Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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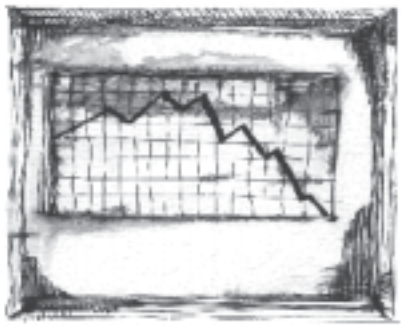
UNREPORTED

Insolvency



A mere disposition of property by a debtor in favour of a creditor which has the effect of preferring that creditor above others following the liquidation of the debtor will not indicate that the debtor intended to prefer that creditor above others. There will be no intention to prefer where the debtor which makes a disposition of its property thinking that it is complying with its obligations in so doing.

THE FACTS

On 4 April 1990, Cat Quip CC passed a notarial general mortgage bond over its movable property in favour of Merchant Trade Finance Ltd. The bond entitled Merchant Trade to enter upon the premises of Cat Quip and take possession of its assets in the event of the bond becoming executable. On 18 November 1992, Cat Quip defaulted in paying certain bills of exchange totalling R121 430,38, which it had drawn in favour of Merchant Trade. This rendered the bond executable and Merchant Trade froze all transactions on Cat Quip's account. It did not however, take possession of Cat Quip's moveable assets.

On 21 January 1993, Merchant Trade decided to take possession of the movables referred to in the bond by way of a court order entitling it to do so. The application for the order was postponed while a settlement proposal was awaited, but on 27 January 1993, by arrangement with the widow of the then deceased member of Cat Quip, attended the premises of the corporation, obtained the keys for them and locked up the premises. At that time, other creditors had already removed certain items which were the subject of credit transactions and a liquidation application against the corporation had commenced. On the same day, Merchant Trade obtained the order perfecting its security. On 2 February 1993, Cat Quip was placed under provisional liquidation.

The liquidators subsequently appointed to wind up the corporation contended that the disposition of Cat Quip's assets in favour of Merchant Trade was a voidable preference in terms of section 29 of the Insolvency Act (no 24 of 1936) and that it should be set aside in terms thereof. Section 29(1) provides that every disposition of property made by a debtor less than six months before liquidation which has the effect of preferring one creditor above another may be set aside by a court, if immediately after making the disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was in the ordinary course of business and was not intended to prefer one creditor above another.

THE DECISION

The important factor in the disposition which is sought to be impeached under the section is the intention of the debtor. In order to bring the section into operation, it must be shown that the debtor intended to prefer one creditor above another. The onus of showing the absence of such an intention is case on the debtor, but in discharging this onus, the debtor need not eliminate all possible reasons for making the disposition which might include the intention to prefer. Where, from the facts of the case, two or more reasons could be inferred, the most plausible or probable inference must be selected.

The most plausible inference to be drawn from the facts of the case were that the widow of the deceased member of Cat Quip handed the keys to the premises to Merchant Finance with the terms of the bond uppermost in her mind, not with the intention to prefer the creditor. She did so under the impression that she was required to do so in terms of the bond, not because she intended to prefer Merchant Finance above other creditors. Although the effect of her having handed over the keys was to confer on Merchant Finance a preference upon the liquidation of Cat Quip, her intention was not to confer this preference on it but to comply with obligations imposed under the bond. This was so despite her awareness that liquidation was inevitable.

The disposition had also been made in the ordinary course of business. Although a solvent businessman would not in the ordinary course of

business, hand over the keys to his business premises to a creditor giving control of his stock, in the present case the keys had been handed over without Cat Quip having any real choice in the matter, the widow of the deceased member having considered herself obliged to hand over the keys.

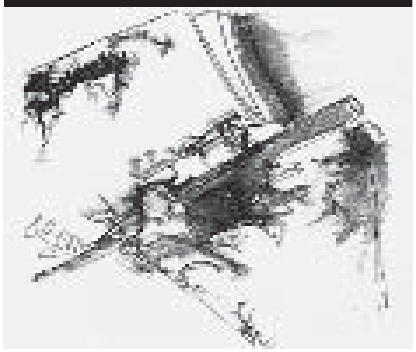
Merchant Finance had discharged the onus of showing the disposition of Cat Quip's assets was made without the intention to prefer and in the ordinary course of business. The liquidator's application was dismissed.

ABSA BANK LTD v DAVIDSON

A JUDGMENT BY OLIVIER JA (SMALBERGER JA, VIVIER JA, HARMS JA and FARLAM AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 1999

UNREPORTED

Suretyship



Mere failure to respond to advice to a creditor that one party is to secure the release of a surety does not amount to a representation that the release of the surety has been agreed. A surety is not prejudiced by actions taken by the creditor which have the effect of increasing the surety's potential liability so long as the creditor does not act in breach of any obligation owed toward the surety. A bank is entitled to honour cheques drawn on a company which are intended to benefit personally a member of the company.

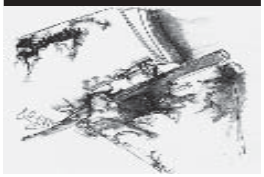
THE FACTS

On 24 February 1989, Davidson applied to the Trust Bank of Africa Ltd, later superseded by Absa Bank Bpk, on behalf of Whistlers Interiors (Pty) Ltd to open a cheque account. The bank accepted the application and the parties entered into a written banker-customer contract. The contract authorised Trust Bank to honour all cheques and other paper drawn on the bank and purporting to be signed by authorised signatories on behalf of Whistlers, and it authorised the bank to allow Whistlers to overdraw its cheque account from time to time and enter into other liabilities with the bank.

Simultaneously, Davidson and another member of Whistlers, Myburgh, signed unlimited deeds of suretyship in which they bound themselves to the bank for the due and proper payment by Whistlers of each amount owed by it or to be owed by it to the bank. The deeds of suretyship were in standard form incorporating provisions extending the sureties' obligations toward the bank in various respects including a provision that the extent, nature and duration of the obligations incurred by Whistlers was to be in the discretion of the bank.

On 7 May 1990, Davidson wrote to the bank informing it that his interest in Whistlers had been purchased by Myburgh who was required to secure his release from all suretyships. He wrote that certain bank officials had been advised of this and unless he was to hear to the contrary, he would regard the surety as cancelled. On 21 August 1990, Davidson formally sold his shares and loan account in Whistlers to Myburgh, the agreement providing that Myburgh would undertake to secure Davidson's release as surety to the bank. Myburgh did not succeed in securing Davidson's release.

On 6 May 1991, Whistlers was placed in liquidation. The bank then brought an action against Davidson based on his suretyship obligations. Davidson defended the action on the grounds that the bank was to be estopped from asserting its rights under the deed of suretyship and on the grounds that it had acted to his prejudice following his sale of his shares in the company by (i) honouring cheques and debit orders on Whistlers' account which were arranged to pay for a motor vehicle bought by Myburgh for his own use (ii) allowing the company's overdraft to double.



THE DECISION

Estoppel could provide no defence to the bank's claim. Without evidence of the despatch or receipt of the letter advising the bank of the terms of the sale of Davidson's interest in the company, its failure to respond to the letter could not be considered a misrepresentation that he was in fact released from his suretyship obligations. Even assuming that the bank knew of the agreement requiring Myburgh to secure Davidson's release, its failure to respond to the advice that the agreement had been entered into did not amount to a representation that the bank in fact accepted his release as surety. Any misrepresentation was therefore of Davidson's own making.

As far as the allegation of prejudice was concerned, the prejudice complained of was in fact prejudice which Davidson had accepted when he signed the deed of suretyship, not prejudice which flowed from some breach of an obligation on the part of the bank. The bank was obliged to honour all cheques and other paper drawn on the bank and allow Whistlers to overdraw its cheque account in the discretion of the bank. It followed that even if the bank knew that the motor vehicle had been purchased for Myburgh's personal use, it could not have dishonoured the cheques and debit orders drawn for the purpose of paying for it. The account was therefore correctly debited in these amounts and Davidson was not prejudiced as surety as a result.

As far as the increase in overdraft was concerned, in terms of the contract subsisting between Whistlers and the bank, the bank was clearly within its rights to increase the overdraft. Davidson could not allege that he was prejudiced by something which the bank could legally do. Davidson had agreed to meet the extent of the obligations of Whistlers which were at all times to be within the discretion of the bank.

The defences raised by Davidson were unsustainable. The bank's claim was upheld.

STANDARD BANK OF SA LTD v DURBAN SECURITY GLAZING (PTY) LTD

A JUDGMENT BY McLAREN J
DURBAN AND COAST LOCAL DIVISION
16 JULY 1999

2000 (1) SA 146 (D)

A deed of suretyship which requires that the surety give formal notice to the principal debtor of the termination of its suretyship obligations does not require that the surety should comply with the particular formalities prescribed for notification if a tacit term can be imported into the suretyship to the effect that substantial compliance with such a requirement is sufficient. Such a term will be implied where the parties would have included it were they to have been asked whether it should be included in the event of failure to follow the prescribed formalities and if such a term is necessary to give business efficacy to the suretyship agreement.

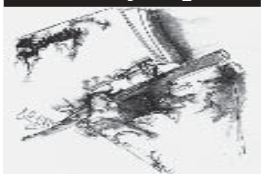
THE FACTS

Bezuidenhout signed a deed of suretyship in favour of the Standard Bank, securing the indebtedness of Durban Security Glazing (Pty) Ltd. Bezuidenhout was the sole director and shareholder of Durban Security. In terms of clause 13.2.1 of the suretyship, it was to remain in force until the expiry of seven days after the bank was to have received written notice from the surety terminating liability for future indebtedness, provided that such written notice was to have no force or effect unless it was accompanied by proof of the sending of a copy thereof by registered post to the debtor.

The suretyship also contained clause 16 which provided that no cancellation or variation of the suretyship would be of force or effect unless recorded in writing and signed by both bank and surety, and clause 22 which provided that it set out the entire agreement between the parties, and the bank would not be bound by any undertakings, representations or warranties expressly recorded therein.

On 8 December 1994, Bezuidenhout addressed a letter to the bank, on the letterhead of Durban Security, in which he confirmed a request to be released of his personal guarantee and to secure the return of the title deeds in respect of certain fixed property situated in Kloof. The bank received the letter but the letter was not sent to Durban Security by registered post. At the time, Durban Security was not indebted to the bank.

The bank brought an action against Durban Security and Bezuidenhout for payment of R27 206,30 allegedly owed to it. Bezuidenhout defended the action on the grounds that he had been released as surety under the operation of the provisions of clause 13.2.1. He contended that although



he had not sent notification of termination by registered post, it was a tacit term of the suretyship agreement that an alternative method of notification was permissible.

THE DECISION

In general, a surety has the right to terminate his suretyship at any time on notice to the creditor. A debtor has an interest in being informed of this fact, and accordingly provision is made for notification to be given in the event of the termination of a suretyship obligation. Bezuidenhout had effectively given Durban Security notice of his termination of the suretyship obligation when he notified the bank thereof, because the letter was written by himself as shareholder and director of the company and on the letterhead of the company. The question was whether the fact of actual notification sufficiently complied with the requirements of the termination provisions of the suretyship.

It was clear that the actual notification did not comply with the proviso to clause 13.2.1. However, a tacit term to the effect that better or substantial compliance with the notification provisions contained in the clause was acceptable could be imported into the agreement. The term was not incorporated in the suretyship document as it stood, but if the parties had been asked at the time of contracting, what the position would be if actual notification of the termination of the suretyship was given, as opposed to notification in strict accordance with the provisions of the suretyship, then they would have answered that the actual notification would have been sufficient. This was a reasonable interpretation of the suretyship agreement, one which accorded with a reasonable and businesslike application of the agreement, and one which gave business efficacy to it.

TESVEN CC v SOUTH AFRICAN BANK OF ATHENS

A JUDGMENT BY FARLAM AJA (MAHOMED CJ, VAN HEERDEN DCJ, SMALBERGER JA and HOWIE JA concurring)
28 SEPTEMBER 1999

2000 (1) SA 268 (A)

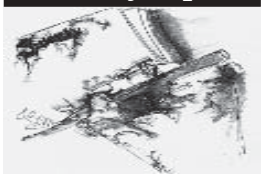
A prior oral agreement may provide a basis for rectifying a deed of suretyship, despite the fact that the prior agreement did not relate to the wording of the deed. A contract can be rectified in order to ensure that it properly reflects the common intention of the parties.

