitled, and had locus standi, to pursue any claim for damages in respect of the collision on behalf of the creditors of the *Limb* and to pay over the proceeds of such a claim to the Registrar to form part of a fund to be dealt with in terms of the order authorising the arrest.

THE DECISION

The sheriff was the only party apparently entitled to proceed against the *South Seas Driller*. There was nothing to suggest that his claim, including his claim for his own costs and expenses incurred in the preservation of the ship, would not be met from the proceeds of the sale of the ship. If he suffered damages as a result of the collision, he would be entitled to exercise his cause of action against the party responsible. There was no apparent reason why he could not do so.

There was therefore no reason for an order as applied for by the sheriff. Such an order would also require that the court make some finding on how the collision ocurred and who was responsible for it. Without evidence relevant to that question before the court, there was no basis for such an order to be made.

As far as the question of locus standi was concerned, there was no reason to confer locus standi on the sheriff where the creditors claiming against the ship might themselves have a claim against the *South Seas Driller*. The sheriff assumes the role of custodian in respect of a ship which he has arrested, and becomes duty-bound to preserve the ship in terms of the Admiralty Rules, but this confers on him the right to take measures necessary to prevent damage being caused to a ship, not take those measures necessary to remedy damage which has already taken place.

The application was dismissed.