THE FACTS

Tesven CC signed a deed of suretyship in favour of the South African Bank of Athens for the due payment of all obligations owed by Michael Gaganakis to the bank, the maximum amount recoverable thereunder being limited to R500 000 plus interest and costs. Two days before the suretyship was signed, Tesven mortgaged its property under a covering mortgage bond in favour of the bank as security for payment of the obligations referred to in the deed of suretyship.

Four months earlier, Mrs MM Gaganakis also signed a deed of suretyship in favour of the bank in respect of Michael Gaganakis's indebtedness to the bank, the maximum indebtedness thereunder being limited to R500 000. At the time, she owned property over which a bond limited to R500 000, had been passed in favour of the bank. That property was later sold and Mrs Gaganakis acquired a new property through her acquisition of a member's interest in Tesven which owned erf 898, Parkwood Township. Upon acquisition, of this member's interest, Mrs Gaganakis signed the deed of suretyship in favour of the bank and Tesven passed the mortgage bond over its property in favour of the bank.

A year later, at a time when he then owed the bank R1 363 021,81, Mr Gaganakis was provisionally sequestrated. The bank brought an action against Tesven and Mrs



Gaganakis for payment of R237 772,28 in terms of their suretyship obligations.

In defending the action, Mrs Gaganakis alleged that the deeds of suretyship did not reflect the intention of the parties as they omitted to state that they would only become effective if Mr Gaganakis became liable to the bank in respect of a guarantee for R500 000 which the bank had undertaken to issue to Rothsay Holdings (Pty) Ltd as part of a settlement of a dispute involving fees owed to Mr Gaganakis by his clients. She claimed that the deeds of suretyship should be rectified so as to correctly reflect this intention.

Tesven appealed the grant of summary judgment against it in favour of the bank.

THE DECISION

Rectification of the deeds of suretyship was not excluded merely because the alleged mistake did not relate to the wording of the documents themselves. It was possible to rectify the deeds of suretyship if it could be shown that they did not properly incorporate the provision regarding the liability in respect of the guarantee for R500 000 alleged by Mrs Gaganakis to have been agreed by the parties. If she had mistakenly thought that this provision would be a part of the agreement concluded between the sureties and the bank, despite it having been omitted from the deeds of suretyship in question, then the deeds of suretyship could be rectified so as to ensure that the oral agreement would still be operative.

The question remaining was whether or not summary judgment should be granted. This depended on an assessment of whether or not the bank's case was unimpeachable and that of Tesven bogus or bad in law. The allegations made by Mrs Gaganakis concerning the bank's undertaking to issue a guarantee for R500 000 required substantial clarification as it was not clear how this would settle the dispute alleged to exist between Mr Gaganakis and his clients. However, some basis for the allegation of the guarantee of R500 000 was found in the explanation of the property transactions which had been given by Mrs Gaganakis. It appeared that the bond on which the bank sued was a replacement of the bond of R500 000 on the property previously owned by Mrs Gaganakis, and this suggested that some limitation on the enforcability of the deeds of suretyship existed.

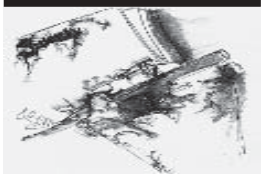
Although some doubts had been raised concerning the defences raised by Mrs Gaganakis to the claim brought by the bank, there was sufficient evidentiary material to lead to the conclusion that the bank's case might not be unanswerable. The court was entitled to exercise its discretion in refusing to grant summary judgment.

The appeal was upheld.

To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result.

VAAL REEFS EXPLORATION AND MINING CO LTD v BURGER

Suretyship



A JUDGMENT BY HARMS JA (VAN HEERDEN JA, GROSSKOPF JA, MARAIS JA and STREICHER JA concurring)
21 SEPTEMBER 1999

1999 (4) SA 1161 (A)

A person who is empowered to act on behalf of his or her spouse by some authority other than the consent of the spouse is not required to comply with the provisions of section 15(2) of the Matrimonial Property Act (no 88 of 1984) in order to validly bind the marital estate. A cession given as security for a debt together with a suretyship undertaking is accessory to the principal debt and not the suretyship obligation.

THE FACTS

On 7 December 1994, Mrs Burger ceded a fixed deposit of R500 000 to Vaal Reefs Exploration and Mining Co Ltd as security for the obligations of Michette Mining Services (Pty) Ltd under a contract entered into between it and Vaal Reefs.

Mrs Burger was married, in community of property, in 1963. In 1992, she was appointed curator of her husband as a result of his incapacity following a motor accident. The court order so appointing her, entitled her to sell or encumber any asset belonging to him and empowered her to exercise any capacity vesting in him or give any consent required for the exercise of such capacity.

Vaal Reefs alleged that Michette had defaulted in its obligations under the contract and claimed payment of the R500 000 for which Mrs Burger had given the suretyship. Burger defended the action on the grounds that the cession and suretyship were void in that they had been given without the consent of her husband as required by section 15(2)(c) and 15(2)(h) of the Matrimonial Property Act (no 88 of 1984). These subsections render void the cession of any fixed deposit or the entering into of a deed of suretyship by a person without the consent of the spouse of that person.

Vaal Reefs contended that the consent of Burger's husband had not been necessary in view of Burger's appointment as curator of her husband, alternatively that if it had been necessary, it was given to her by herself on his behalf.

THE DECISION

The provisions of section 15(2) are not applicable to the unusual situation where a person has the power to bind the marital estate and obtains that power from a source other than the consent of the other spouse. Failure to comply with the section therefore provided no reason why Burger could not bind herself in favour of Vaal Reefs under the cession and the deed of suretyship.

All that had to be decided was whether or not the court order appointing Burger as curator conferred the power to bind the marital estate to the extent of entitling her to execute the cession and enter into the deed of suretyship. The court order had expressly empowered Mrs Burger to encumber the property of her spouse. This clearly covered the cession of the fixed deposit and the entering into of the deed of suretyship. It therefore conferred on her the power to bind the marital estate in the manner in which she had.

Even if the suretyship undertaking were considered void, the cession would not necessarily be void as well. The cession secured the principal debt as much as the deed of suretyship did. The cession was not accessory to the deed of suretyship but to the principal debt and it would remain valid despite any possible invalidity of the deed of suretyship.

Vaal Reefs' claim was upheld.

P G BISON LIMITED v THE MASTER OF THE HIGH COURT, GRAHAMSTOWN

A JUDGMENT BY GROSSKOPF JA (HEFER JA, OLIVIER JA, SCOTT JA AND STREICHER JA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 1999

UNREPORTED

Cession

A cession agreement which gives the cedent the right to collect the ceded debts as agent of the cessionary, the right being terminable upon the cessionary giving notice of the cession and recovering payment of the debts directly, renders the cedent a secured creditor giving it a preferential right to the collected debts upon the liquidation of the cedent. The cessionary's secured position is not dependent on it having given notice of the intention to implement the cession, if this is required by the cession agreement, where it is clear that the cessionary retains the right to recover payment of the debts directly.

THE FACTS

Pats Planks CC ceded its book debts to PG Bison Ltd, the cession being recorded in a document entitled 'General Covering Cession'. The document recorded that Pats thereby ceded in securitatem debiti, and transferred and made over the claims thereby ceded. It also included a provision that Pats would collect any of its debts as agent on behalf of PG, its mandate being terminable by PG and PG entitled to collect the debts for its own account. The Cession contained an additional clause which recorded that the cession would not be implemented unless Pats' account with PG was overdue by thirty days, and seven days' notice of intention to implement the cession had been given.

Pats was placed in liquidation. As at that date, its account was thirty days overdue but seven days' notice of intention to implement the cession had not been given. When the liquidation and distribution account was drawn up, it was amended to reflect the proceeds of Pats' book debts in the free residue account, ie not as subject to PG's secured claim, because the seven days' notice referred to in the additional clause had not been given. PG objected to this, contending that the cession in its favour conferred security on it entitling it to a preferential payment of dividends available to creditors.

PG brought an application for an order that the liquidation and distribution account be amended to reflect the book debts as an encumbered asset, and the proceeds thereof not reflected in the free residue account. It appealed against the dismissal of its application.

THE DECISION

The meaning of the word 'implement' in the additional clause was crucial to the outcome of the case: if PG could not implement the cession in terms thereof, then it could not claim to hold any security entitling it to a preferential position in regard to the assets available for distribution to creditors.

'Implement' was to be read in the context of the Cession as a whole. The Cession conferred on PG extensive rights, Pats having in fact divested itself of its rights to claim against its debtors. That it had so divested itself of those rights was clear from the fact that Pats was given the right to collect the debts as agent of PG. This was underlined by the provision that PG could terminate this arrangement and collect the debts for its own account, and would ordinarily assert this right upon Pats defaulting in its obligations toward PG. The giving of notice as required by the additional clause could therefore be considered equivalent to the termination of the mandate given to Pats to collect its own debts.

Accordingly, the rights held by Pats were transferred to PG by the Cession. This security entitled it to have the book debts reflected as encumbered assets in the liquidation and distribution account. The appeal was upheld.

MILLSELL CHROME MINES (PTY) LTD v MINISTER OF LAND AFFAIRS

A JUDGMENT BY ZULMAN JA (STREICHER JA, MELUNSKY JA, FARLAM AJA AND MADLANGA AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 1999

1999 CLR 602 (A)

Contract

An option which requires both that it be exercised within a certain time, and state a date on which the rights conferred in it are to be exercised, must be exercised as well as state such a date in order for the option to be validly exercised.

THE FACTS

On 28 July 1977, a notarially executed mineral lease was entered into between the Minister of Bantu Administration, Development and Education in his capacity as trustee of the Bafokeng Tribe as lessor and Palmiet Chrome Corporation (Pty) Ltd as lessee. Palmiet later ceded its rights in terms of the lease to Millsell Chrome Mines (Pty) Ltd and the Minister of Land Affairs succeeded the Minister of Bantu Administration as trustee of the Tribe.

In terms of the lease, the lessee was exclusively entitled to prospect for chrome ore for a period of five years from the date of the agreement. In terms of clause 3, the lessee was entitled to exercise an option to mine and dispose of chrome ore during the prospecting period. The option was to be exercised by giving written notice to this effect to the lessor, the Magistrate Bafokeng and the Bantu Mining Corporation Ltd, and was to state a date on which operations would begin.

On 7 July 1982, a Notarial Exercise of Option to Take a Mineral Lease was notarially executed. In an Annexure, it was stated that Millsell exercised the option and thereby, the right to mine manganese ore. Later, on 18 August 1982, the reference to manganese ore was substituted by a reference to chrome ore by a notification to the Tribe's attorney to this effect.

The Minister brought an application claiming an order that there was no exercise, alternatively no valid or effectual exercise of the option, alternatively, if there was a valid and effectual exercise of the option, Millsell thereafter abandoned the mineral lease. The Minister contended that the option had not been timeously exercised since the notarial execution of the option was defective in having incorrectly referred to manganese ore, and in having failed to specify a date on which mining would begin.

THE DECISION

It should have appeared to the recipient of the Annexure that Millsell intended to exercise the option to mine for chrome ore and that the reference to manganese ore was an obvious error. However, the real difficulty faced by Millsell centred on its failure to state a date on which mining operations would begin.

The lease had clearly stated that the option was to be exercised, and that a date was to be stated on which mining operations would begin. There were therefore two separate things that the lessee had to do. Interpreting the wording of clause 3 grammatically, there were two aspects which had to be construed conjunctively and not disjunctively. Each were to be performed and it was impossible for performance of the one to be seen as incorporating performance of the other. There was no indication that the parties intended the date of exercise of the notarial lease to be the date on which mining operations would begin. There having been two things Millsell was required to do, and it having failed to do one of them, there was no proper exercise of the option. The purported exercise was of no force and effect.

Millsell's contention that it had properly exercised the option was also unacceptable on the grounds that it had not communicated its acceptance of the offer contained in the option. Any offer requires an acceptance in order for a valid contract to come into existence. In the present case, no contract had come into existence because Millsell had not communicated an acceptance of the offer.

The application succeeded.

KOHLER FLEXIBLE PACKAGING (PINETOWN) (PTY) LTD v MARIANHILL MISSION INSTITUTE

A JUDGMENT BY HOWARD JP
DURBAN AND COAST LOCAL DIVISION
30 JUNE 1999

2000 (1) SA 141 (D)

A claim against a party which has improperly performed professional services under a contract entered into by that party must be brought upon the basis of that contract and cannot be brought in delict, where that which is complained of arises from the contract in question.

THE FACTS

Kohler Flexibile Packaging (Pinetown) (Pty) Ltd brought an action against Marianhill Mission Institute in which it alleged that it had purchased from Marianhill certain fixed property. It alleged that Marianhill had arranged with the second defendant the construction of certain earthworks for a building platform, and Marianhill had warranted to Kohler that the building platform consisted of acceptable fill material and had been properly compacted.

Kohler alleged that it had constructed factory buildings on the property, but the earthworks on which they were constructed exhibited excessive settlement. It had undertaken certain remedial measures to prevent differential movement which would have resulted in cracking in the building. The reasonable and necessary cost of doing so, as well as estimated future costs, amounted to R17 499 668,45.

Kohler alleged that the second defendant owed it a duty of care in carrying out the earthworks to guard against excessive settlement which might result in cracking of the buildings.

The second defendant issued third party notices against three parties, engineers employed by Marianhill to design the building platform and supervise the earthworks contract, consulting engineers appointed in respect of the construction of the factory buildings and the nominated subcontractor which had constructed the buildings. It alleged that in carrying out the design of the buildings, their floors and foundations, they owed it a duty of care to guard against excessive settlement which might result in cracking in the buildings. It alleged that they had breached that duty of care, and claimed a contribution from them under the provisions of the Apportionment of Damages Act (no 34 of 1956).

Two of the third parties objected to the notices on the grounds that they lacked averments necessary to sustain a cause of action against them and excepted to them on the grounds that Kohler had no cause of action in delict against them. The basis for this exception was that their liability toward Kohler had to be found in the contract under which they performed their professional work and not in delict.

THE DECISION

The basis of the exception was established in the case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers (Pty) Ltd* 1985 (1) SA 475 (A), which held that the basis of the liability of a person who has performed professional services is to be found in the contract under which the professional work was performed, and not in delict, unless the actions complained of infringe a right which is independent of the contract.

This principle was directly applicable in the present case. The claim made by the second defendant against the third parties could be construed as a claim for more than mere economic loss, ie included loss which might arise from physical damage. However, this factor did not distinguish the second defendant's claim as being independent of the contract under which the claim was brought. The physical defects in the buildings did not arise from any wrong done independently of the contract but a wrong done in the improper performance of the contract. There was therefore no basis for a claim in delict against the third parties.

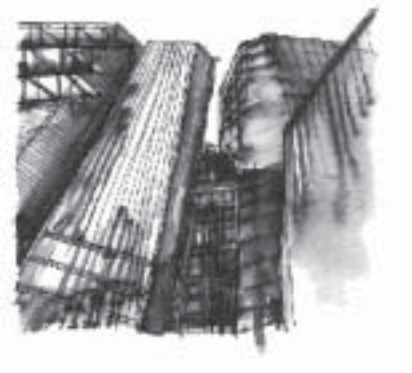
The exceptions were upheld.

FAIRBRASS v ESTATE AGENTS BOARD

A JUDGMENT BY CLOETE J (MALAN J and LANE AJ concurring)
WITWATERSRAND LOCAL DIVISION
12 AUGUST 1999

1999 (4) SA 1052 (W)

Property



An person who acts for a body corporate in collecting money due to the body corporate acts as an estate agent as defined in the Estate Agents Act (no 112 of 1976) and is therefore subject to the disciplinary procedures which may be brought against estate agents by the Estate Agents Board under that Act. That Board is the proper forum for the investigation of a complaint brought against such a person, even if the circumstances giving rise to the complaint have also resulted in legal proceedings.

THE FACTS

Fairbrass lodged a complaint against Inglestone, a member of Zingle Estates CC which was the managing agent appointed by the body corporate of Maxwelton Building. He alleged that Fairbrass had tried to extort from him payment of electricity charges in respect of the flats which, to the knowledge of Inglestone, were not due. He alleged that Inglestone had deposed to an affidavit in support of a summary judgment application that these charges were due.

Fairbrass lodged his complaint with the Estate Agents Board. The Board was empowered, in terms of section 30(2) of the Estate Agents Act (no 112 of 1976), to bring and investigate any charge of improper conduct against an estate agent.

A disciplinary committee of the Board considered the complaint and decided that the actions or omissions with which Inglestone was charged did not constitute improper conduct. Its decision was based on the reasoning that the complaint was the subject of a civil action issued out of the magistrate's court in Johannesburg which was the appropriate forum to determine the matter, and that Inglestone had merely acted on instructions received from the Maxwelton body corporate. The Board ratified the committee's decision. It held that the committee was not the correct forum for the ventilation of the complaint, and that the Board itself did not have jurisdiction to entertain the complaint since Inglestone had not been acting as an estate agent.

Fairbrass appealed this decision.

THE DECISION

The Estate Agents Act defines an estate agent as any person who for the acquisition of gain in any manner holds himself out as a person who renders such services as the Minister may specify from time to time. One such service was specified as that of collecting or receiving money payable by any person to a body corporate.

One of the functions of Zingle Estates CC was the collection of money payable to the Maxwelton body corporate. Deposing to an affidavit in support of a summary judgment application was part of that collection process. It followed that in carrying out those functions, Zingle, and Inglestone as the person entitled to take part in the running of that business, was acting as an agent as defined in the Estate Agents Act.

The actions alleged to have been taken by Inglestone would, if proved, constitute improper conduct for an estate agent, and should therefore have been investigated by the Board's disciplinary committee. There was a reasonable prospect that the allegations would be proved. The proper forum was in fact the Board itself, since an investigation of and decision on Inglestone's actions was a part of the Board's functions and obligations.

The appeal was upheld.

HIGHVELD 7 PROPERTIES (PTY) LTD v BAILES

JUDGMENT BY STREICHER JA (HEFER JA and MPATI JA concurring)
SUPREME COURT OF APPEAL
27 SEPTEMBER 1999

[1998] 3 All SA 205 (N)

In determining whether or not a party has repudiated an agreement, thereby entitling the other party to cancel the agreement, a court will determine whether objectively viewed, that party has exhibited a deliberate and unequivocal intention no longer to be bound to the agreement. Where the party in question insists upon performance of an agreement which is different from that agreement, alleging that the latter has been superseded or amended by a later agreement, then objectively, the party will be seen to have repudiated the agreement, thus entitling the other to cancel the original agreement.

THE FACTS

Highveld 7 Properties (Pty) Ltd bought immovable property from Bailes. The purpose of the acquisition was to enable the establishment of a golf course estate.

After the sale, in response to an request from Highveld, Bailes indicated his willingness to enter into an addendum to the agreement of sale in a letter written to Highveld. This addendum recorded Bailes' willingness to sell further land identified by a firm which had been engaged to prepare a development plan with a view to obtaining town planning approval for the golf course estate. It recorded that part of the land already sold would be simultaneously subtracted from the land sold. A higher net price was then recorded as the applicable price. Highveld responded with a counter-proposal as to the precise area of the extra land it wished to obtain. In a letter written in reply to Bailes, it stated that it had been agreed that the size of the site was to be increased but it required that it be entitled to an increase in the number of stands to be purchased on the site.

Highveld then applied for the approval of its development plan on the basis of the increased land size. Bailes contended that the terms contained in his letter written to Highveld had been accepted, although he was prepared to reduce the total purchase price. Highveld suggested a further reduction of the purchase price, but Bailes rejected this.

Highveld then stated that as a result of a failure to agree on the terms of the acquisition of the extra land, the application for approval of its development plan be amended to adhere to the land size recorded in the original agreement. Bailes disputed that there had been a failure to agree to the amendment, and called upon Highveld to comply with the amended agreement by furnishing the guarantees payable in terms thereof, failing which he would invoke the breach provisions of the agreement and claim damages. Highveld stated that by his behaviour, Bailes appeared to have no intention of proceeding with the original agreement and appeared to require it to comply with the terms of a new agreement. It considered this a repudiation of the original agreement, accepted the repudiation, and cancelled the contract.

Bailes denied that he had repudiated the agreement, and brought an application for an order that the original agreement as amended, alternatively the original agreement alone, was of full force and effect. Highveld appealed against an order that the original agreement was binding on the parties.

THE DECISION

Section 2(1) of the Alienation of Land Act (no 68 of 1981) provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or their agents acting with their authority. The amendments contended for by Bailes did not comply with this Act and could therefore not be said to have formed part of the parties' agreement. There was, in any event, no evidence that the parties had reached consensus on the price payable in respect of the additional land proposed to be incorporated with the existing land.

The question to be decided was whether or not the attitude Bailes had adopted amounted to a repudiation of the original agreement. The test was whether or not he had exhibited a deliberate and unequivocal intention no longer to be bound to the original agreement.

Bailes' subjective intention was not relevant in determining this. If he had no intention of repudiating the original agreement, this would not meant that objectively, he did not do so. If he did act in such a way as to lead a reasonable person to conclude that he did not intend to

perform his obligations under the original agreement, then he would have repudiated the agreement.

Bailes's action in demanding delivery of the guarantees under threat of a claim for damages would have led a reasonable person to conclude that it would serve no purpose to apply for approval of a development plan and rezoning in respect of the land originally sold, nor to deliver guarantees for the payment of the purchase price payable in terms of the original agreement. A reasonable person would also have concluded that Bailes would not have transferred the land originally sold in terms of the original agreement. It was therefore clear that Bailes had considered himself bound by the disputed agreement and not the original agreement. He had repudiated that agreement.

The appeal was upheld.

RD SUMMERS FISHERIES CC v VIKING FISHING CO (PTY) LTD

A JUDGMENT BY ERASMUS J
SOUTH EASTERN CAPE LOCAL DIVISION
4 AUGUST 1999

1999 (4) SA 1081 (SECLD)

Shipping

An arrest of a ship may be continued only if there is evidence which would show that the claimant has a cause of action as averred in the action in rem, irrespective of the probabilities for or against the successful outcome of the action.

THE FACTS

In terms of a loan agreement recorded in a document, Viking Fishing Co (Pty) Ltd lent R220 000 to Mr R D Summers. The loan was to be repaid by the delivery of fish for Viking's business, and Summers was to take all steps necessary to have a marine bond registered in favour of Viking over the MFV *Lochan Ora*, the vessel to be used for fishing purposes.

The loan was concluded a few weeks after Summers purchased the *Lochan Ora* on behalf of a close corporation yet to be formed, RD Summers Fisheries CC. This close corporation was later formed.

Because loan repayments were not made, Viking instituted an action in rem against the *Lochan Ora* and arrested it. Summers Fisheries applied for the setting aside of the arrest, contending that the R220 000 was lent to Summers personally. Since it, being a close corporation different from Summers himself, was not liable to Viking for repayment of the loan, the arrest of the *Lochan Ora* was not competent under section 3(4) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983). Viking contended that the loan agreement incorrectly recorded the debtor as Summers and that the agreement required rectification so as to show Summers Fisheries as the correct debtor.

THE DECISION

Section 3(4) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) provides that a maritime claim may be enforced by an action in rem if the claimant has a maritime lien over the property to be arrested or if the owner of the property to be arrested would be liable to the claimant in an action in personam in respect of the cause of action concerned.

The defendant whose ship has been arrested is entitled to challenge the arrest on the grounds that the provisions of this section have not been adhered to. One such ground is that the claimant does not have a maritime lien, or has no claim

against the owner of the property to be arrested. The defendant may therefore require that the claimant show that it has reasonable or probable cause as to the whole of its action in rem. The defendant should not have to accept an arrest and be content to a claim for damages should the arrest later appear to be wrongful. An arrest may be continued only if there is evidence which would show that the claimant has a cause of action as averred in the action in rem, irrespective of the probabilities for or against the successful outcome of the action.

In order to show that it had a cause of action against Summers Fisheries, Viking would have to show that it was entitled to rectification of the loan agreement. The allegations made by Viking in this respect did not show that it would be entitled to rectification of the loan agreement. The most they showed was that Viking had laboured under the mistaken impression that Summers Fisheries would assume the position of debtor under the loan agreement. This was insufficient to show that it was entitled to rectification of the loan agreement, and this left Viking without a cause of action against Summers Fisheries.

The arrest was set aside.

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

A JUDGMENT BY COMRIE J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
7 MAY 1999

2000 (1) SA 286 (C)

An applicant for security under section 5(2) & (4) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) must show that it has a prima facie case in respect of its claim for which it requires security, that there is a genuine and reasonable need for security and that it is appropriate that the court exercise its discretion in favour of ordering that security be furnished.

THE FACTS

Palm Base Maritime SDN BHD obtained an order for the arrest of the *Heavy Metal*, a ship owned by Belfry Marine Ltd, as security for a claim it had against Dahlia Maritime Ltd arising from the sale of the *Sea Sonnet* an alleged associated ship. Belfry appealed against the grant of this order. Before the appeal was heard, Belfry applied for an order that Palm Base furnish security in respect of a claim for damages it wished to bring against Palm Base arising from the arrest of the *Heavy Metal*.

Belfry contended that it was entitled to security on the basis of section 5(2) & (4) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983). Section 5(2) provides that a court may order any person to give security for costs and order that any arrest or attachment be made subject to such conditions as to the court appears just. Section 5(4) provides that any person who makes an excessive claim or requires excessive security or without reasonable or probable cause obtains the arrest of property or an order of court, shall be liable to any person suffering loss or damage as a result thereof.

THE DECISION

Section 5(2) vests in the court a wide power to order that security or counter-security be furnished. In applying the provisions of the section, it must be shown that there is a prima facie case in respect of the claim or counterclaim, that there is a genuine and reasonable need for security and that it is appropriate that the court exercise its discretion in favour of ordering that security be furnished. Factors influencing the court's exercise of its discretion include whether the arrest was made in terms of section 5(3), the location of the forum, whether the arresting party is a peregrinus of the court, the nature of the counterclaims and the effect of a forfeiture order on the arrestor's position.

Palm Base was permitted to adduce evidence in addition to that which it presented in bringing the application for the arrest of the *Heavy Metal*. In order for Belfry to show that it had

a prima facie case, it had to show that Palm Base had no reasonable or probable cause in arresting the ship.

Palm Base's evidence, even as criticised by Belfry, showed however, that Palm Base had reasonable or probable cause to arrest the ship.

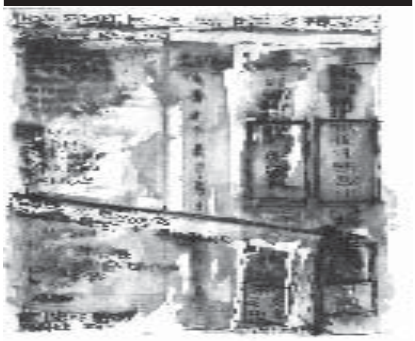
Belfry had therefore not shown that it had a prima facie case in respect of the counterclaim it wished to bring.

THOROUGHBRED BREEDERS ASSOCIATION OF SA v PRICE WATERHOUSE

JUDGMENT BY GOLDSTEIN J
WITWATERSRAND LOCAL DIVISION
7 JULY 1999

1999 (4) SA 968 (W)

Auditors



An auditor is required to examine the financial affairs of a company so as to be reasonably satisfied that the financial statements of the company properly reflect the company's financial position. In doing so, it must make inquiries which would expose transactions which might lead to a fraud or theft against the company, such as reperforming bank reconciliations and testing sample entries in the company's books of account. The extent to which it must do so will depend on the importance of the transactions in question as determined by their amounts in relation to the total amounts involved. An auditor's failure to conduct an examination in this manner involves a breach of contract with its client, but it will not be fully liable for any loss resulting therefrom where the client itself is also responsible for such resulting loss.

THE FACTS

In 1991, the Thoroughbred Breeders Association of SA (the 'TBA') employed a certain JW Mitchell as its financial manager. During an initial three-month probation period, it learnt that Mitchell had been convicted of theft of cheques amounting to R50 103,07 and had spent time in prison serving a sentence imposed following the conviction. The TBA nevertheless decided to continue employing Mitchell.

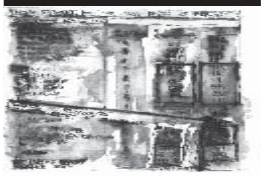
While so employed, and during 1994, Mitchell stole R1 389 801,90 from the TBA by misdirecting to himself undeposited cash, and encashing a promissory note with a face value of R138 864 and maturity date 8 February 1993.

During January 1994, Price Waterhouse performed an audit of the TBA's financial statements for the financial year ending 31 October 1993. It did so under a contract concluded between the two parties, the terms of which affirmed that the TBA and not Price Waterhouse was responsible for the correctness of the assertions made in the TBA's financial statements. They further affirmed that Price Waterhouse's duty was to obtain reasonable assurance that the financial statements fairly presented in all material respects the financial position of the TBA but was not required to examine every assertion in order to do so. If Price Waterhouse decided to examine a particular assertion, it would be obliged to do so with reasonable care and not negligently, and it would be alert to the possibility of misstatements.

Transactions which formed the subject-matter of the audit conducted by Price Waterhouse included the recording of cash deposits with the TBA and the recording thereof in the bank account of the TBA. Some of these showed that in some cases, cash deposits were not recorded as banked for three or four months, and then as cleared before a reconciliation which was done on 31 October 1993. Others showed no apparent relationship between cash received and cash deposited in the bank. Some cashbook entries recorded cash as received some six months after the cash was in fact received.

In the audit which took place in January 1994, none of these events were noted. The results of the examination of the bank reconciliations were reported as being generally satisfactory.

As far as the promissory note was concerned, the TBA held it as an asset in its Futurity Race Programme account, an account which had been established to provide for prizes for owners or breeders of horses. Working papers prepared during the audit recorded that the promissory note was an asset in the Futurity account and its maturity date noted, but the note itself was not examined. The Futurity account reflected total assets of R1 862 366. TBA's assets as a whole amounted to R16m.



The TBA contended that the audit had not been performed properly and if it had been, would have uncovered Mitchell's activities which would have resulted in his dismissal before the thefts took place later in 1994. It brought an action against Price Waterhouse for payment of the amount of the thefts, with interest.

THE DECISION

The first question was whether or not Price Waterhouse committed a breach of the contract between it and the TBA.

Price Waterhouse had been obliged to scrutinise the outstanding cash deposits to determine whether or not the financial statements fairly reflected the financial position of the TBA. A reperformance of the end-of-year bank reconciliation would have brought to light the deposits in the cash book which were not in agreement with the bank statements. This would have set off a train of enquiry which would have shown the long outstanding cash deposits which existed in October 1993, and this would inevitably have led to the prevention of the thefts which had been committed by Mitchell. In fact, the examination of the outstanding deposits which was made was so superficial that their significance was not realised. The working papers showed that the overall results were considered generally satisfactory. In not following the procedures which would have resulted in the prevention of the thefts, Price Waterhouse had in this respect, failed to properly perform the audit which it had undertaken to do.

As far as the promissory note was concerned however, Price Waterhouse could not be criticised. The value of the note was not large when compared with the total assets in the Futurity account, even less so when compared with the total assets held by the TBA. It was therefore not a material factor in the performance of the audit, although this did not detract from the fact that the promissory note should have been examined, and the failure to do so showed negligence on the part of the auditors.

In order to impose liability on Price Waterhouse, it was however necessary to be sure that its breach of contract had been the cause of the TBA's loss from the thefts committed by Mitchell. There was no doubt that had Price Waterhouse made inquiries regarding the undeposited cash and the promissory note, Mitchell would not have been able to adequately explain them. Its failure to do so could therefore be attributed to it as a direct cause of the TBA's loss. However, the TBA's action in employing a person known to have previous convictions relating to theft was also negligent and was the predominant cause of its loss. Were it not for the provisions of the Apportionment of Damages Act (no 34 of 1956) the action brought by the TBA against Price Waterhouse should consequently fail.

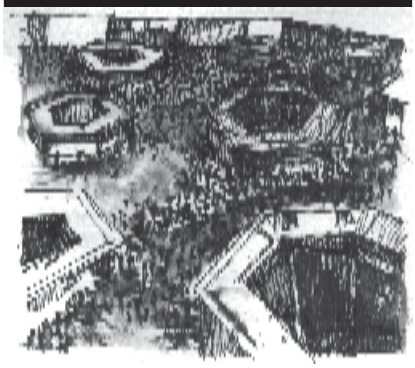
Section 1 of this Act provides for the reduction of the claim of a party where the claim is in respect of damages caused partly by that party's own fault and partly by that of its defendant. The reduction so applied is related to the degree to which the claimant is at fault. In the present case, TBA's degree of fault far exceeded that of Price Waterhouse, and its claim had to be reduced to 20% of the amount it in fact claimed.

AMERICAN FLAG PLC v GREAT AFRICAN T-SHIRT CORPORATION CC

A JUDGMENT BY WUNSH J (NAVSA J and SNYDERS J concurring)
WITWATERSRAND LOCAL DIVISION
16 OCTOBER 1998

2000 (1) SA 356 (W)

Companies



A foreign person (peregrinus) may become subject to the jurisdiction of a South African court by consenting to the jurisdiction of the court without there necessarily being any other reason for jurisdiction by the court to determine the matter. Such consent will be seen to have been made where the peregrinus has itself instituted an action against a local person (incola) and has become the subject of a counterclaim.

THE FACTS

American Flag plc issued a provisional sentence summons against Great African T-Shirt Corporation CC (GATS) for payment of US$280 000, interest and costs, which it alleged was due under an acknowledgement of debt signed on behalf of GATS. GATS had signed the acknowledgement of debt in recognition of payments due to American Flag for T-shirts which it had ordered from that company.

In opposing the action for provisional sentence, GATS stated that it had a damages claim for approximately R1½m arising from late and short delivery of the T shirts. It gave notice that in order to found the jurisdiction of the court to determine this claim, it intended to apply for the attachment of American Flag's claim. This was necessary because American Flag was not a resident in the area of the court's jurisdiction (an incola) but a pergrinus with its principal place of business the United Kingdom.

American Flag opposed the attachment application. It contended that the court had jurisdiction to determine the damages claim without the attachment because GATS was an incola of the court and the damages were allegedly suffered within the court's area of jurisdiction. It also contended that it had consented to the jurisdiction of the court by notification to this effect which was sent to GATS upon American Flag having given notice of its intention to apply for attachment of American Flag's claim.

GATS contended that the consent to jurisdiction was not effective to confer jurisdiction in the absence of a reason for jurisdiction (ratio jurisdictionis). The court considered whether or not an attachment to found jurisdiction was necessary in order to establish jurisdiction.

THE DECISION

The argument that a consent to jurisdiction by a defendant would not, without the existence of another reason for jurisdiction, confer jurisdiction on the court is a simplistic statement of the law. Unqualified, it is an untrue assertion of the law, and applicable only in certain limited cases, such as where the plaintiff itself is a peregrinus of the court. The general policy of the courts is to accept that they have jurisdiction, where their judgments will be effective. It is also their policy to assist an incola of the court to litigate in its local court. Actions by incola of the court against foreign defendants have been entertained in the past, solely on the ground of a consent to jurisdiction by the defendant. Attachment as a means of establishing the jurisdiction of the court is not required in order to ensure the effectiveness of any judgment issuing from the court—since there is no minimum placed on the value of an attached asset, effectiveness would not be secured in this manner in any event.

It is true that consent to jurisdiction by itself does not necessarily confer jurisdiction on the court: where the court's jurisdiction is restricted as to the type of action it may consider, such as divorce actions between persons not subject to the court's jurisdiction, no consent by either party will confer jurisdiction. However, in the case of actions arising from commercial transactions, the jurisdiction of South African courts may be asserted where the defendant has consented to the court's jurisdiction. American Flag had consented to the court's jurisdiction. Attachment of its claim against GATS was therefore neither necessary nor permissible.

The action proposed by GATS would effectively become a counterclaim against the action brought by American Flag, since it was closely

intertwined with the allegations made by American Flag in its action. For the purposes of the counter-claim, American Flag could be seen to have consented to the jurisdiction of the court in that it had brought the initial action against GATS. It was common sense, and a matter of practical convenience, that American Flag should be so seen to have submitted to the court's jurisdiction.

The application to attach American Flag's claim was dismissed.

PEREGRINE GROUP (PTY) LTD v PEREGRINE HOLDINGS LTD

A JUDGMENT BY LAZARUS AJ
WITWATERSRAND LOCAL DIVISION
30 JUNE 1999

2000 (1) SA 187 (W)

The use of a commonplace word in the name of a company, which does not carry on the same business activities of another company, as well as its use in the name of the other company, does not necessarily entitle the other company to to require a change of name. For such an order to be made, it must be shown that the name is undesirable or is calculated to cause damage to the applicant.

THE FACTS

Peregrine Group (Pty) Ltd, the holding company of a number of companies all of which incorporated the word 'Peregrine' in their names, traded under its name from 1 August 1994.

Peregrine Holdings Ltd and the other respondents were a group of companies which also used the word 'Peregrine' in their names and had done so from March 1996 when they were incorporated.

Peregrine Group traded as a property developer and its subsidiaries traded in businesses related to property development and the provision of financial advice. Peregrine Holdings did business as a provider of specialised financial expertise.

Some two years after the incorporation of Peregrine Holdings, Peregrine Group brought an application for an order directing Peregrine Holdings and the other respondents to change their names so as to exclude the word 'Peregrine'. Its application was based on section 45(2A) of the Companies Act (no 61 of 1973) and on passing off. Section 45(2A) provides that a person may apply to court for an order directing a company to change its name on the grounds that the name is undesirable or is calculated to cause damage to the applicant.

THE DECISION

The evidence did not show that there was any significant degree of overlap between the activities of Peregrine Group and Peregrine Holdings. Peregrine Group's property development activities might have involved structured financial packages, but there was no overlap in the field of providing and offering property finance services.

Section 45(2A) provides for a change of name in two cases, ie where the name objected to is undesirable or calculated to cause damage to the applicant. The use of the word 'Peregrine' had been permitted by the Registrar of Companies in recognition of the fact that no one company could hold a monopoly in the use of that word in its name. The word 'Peregrine' had not acquired a secondary meaning in the minds of the public and had not become associated with any business reputation held by the companies of the Peregrine Group. There was no likelihood of confusion between the two groups of companies. The name used by the respondent companies was therefore not undesirable.

Since there was no likelihood of confusion, it could safely be said that the respondent companies' names were not likely to cause damage to the Peregrine Group.

The application was dismissed.

LIBERTY LIFE ASSOCIATION OF AFRICA LTD v DE WAAL

A JUDGMENT BY VAN HEERDEN JA
(VIVIER JA, HARMS JA, MARAIS JA and SCOTT JA concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 1999

1999 (4) SA 1177 (A)

Insurance

In determining whether an insurer may repudiate an insurance policy after the insured has made a misstatement in the proposal for the policy, it is necessary to show that the misstatement materially affected the insurer's assessment of the risk.

THE FACTS

De Waal completed a proposal form for life insurance of R200 000 to be provided by Liberty Life Association of Africa Ltd. One of the questions which he answered when completing the form was whether or not he had previously obtained another life policy after furnishing a full medical declaration. He answered positively to this question, indicating that the policy was issued in October 1988 by Old Mutual.

The policy issued by Old Mutual was issued after answering certain questions of a medical nature but not after a full medical declaration had been issued.

After De Waal's death, Liberty refused to pay out on the policy on the grounds that De Waal had made a materially incorrect statement in his proposal which had caused it to issue the policy in question.

Liberty defended an action for payment.

THE DECISION

Although De Waal had made an incorrect statement in his proposal, this would not entitle Liberty to repudiate liability under the policy, unless the incorrect statement materially affected Liberty's assessment of the risk undertaken in the policy of insurance. This was because of the provisions of section 63(3) of the Insurance Act (no 27 of 1943) which applied to the contract of insurance between the parties.

The essential determinant of whether or not Liberty could repudiate the policy was not the effect of the incorrect statement on the risk, but the effect of the incorrect statement on the assessment of the risk. Liberty would be entitled to repudiate the policy if the incorrect statement had affected its assessment of the risk but not otherwise.

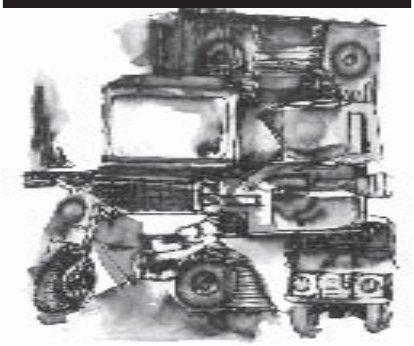
The purpose of asking whether or not De Waal had previously obtained another life policy after furnishing a full medical declaration was to give Liberty an indication of whether it should require such a medical declaration, which would enable it to evaluate the risk itself, or rest on the assurance that one had been given to Old Mutual with no deterioration in De Waal's medical condition since then. The statement so elicited had therefore affected Liberty's assessment of the risk and Liberty was entitled to repudiate the policy.

AFRICAN LIFE ASSURANCE CO LTD v NBS BANK LTD

A JUDGMENT BY
BORUCHOWITZ J
WITWATERSRAND LOCAL
DIVISION
28 JANUARY 2000

UNREPORTED

Credit Transactions



The payee of a cheque is under a duty of care to the true owner of the cheque to ensure that the proceeds of the cheque are not lost or misappropriated, where the payee holds the cheque on behalf of a party and collects the cheque on behalf of that party without examining the party's right or title to the cheque. A deposit-taking institution which employs a person to accept investments from the public represents that the person so employed has the authority to conclude transactions for such investments, and is bound by the actions of its employee, whether or not the employee acts fraudulently in do doing.

THE FACTS

In September 1996, a Mr S Swanepoel contacted an executive director of African Life Assurance Co Ltd and informed him that NBS Bank Ltd was prepared to pay an effective annual rate of return of 18% per annum on a fixed deposit investment. African Life were informed that this high rate of interest was possible because the funds would be invested in a property development project in respect of which the property developers required funds urgently. Following further discussions between Swanepoel and African Life, African Life agreed to invest R3m on a fixed deposit for twelve months at an effective annual rate of interest of 18,2% per annum.

On 12 November 1996, African Life drew a cheque in favour of NBS for R3m, the cheque being crossed and marked 'not transferable'. The cheque was received by a Mr Stephenson, whom Swanepoel had indicated would be taking delivery of the cheque for NBS. Stephenson also delivered a letter of undertaking in favour of African Life signed by Mr V Assante, a branch manager of the NBS, in which he stated that on behalf of NBS, receipt was acknowledged of the sum of R3m and that NBS irrevocably undertook to guarantee that this sum would be repaid a year later, together with interest.

Unbeknown to African Life, Assante intended to misappropriate the cheque in order to divert the proceeds thereof to finance property developments in which he and his accomplices had an interest. The cheque was not delivered to the NBS but handed to a clerk employed by a firm of attorneys who deposited it into a 'corporate saver' account held by the NBS at the Standard Bank. The NBS's account with Standard was accordingly credited and a debit in an equal amount in favour of the attorneys was raised in the books of NBS. The attorneys used the amount recorded in their favour to pay money to Wietsche Jacobs Ontwikkelaars.

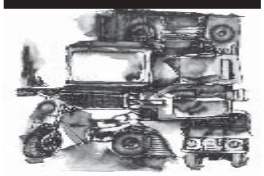
A 'corporate saver' account was a savings account with the NBS to which a client of the NBS could make deposits. The cheque deposits so made would be recorded and then collection of payment of the cheque would be effected by the Standard Bank, to which NBS would forward the cheques for collection.

The NBS did not repay African Life the amount secured from it. African Life brought an action for payment, basing the claim on a duty of care owed by NBS to ensure that no-one other than itself obtained payment of the cheque and on the obligation resting on NBS to honour its obligations as recorded in the letter of undertaking. NBS defended the action on the grounds that it was not under the duty of care alleged by African Life, and that Assante did not have the authority to issue the letter of undertaking.

THE DECISION

It is an established principle of law that the collecting bank which negligently collects a cheque causing loss to the true owner is liable to the true owner for the loss so sustained. In the present case, NBS was not the collecting bank but the payee of the cheque. Nevertheless, NBS had collected payment of the cheque on behalf of another party, ie the firm of attorneys. This had resulted in the NBS crediting the attorneys' corporate saver account and allowing that firm to draw on the account. There was no reason why the duty of care resting on a collecting bank should not apply to the NBS in the same way. This duty of care included the duty to take reasonable steps to satisfy itself that its customer's title to any cheque deposited to the corporate saver account was not defective.

In the present circumstances, the



NBS did not examine African Life's cheque because the cheque was deposited directly into the NBS account at the Standard Bank which had been deposited by the attorneys firm as agent for NBS. However, this did not exempt NBS from its duty of care: it still performed a collecting function and it was obliged to satisfy itself that the attorneys firm's title to the cheque was not defective. An examination of the cheque would have case doubt on the firm's title to it: it was crossed and marked 'not transferable'. A reasonable banker would have appreciated the significance of these instructions which had been inscribed on the face of the cheque and failure to have complied with them constituted negligence.

As far as the authority of Assante was concerned, it had to be remembered that African Life would have been unlikely to have invested substantial sums with an unknown entity, such as a property development concern. African Life had stated that it intended to invest with the NBS and there was no reason to doubt that this is what it attempted to do when it delivered its cheque to Stephenson.

Assante did not have actual authority to accept the investment on behalf of NBS. The investment had been kept secret from the authorised representatives of the NBS. However, the question arose whether the NBS should be estopped from denying Assante's lack of actual authority. African Life contended that NBS should be so estopped because it represented that Assante had such authority by employing him as a branch manager, authorised him to conclude transactions of a similar nature, and did not inform anyone that Assante was not authorised to conclude such transactions.

The evidence showed that the NBS conducted the business of a deposit-taking institution through branch managers who had authority to accept deposits. When appointing Assante, the NBS must have reasonably expected those dealing with him to think that he had the authority to receive and undertake to repay deposits. In accordance with accepted principles of representation, it could be held that NBS had given the impression that Assante had the authority to conclude the transaction he had. The NBS had represented that Assante was authorised to accept the investment upon the terms concluded with African Life.

NEDCOR BANK LTD v BEHARDIEN

A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
28 JULY 1998

2000 (1) SA 307 (A)

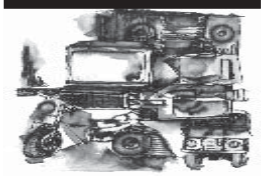
A claim for repayment of money misappropriated is a liquidated claim. The requirement that a defendant in summary judgment proceedings set out his defence does not violate the constitutional right to silence where criminal proceedings arising from the same facts are pending against the defendant.

THE FACTS

Nedcor Bank Ltd brought an action for repayment of money allegedly misappropriated by Behardien while he was employed by the bank. Behardien defended the action and the bank brought an application for summary judgment. Its affidavit in support of the application was signed a person who described himself as a legal adviser of the bank and stating that the facts deposed to were within his personal knowledge and that he could swear positively to the facts contained therein.

Behardien opposed the application for summary judgment on the grounds that the amount claimed was not a liquidated amount in money, and that civil proceedings against him ought to be stayed until the finalisation of a criminal trial then pending in respect of the alleged theft. This defence was based on the grounds that in view of the pending criminal trial, a disclosure of his defence to the bank's claim would violate his constitutional right to a fair trial, including the right to remain silent.

The bank asked for an order confirming summary judgment against Behardien.



THE DECISION

A claim for a sum of money which has been misappropriated is a liquidated amount of money, for the purposes of summary judgment proceedings. This ground of opposition to the application for summary judgment could not be sustained.

As far as the defence based on the right to silence was concerned, in facing the application for summary judgment, Behardien was presented with a choice, either to set out his defence or have summary judgment granted against him. This did not amount to a compulsion to set out his defence, and the consequences of the failure to set out a defence could not be seen as a penalty for failing to do so. The choice not to set out a defence was made as a choice, but without any penalty having been imposed for having made the choice. Behardien had not even denied that the bank had a claim against him. He could therefore not be seen to have been compelled to show his hand before the pending criminal trial.

Had Behardien wished to avoid summary judgment without setting out his defence, he could have done so by giving security for the bank's claim.

The application for summary judgment was granted.

SOUTH AFRICAN BREWERIES LTD v RIBEIRO

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
29 SEPTEMBER 1999

1999 CLR 587 (W)

A creditor may sue for payment of an unpaid debt for which a cheque has been given and has been dishonoured without tendering return of the cheque provided that the creditor can account for the cheque, either by having the cheque in his possession or being able to give an explanation for it being destroyed or unlawfully removed from its possession.

THE FACTS

On 15 April 1995, South African Breweries Ltd and Ribeiro entered into an agreement recording Ribeiro's indebtedness to SA Breweries and providing for payments to be made in reduction of this indebtedness. The agreement provided that Ribeiro would pay SA Breweries R330 000 on 18 April 1995 and furnish a cheque in this amount on 15 April 1995 as security for the payment of this amount. On paying the amount of R330 000, Ribeiro would be entitled to return of the cheque and on failing to do so, SA Breweries would be entitled to deposit the cheque. On the same day, the parties were to meet to finalise the exact measure of Ribeiro's indebtedness to it and Ribeiro was to execute an acknowledgement of indebtedness in favour of SA Breweries.

In terms of the agreement, Ribeiro furnished SA Breweries with the cheque for R330 000, but the cheque was dishonoured when it was presented. The parties failed to agree on the exact measure of Ribeiro's indebtedness to SA Breweries and it brought an action against him for payment of R1 897 426,93 which it claimed Ribeiro owed it.

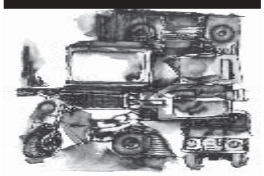
SA Breweries then reduced this claim by R330 000, and brought a separate application for payment of this amount which it contended was clearly payable in distinction from the balance of its claim in respect of which there were disputes.

Ribeiro objected to the application on the grounds that in seeking enforcement of a payment due under an agreement, for which a cheque had been given, SA Breweries was obliged to tender return of the cheque.

THE DECISION

Ribeiro's argument was that while SA Breweries retained his cheque for R330 000, he was in jeopardy of being sued twice for the same debt and that a creditor electing to sue on the basis of an underlying agreement must account for any negotiable instrument issued by the debtor in relation to it.

However, it was significant that SA Breweries had retained possession of the cheque. Whereas there is a rule



of law which requires a creditor in these circumstances to account for the negotiable instrument which it holds as security for its debt, such accounting requires merely that the creditor give a satisfactory explanation of its status and whereabouts and has not parted with it, thus enabling a third party to sue on it.

SA Breweries had retained possession of the cheque and had tendered its return. Ribeiro was, moreover, entitled to claim return of the cheque on effecting the payment of R330 000 on 18 April 1995.

The objection raised by Ribeiro was dismissed.

EDEN v PIENAAR N.O.

A JUDGMENT BY CLOETE J (BORUCHOWITZ J AND ELOFF JA concurring)
WITWATERSRAND LOCAL DIVISION
29 OCTOBER 1999

1999 CLR 563 (W)

A South African court will enforce a judgment ordering payment in a foreign currency where the currency is determined by the law of the country in which the debt is payable. A South African court will also enforce a judgment given in a foreign country which orders protection for the judgment creditor in a manner which is not provided for in South Africa, provided this is not contrary to public policy in South Africa.

THE FACTS

Eden brought an action against Segal in the Magistrates' Court in Israel basing his claim on section 12 of an Israeli statute, the Contracts (General Part) Law. The section provides that in negotiating a contract, a person shall act in customary manner and in good faith. It further provides that a party who does not act in that manner shall be liable to pay compensation to the other party for damage caused to him in consequence of the negotiations or the making of the contract.

Eden alleged that Segal contravened the provisions of the section in conducting negotiations for the sale to him of a flat situated in Israel, and that in consequence he had suffered damages in the sum of US$45 000. Eden and a co-plaintiff claimed payment of this amount or the equivalent in New Israeli Shekels, plus interest and linkage. Linkage was an amount calculated by reference to the ratio of the cost of living index as at date of payment compared to the index as at date of institution of the claim. The purpose of the claim was to compensate the plaintiff for loss arising as a result of the increase in the cost of living.

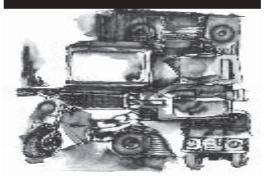
The action resulted in a judgment in favour of Eden against Segal for payment of the equivalent amount of US$10 000 in New Israeli Shekels, interest thereon, linkage and costs. Eden applied in the South African High Court for an order enforcing the judgment against Segal's executor (Segal having died) Pienaar. The application was dismissed and Eden appealed.

THE DECISION

The amount awarded against Segal was not a penalty imposed for some breach of duty to the State. It was therefore not unenforceable for that reason.

The question arose whether or not payment of the judgment could be ordered in New Israeli Shekels, as ordered by the Israeli court. The common law principle is that the currency in which a party is entitled to payment is determined by the law of the country in which the debt is payable, in this case, the law of Israel. This was determined, by the court which gave the order, as New Israeli Shekels. That therefore, was the currency in which the judgment had to be paid.

The conversion of the currency into another currency was also to be determined by the law applicable to the contract entered into between the parties. This had been done by the Israeli court applying the law of Israel. There could therefore be no objection to the order that the claim



in US dollars be converted to New Israeli Shekels.

As far as the claim for linkage was concerned, the purpose of this was to protect the judgment creditor against the prejudice it might suffer from the depreciation in the value of money. There was nothing wrong in this and nothing which offended against public policy in South Africa. In South Africa, recognition of the principle that a creditor was entitled to interest on a liquidated or unliquidated debt was recognised in the Prescribed Rate of Interest Act (no 55 of 1975) and this was evidence of the fact that in this country, a measure designed to protect a creditor in the same circumstances would not be considered contrary to public policy. The principle of 'linkage' could therefore be accepted.

The Israeli statute upon which Eden based his claim was also not contrary to public policy in South Africa. There is nothing repugnant in a statute which requires a party to pay damages if he does not negotiate in good faith.

The appeal was upheld.

THE COMMISSIONER FOR INLAND REVENUE v CONHAGE (PROPRIETARY) LIMITED

A JUDGMENT BY HEFER JA (MAHOMED CJ, OLIVIER JA, FARLAM AJA and MADLANGA AJA concurring)
15 SPETEMBER 1999

1999 (4) SA 1149 (A)

A court is entitled to determine that if an agreement entered into between two parties is a simulation for some other transaction, that other transaction is the real agreement between them. A court will however, not make such a determination merely because the effect of the agreement is to give the advantage of a deduction in the determination of taxable income, and the particular agreement exhibits unusual terms and conditions for that kind of agreement. The court was not prepared to determine that this had happened in this case. In order to apply section 103 of the Income Tax Act (no 58 of 1962) (which entitles the Commissioner for Inland Revenue to disregard any transaction which is abnormal and entered into for the purpose of avoiding, reducing or postponing tax liability) the Commissioner must show that the predominant purpose of the transaction is to avoid tax liability.

THE FACTS

Conhage (Pty) Ltd wished to raise loan capital in order to expand its business. In order to do so, it entered into two sets of agreements with Firstcorp Merchant Bank Ltd. Each consisted in a sale and lease-back of some of Conhage's manufacturing plant and equipment.

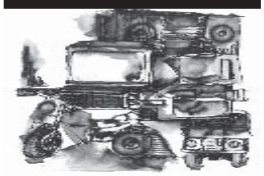
In terms of the agreements, ownership of the assets would not vest in Conhage but would remain with Firstcorp upon expiry of the lease. Upon expiry, and annually thereafter, Conhage would be entitled to renew the lease and so obtain indefinite use of the equipment.

Negotiations prior to the conclusion of the agreements were entered into after extensive consideration of the advantages and disadvantages of this method of securing loan finance in comparison to other methods, and after extensive negotiations had been entered into between Conhage and Firstcorp.

Conhage deducted the rentals paid in terms of the leaseback as expenditure in the production of income for the purposes of its calculation of taxable income. The Commissioner for Inland Revenue refused to allow the deductions and claimed that the agreements were simulations for another agreement the effect of which would not be to entitle Conhage to the deductions it claimed. The Commissioner also contended that section 103 of the Income Tax Act (no 58 of 1962) could be applied entitling him to disregard any the transaction as abnormal and entered into for the purpose of avoiding, reducing or postponing tax liability.

THE DECISION

There was no evidence that Conhage and Firstcorp had intended to enter into the agreements as simulations for another agreement. The evidence of the negotiations entered into prior to the agreements having been entered into showed that the intention was to seriously enter into them and proceed with their implementation. The terms of the agreements themselves, when viewed together, also showed that the intention was to proceed with their implementation. It could certainly be said that the parties had departed from the usual terms of a sale and of a lease, but the variations were introduced in order to meet Conhage's particular requirement of loan capital. Once met, the disadvantages of foregoing ownership of the



asset was counterbalanced by the provision of the loan capital. There was therefore no indication that the agreements were simulations for some unexpressed agreement the purpose of which was different to that of the agreements actually entered into.

As far as the attack based on section 103 was concerned, in order to succeed on this basis, the Commissioner would have to show that the sale and leaseback agreements were abnormal transactions the purpose of which was to avoid, reduce or postpone the payment of tax. The purpose of the sale and leaseback agreements was patently to provide Conhage with capital and take advantage of the tax benefits to be derived from the transaction. This was the predominant purpose: if Conhage had not needed loan capital it would not have entered into the transaction.

In view of the finding of the purpose of the transaction, it was not necessary to determine whether it was abnormal as well, since this finding rendered the section inapplicable. It was clear however that the proper method of determining this was to consider all the circumstances of the transactions and not confine the enquiry to an examination of the typicality of the terms of the agreements.

The deductions were correctly made and the Commissioner's denial of them could not be upheld.

TICKTIN TIMBERS CC v THE COMMISSIONER FOR INLAND REVENUE

A JUDGMENT BY HEFER JA (GROSSKOPF JA, MARAIS JA, ZULMAN JA and MADLANGA AJA concurring)
SUPREME COURT OF APPEAL
10 SEPTEMBER 1999

1999 (4) SA 939 (A)

A close corporation which pays interest on a loan which is only required because its reserves have been diverted to the benefit of the person giving the loan may not deduct the interest so incurred for the purposes of assessment of its taxable income.

THE FACTS

In 1985, Ticktin acquired the shares in a private company for R1,8m. Thereafter, Ticktin converted the company into a close corporation, Ticktin Timbers CC.

The company held distributable reserves which, in terms of section 40A of the Income Tax Act (no 58 of 1962) were deemed to have been distributed to the close corporation. The balance of the reserves was credited to Ticktin and then treated as a loan from Ticktin to the close corporation. For four years thereafter, the net income and trading income of the close corporation was credited to Ticktin.

Ticktin paid the purchase price of the shares with the aid of a loan given by the sellers. He paid the interest on this loan from interest obtained on the loan he had made to the close corporation.

For the 1985-1989 years of assessment, the close corporation deducted the interest paid on the loan to Ticktin for the purposes of calculating its taxable income. The Commissioner for Inland Revenue disallowed the deduction, contending that the interest expense was not incurred in the production of income and not wholly and exclusively for the purpose of trade.

Ticktin appealed.

THE DECISION

The purpose of the scheme of diverting the funds of the corporation and making them available again in the form of an interest-bearing loan was devised when Ticktin bought the shares in the company. The purpose was to enable him to pay the interest on the purchase price. This was a purpose directed at the acquisition of a

capital asset, ie the shares in the company, and it was not irrelevant to the purpose for which the interest expenditure on the loan to the close corporation was incurred.

The loan was not needed for the close corporation's income producing activities. It was incurred in order to increase Ticktin's income, not that of the close corporation, or at the most for both purposes. It was therefore not deductible in terms of the Act. Just as interest raised on a loan in order to enable the payment of dividend is not deductible, so in this case the interest raised on the loan, which enabled the payment of a greater portion of trading income, was not deductible.

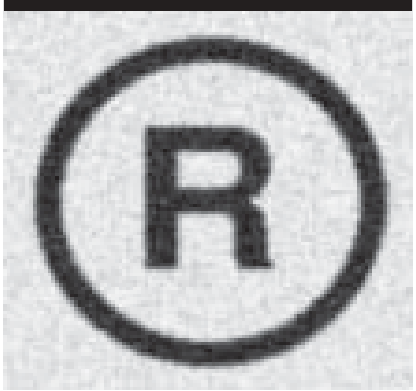
The appeal was dismissed.

ABDULHAY M MAYET GROUP v RENASA INSURANCE CO LTD

A JUDGMENT BY VAN DIJKHORST J
TRANSVAAL PROVINCIAL DIVISION
21 JULY 1999

1999 (4) SA 1039 (T)

Trade Mark



A trade mark is infringed by the use of a word included in the trade mark by a party which sells the same or similar services as the trade mark holder and confusion has resulted from the use of the word in the market place. The infringement will not be excused merely because the company name of the infringer includes the word which is the subject of trade mark rights.

THE FACTS

From 1980, the Abdulhay Mayet Group traded as short term insurance brokers under the name 'Reliance Insurance Brokers' or 'Reliance Insurance Agency'. In November 1994, it became the registered proprietor of the trade mark 'Reliance Insurance Brokers', covering insurance, reinsurance and brokerage services. The mark was registered subject to a disclaimer of a trade mark in the words 'insurance' and 'brokers'.

On its letterheads, Renasa Insurance Co Ltd stated that it was a 'Reliance Group Holdings Company', and it gave its address as 'Reliance National House' in anticipation of the building it occupied being given that name. In its marketing campaign, Renasa distributed to the public promotional material using the trade mark 'reliance' and stated that it was a 'Reliance Group Holdings Company' of 'Reliance National House'. It had received telephone calls which were intended for the Abdulhay insurance business as well as correspondence.

The second respondent, the holding company of Renasa, was called 'Reliance National Insurance Co (Europe) Ltd', a company registered under the English Companies Act and having its place of business in London.

Abdulhay contended that Renasa's activities constituted an infringement of its trade mark rights and it brought an application for an interdict restraining it from passing off its services as that of itself by using its trade marks. It depended on section 34(1)(a) of the Trade Marks Act (no 194 of 1993) which provides that the rights acquired by the registration of a trade mark shall be 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 of a mark so nearly resembling it as to be likely to deceive or cause confusion.

Renasa argued that it did not use the trade mark 'reliance' and that this mark was not confusingly similar to 'reliance insurance brokers'. It also argued that its use of the word 'reliance' had been a bona fide description of the services it offered.

THE DECISION

The use of the terms including the word 'reliance' by Renasa and the second respondent was not an infringement of the trade mark

rights of Abdulhay merely because this was the word in which it held such rights. The disclaimer of the words 'insurance' and 'broker' in connection with the word 'reliance' did not serve to emphasize the dominant feature of the word 'reliance' as the word in which Abdulhay held trade mark rights. However, it was clear that Renasa had used the word in the course of trade and had used it in securing and finalising transactions. The use of the word had also created confusion. This meant that there had been infringement of the mark in terms of section 34(1)(a) of the Act.

The honest concurrent use of the trade mark by Renasa did not constitute any defence to the application brought against it. The fact that its holding company's name included the word 'reliance' did not entitle Renansa to use the word in describing its services. A description of its holding company's name was not characteristic of the services Renasa offered. The word 'reliance' was characteristic of the services it offered and this was the word which Renasa had used in advertising and selling its services to the public.

Taking the trade mark held by Abdulhay as a whole, Reliance Insurance Brokers, when compared with the terms 'Reliance Group Holdings' and 'Reliance National House' the unsuspecting customer would conclude that both represented entities working in the same field and to the same end. This confusion would show that the use of the latter terms represented an infringement of Abdulhay's trade mark.

The application was granted.

AFRICAN LIFE ASSURANCE CO LTD v NBS BANK LTD

A JUDGMENT BY
BORUCHOWITZ J
WITWATERSRAND LOCAL
DIVISION
28 JANUARY 2000

2000 CLR 101 (W)

Banking

The payee of a cheque is under a duty of care to the true owner of the cheque to ensure that the proceeds of the cheque are not lost or misappropriated, where the payee holds the cheque on behalf of a party and collects the cheque on behalf of that party without examining the party's right or title to the cheque. A deposit-taking institution which employs a person to accept investments from the public represents that the person so employed has the authority to conclude transactions for such investments, and is bound by the actions of its employee, whether or not the employee acts fraudulently in do doing.

THE FACTS

In September 1996, a Mr S Swanepoel contacted an executive director of African Life Assurance Co Ltd and informed him that NBS Bank Ltd was prepared to pay an effective annual rate of return of 18% per annum on a fixed deposit investment. African Life were informed that this high rate of interest was possible because the funds would be invested in a property development project in respect of which the property developers required funds urgently. Following further discussions between Swanepoel and African Life, African Life agreed to invest R3m on a fixed deposit for twelve months at an effective annual rate of interest of 18,2% per annum.

On 12 November 1996, African Life drew a cheque in favour of NBS for R3m, the cheque being crossed and marked 'not transferable'. The cheque was received by a Mr Stephenson, whom Swanepoel had indicated would be taking delivery of the cheque for NBS. Stephenson also delivered a letter of undertaking in favour of African Life signed by Mr V Assante, a branch manager of the NBS, in which he stated that on behalf of NBS, receipt was acknowledged of the sum of R3m and that NBS irrevocably undertook to guarantee that this sum would be repaid a year later, together with interest.

Unbeknown to African Life, Assante intended to misappropriate the cheque in order to divert the proceeds thereof to finance property developments in which he and his accomplices had an interest. The cheque was not delivered to the NBS but handed to a clerk employed by a firm of attorneys who deposited it into a 'corporate saver' account held by the NBS at the Standard Bank. The NBS's account with Standard was accordingly credited and a debit in an equal amount in favour of the attorneys was raised in the books of NBS. The attorneys used the amount recorded in their favour to pay money to Wietsche Jacobs Ontwikkelaars.

A 'corporate saver' account was a savings account with the NBS to which a client of the NBS could make deposits. The cheque deposits so made would be recorded and then collection of payment of the cheque would be effected by the Standard Bank, to which NBS would forward the cheques for collection.

The NBS did not repay African Life the amount secured from it. African Life brought an action for payment, basing the claim on a duty of care owed by NBS to ensure that no-one other than itself obtained payment of the cheque and on the obligation resting on NBS to honour its obligations as recorded in the letter of undertaking. NBS defended the action on the grounds that it was not under the duty of care alleged by African Life, and that Assante did not have the authority to issue the letter of undertaking.

THE DECISION

It is an established principle of law that the collecting bank which negligently collects a cheque causing loss to the true owner is liable to the true owner for the loss so sustained. In the present case, NBS was not the collecting bank but the payee of the cheque. Nevertheless, NBS had collected payment of the cheque on behalf of another party, ie the firm of attorneys. This had resulted in the NBS crediting the attorneys' corporate saver account and allowing that firm to draw on the account. There was no reason why the duty of care resting on a collecting bank should not apply to the NBS in the same way. This duty of care included the duty to take reasonable steps to satisfy itself that its customer's title to any cheque deposited to the corporate saver account was not defective.

In the present circumstances, the NBS did not examine African Life's cheque because the cheque was

that the beneficiary has not been paid and cannot be paid in terms of the letter of credit.

In the present case, it was not possible to be certain whether or not ZVL either had been paid or could not receive payment after the confirmation of the order. This was because First National Bank had confirmed the letter of credit, thereby rendering the bank in the Slovak Republic jointly and severally liable to the beneficiary for payment. Since this was the case, the beneficiary could have by-passed First National Bank and insisted upon payment from the Slovak bank, which in turn would have been entitled to reimbursement in accordance with inter-bank arrangements. Even if ZVL had not yet received payment under the letter of credit therefore, it would have been entitled to demand payment notwithstanding any order of attachment. This would have nullified the value of the security constituted by the attachment and left First National Bank with a possibly disputed claim for return of money then in the hands of the sheriff.

There being no certainty that ZVL would not be paid in terms of the letter of credit, the order of attachment could not be confirmed.

MASTERS v THAIN

A JUDGMENT BY HORWITZ AJ (SHAKENOVSKY AJ concurring)
WITWATERSRAND LOCAL DIVISION
5 OCTOBER 1999

2000 (1) SA 467 (W)

Contract

A party who cancels a contract on the grounds of the failure of the other party to perform properly is not bound to claim damages as quantified by 'negative interesse' (ie the money which it would be necessary for him to have in order to place him in the position he would have been in had the contract not been performed at all. Such a party may claim repayment of that which has been paid on the basis that restitution should take place.

THE FACTS

Thain, who engaged in the business of a travel agency under the name 'Inhaca Safaris', undertook to arrange a holiday for Masters and his family to the Mozambican island of Inhaca. When Masters gave Thain the instruction to arrange the holiday, he made it clear that the only reason for the holiday was that he wished to do scuba diving at the island. He paid R15 245 for the holiday and departed for the island with his family.

Upon arrival at the island, he was informed that scuba diving would be impossible because there were no boats available to take him out to sea to do scuba diving. Masters immediately telephoned Thain and complained about this, and instructed her to get him back to South Africa as soon as possible. He indicated that he would be reclaiming the full amount of the price paid for the holiday.

Upon his return to South Africa, Masters claimed damages in the sum of R15 245, alternatively repayment of the purchase price in the sum of R15 245. His claim failed in the magistrate's court and he appealed.

THE DECISION

Masters' claim was not one for damages in the sense of the sum of money which would put him back in the position he would have been in had the parties never contracted (negative interesse). It was a claim against Thain for money which had been paid to her under a contract which was subsequently cancelled. Whether or not this amounted to the same claim that could have been made for damages was unimportant because Masters was entitled to make this claim after he cancelled the contract entered into with Thain. The course adopted by Masters was to claim what was commonly referred to as restitution (restitutio in integrum) and what he was entitled to thereunder was repayment of what he had paid.

No deduction from the claim could be made on the grounds that Masters had received the benefit of a holiday in spite of the absence of the scuba diving facility. He had indicated his dissatisfaction immediately upon discovering that the facility was not available and had not been able to return immediately due to flight constraints. What Masters had required as an essential part of his holiday had not been given to him and this entitled him to full repayment notwithstanding the benefit he might have received from his stay on the island.

The appeal was upheld.

PHASHA v SOUTHERN METROPOLITAN LOCAL COUNCIL OF THE GREATER JOHANNESBURG METROPOLITAN COUNCIL

JUDGMENT BY SATCHWELL J
WITWATERSRAND LOCAL DIVISION
14 OCTOBER 1999

2000 CLR 36 (W)

Where the rights of two parties to a contract are reciprocal, the obligation to perform under the contract arises simultaneously with the performance by the other party. Consequently, the time when the debt owing to one party becomes due is the time when that party either performs or tenders performance toward the other party. In the case of a cash sale, this means that the seller's obligation to give transfer arises when the purchaser pays the purchase price or tenders payment. Prescription runs against the seller's obligation to give transfer only when either event takes place, but the purchaser may not rely on the fact that the running of prescription against that obligation has not begun because the purchaser has himself failed to pay the purchase price or tender payment.

THE FACTS

On 16 January 1985, Phasha bought a right of provisional leasehold over Stand 11900 Orlando, Soweto, from the West Rand Administration Board, the predecessor-in-title to the Southern Metropolitan Council. The purchase price of R228 222 was payable by a deposit of R45 645, and by means of a loan to be granted by the Board repayable over twenty years. The right of provisional leasehold was granted subject to the condition that a mortgage bond for the loan amount be registered against the right in favour of the Board.

Phasha failed to pay any portion of the purchase price, but acknowledged his intention to make payment on two occasions, in 1996 and 1998. Shell Company then offered to purchase the site and the service station erected thereon for R300 000. The Council passed a resolution rescinding the leasehold agreement and advertised in the Sowetan newspaper for tenders for the purchase of the property.

In response, Phasha sought an interim interdict preventing the Council from selling the property pending an action to be instituted by him to compel the registration of a right of provisional leasehold over the property in his favour, and pending the finalisation of an enquiry to be held under section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act (1981) (the Conversion Act). Phasha's dependence on this Act was based on his having held a trading site permit issued to him in 1978. At that time, Shell had erected a service station on the property and donated it to the Council whereafter Phasha, upon concluding the agreement of 16 January 1985, leased it to Shell.

The Council opposed the grant of the interdict on the grounds that any right Phasha might have had had prescribed.

THE DECISION

The Prescription Act provides for the extinction of a debt after the lapse of certain periods of time. The debt which the Council alleged had prescribed in the present case was its obligation to register a right of provisional leasehold in favour of Phasha, a debt which would have prescribed within a period of three years.

The Prescription Act provides that prescription shall commence to run as soon as the debt is due. This is when the creditor acquires a complete cause of action for recovery of the debt. The Council argued that in the present case, this was 16 January 1985 from which date, Phasha had become entitled to demanded registration of the right of leasehold in his favour.

The question of when Phasha became entitled to demand registration of this right was affected by the nature of the transaction. Being a cash sale, not a credit sale, the implication was that the obligation to give registration of the right was to be performed simultaneously with the payment of the purchase price, not following payment. The fact that the sale agreement provided for a loan to be secured by the registration of a mortgage bond following registration of the right of leasehold was no indication that the balance of the purchase price was to be paid by Phasha prior to registration of the right of leasehold—this merely indicated the method by which Phasha would arrange payment of the purchase price. The obligations of both parties under the agreement were reciprocal, each being conditional upon performance by the other. Phasha had therefore been entitled to demand registration of the right of leasehold immediately upon conclusion of the agreement in January 1985.

While Phasha's entitlement to demand registration of the right of leasehold had arisen from this date,

employer, Purity Ferrochrome (Pty) Ltd. This was Consolidated Metallurgical Industries Ltd (CMI), which had taken cession of all of Purity's assets but had not taken cession of Purity's rights in terms of the contract entered into between Purity and Titaco. The settlement incorporated an undertaking to provide 16 new copper shoes and a cash payment of R183 325.

AA defended Titaco's claim for damages on the grounds that Titaco had failed to prove what AA's obligations were in regard to the specifications of the shoes it had to supply, and failed to prove that it had been obliged to reach a settlement with CMI in view of the fact that CMI had not taken cession of Purity's claim against it. It also contested the basis of the claim for damages, contending that because Titaco's holding company had paid the debt to CMI, and Titaco had written off the debt for tax purposes, Titaco had not suffered damages in the sum claimed.

THE DECISION

AA's obligations were identifiable from the quotation it had given in the quality control plan. This document constituted evidence of the terms of the contract entered into between the parties and could be considered a part of that contract. As it was evidence of an identifying nature, it was admissible as proof of the terms of the contract and did not offend the parol evidence rule.

As was apparent from the quotation, the quality of the brass was specified and the failure of AA to produce shoes complying with these specifications was a breach of contract giving rise to a claim by Titaco for damages.

As far as the defence based on the failure of a cession was concerned, it was clear that the intention of the parties to the transfer of the assets from Purity to CMI was that a cession of all Purity's claims should take place. In view of AA's failure to lead evidence showing that the probabilities were against such a cession having taken place, against Titaco's allegation that it had taken place, it could be accepted that a cession had taken place.

As far as the challenge to the existence of the damages claim was concerned, the fact that another party had paid CMI and not Titaco was not vital to the contention that Titaco had suffered damages. In the circumstances of the case, in which the associated companies had operated without regard to the separate nature of each of them, the fact that Titaco had paid, whether through another company as agent or another company had paid as donor or some other legal form, was undisputed.

Titaco's claim was upheld.

The document headed `quotation' itself did make rference to the nature of the brass by stating that the copper-zinc ratio would be 80:20—which was in any event he prescribed ratio according to the drawing prepared by Tanabe and provided to the defendant—but it did not provide the required full details of the brass selected. That was set out in the accompanying plan. These facts satisfy me that Heher J was correct in concluding that the `quotation' referred to in the purchase order was intended by the parties to include the quality plan. Evidence of such an identifying nature is permissible and does not infringe the parol evidence rule.

prescription brought about by the original application was effectively continued by the declaration which followed in the trial action.

The amendment of the declaration was in accordance with the averments made in the averments contained in the original application. It was a further act in the continuation of the case against Melamed and could therefore be seen as the interruption of prescription begun by the commencement of the original application. Prescription had therefore not run against the claim being brought by BP.

As far as the suspensive condition was concerned, a party may claim restoration of what it has given under a contract which has failed due to non-fulfilment of a suspensive condition on the basis of unjust enrichment (the condictio indebiti). The fact that BP did not expressly rely on this basis for its claim did not mean that it could not so base its claim—its original allegations were sufficient to support such a claim even if they were sufficient to support an alternative claim based on mistaken belief as well. The amendment made these two alternatives quite clear and the fact that the original declaration did not refer to the termination of the contract by non-fulfilment of the suspensive condition was no obstacle to accepting this as a basis of claim as expressed in the amendment.

FIRST NATIONAL BANK LTD v AVTJOGLOU

A JUDGMENT BY MAYA AJ
CAPE OF GOOD HOPE PROVINCIAL DIVISION
14 SEPTEMBER 1999

2000 (1) SA 989 (C)

The deliberate prevention of fulfilment of a condition required for the conclusion of an agreement will be grounds for the application of the doctrine of fictional fulfilment and the consequent validation of the agreement as an existing agreement.

THE FACTS

First National Bank Ltd and Avtjoglou entered into an agreement in terms of which Avtjoglou and Aglorn Canvas CC, for whom Avtjgolou was surety, undertook to pay the bank sums of money for which they were both liable. The agreement recorded that a sum of R40 000 was about to be paid to Avtjoglou by an investor in Aglorn, and that this amount would be paid to the bank within 14 days of signature of the agreement. Subject to the suspensive condition that the R40 000 was paid to the bank, Aglorn's entire indebtedness was to be assigned to Avtjglou.

Avtjglou sent to the bank by fax a signed copy of the agreement but did not return the original. When doing so, he indicated that he could not guarantee that the R40 000 would be received from the investor and he would not pay the first instalment due until he received a signed copy of the agreement from the bank.

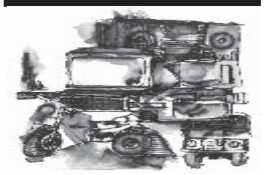
The bank brought an action for provisional sentence against Avtjglou based on the acknowledgement of debt contained in the agreement. Avtjglou defended the action on the grounds that the suspensive condition contained in the agreement had not been fulfilled, and no consensus between the parties had been achieved, so that there was no agreement upon which the bank could base its action.

THE DECISION

On a proper construction of the agreement, Avtjglou's liability did not depend on payment of the sum of R40 000. His liability was affirmed whether or not this money was paid. The response he gave, in the form of his fax, was not a counter-offer but a statement of the manner in which payment was going to be made. Consequently, a binding agreement would have been entered into upon the bank returning a signed copy of it to Avtjglou.

The fact that Avtjglou deliberately failed to forward a signed copy of the agreement to the bank showed that he had frustrated the fulfilment of a condition which was necessary

JONKER v BOLAND BANK PKS BPK



A JUDGMENT BY WRIGHT J
(VAN COLLER J concurring)
ORANGE FREE STATE PROVINCIAL DIVISION
21 JUNE 1999

2000 (1) SA 542 (O)

In order to successfully defend an action on the grounds that the plaintiff is to be estopped from asserting its claim because the defendant acted upon certain representations negligently made, it is necessary to show that the defendant suffered prejudice as a result of so acting. A customer of a bank may therefore not depend on estoppel to answer a bank's claim for payment where the bank made the incorrect representation that a cheque deposited to its account was honoured but it is not shown that the customer acted to its prejudice as a result of the representation.

THE FACTS

Jonker deposited a cheque into his account which he held at Boland Bank PKS Bpk, and requested that the bank obtain special clearance of the cheque. Special clearance involved a speeded-up procedure for collection of the cheque and a telephone call from the collecting bank to the drawee bank to ensure that there were sufficient funds to pay the cheque.

Boland informed Jonker that the cheque had been honoured. This information was given On the strength of this information, Jonker drew a cash cheque for R7 000 and received this sum from the bank. The cheque which Jonker had deposited was dishonoured upon presentation and Boland then debited Jonker's account with the amount of the cheque.

Boland brought an action against Jonker for the resulting overdrawn balance of his account. Jonker contested Boland's right to debit his account with the amount of the cheque. He defended the action on the grounds that Boland was to be estopped from alleging that the cheque he had deposited could not be drawn against, because it had made the representation that the cheque had been honoured and he had acted upon the strength of this representation. He appealed a finding adverse to him.

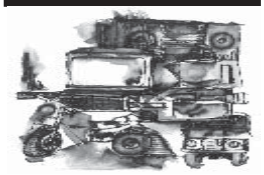
THE DECISION

A defence based on estoppel must show that the person raising the defence acted to his own prejudice. Such prejudice is shown where the person so acting changes his position so as to assume a weaker financial position than he was in before doing so. A bank may be liable toward its customer in circumstances where it incorrectly records a credit to the customer's account, but it will not be liable where the customer is unable to prove that it acted to its own prejudice as a result.

Jonker had not shown that he had acted to his own prejudice, either by drawing the cheque for R7 000 or in any other manner. The time when prejudice needs to have arisen—for purposes of proving the estoppel—is when the person who has made the representation retracts the representation and will no longer be bound to it. In the present case, this was when Boland debited Jonker's account with the amount of the dishonoured cheque. This happened after Jonker had drawn the sum of R7 000.

It was also clear that the prejudice which Jonker suffered was not a result of the actions of the bank. The mere fact that Jonker had incurred an obligation as a result of the bank's actions was not sufficient to show this.

The appeal was dismissed.



have applied interest to their investment in order to calculate its value.

Since the in duplum rule was not applicable, SA Breweries could not depend on it to avoid its obligation to pay the amount claimed by Sanlam. The application for payment was upheld.

SOOMAR v AVON LEIGH CC

A JUDGMENT BY LEACH J
(SCHOEMAN AJ concurring)
EASTERN CAPE DIVISION
21 SEPTEMBER 1999

2000 (1) SA 524 (E)

A creditor is not subject to a six-month limitation period in the enforcement of its claim against a trader where the claim arose before the trader sold his business and the creditor's claim falls within the provisions enacted in section 34(3) of the Insolvency Act (no 24 of 1936).

THE FACTS

Soomar bought a business from Amods Wholesalers and Ice-Cream Depot CC including certain stock-in-trade.

At the time of the sale, Avon Leigh had, some two months previously, commenced an action for payment in respect of goods sold and delivered to Amods. Two years after the action began, Avon Leigh obtained judgment against Amods and then attempted to execute on the judgment by attaching goods at the business premises then being controlled by Soomar. Soomar contended that he was the owner of the goods and entitled to resist any claim against them, including that of Avon Leigh.

Avon Leigh asserted that it was entitled to attach the goods because in terms of section 34 of the Insolvency Act (no 24 of 1936), the transfer of the business was void as against it as creditor. Section 34(3) renders void, as against any claimant against a trader, any transfer of the trader's business, if the trader knew at the time of transfer that proceedings had been instituted against it by the claimant.

THE DECISION

Section 34(3) provided for no time limitation for the enforcement of the claim referred to in the section. It was not affected by the six-month time period provided for in subsection 1 and there were no grounds for holding that it was. The fact that Avon Leigh did not enforce the judgment it had obtained against Amods until the lapse of some two years after the sale of the business was therefore no bar to its proceeding with enforcement of the judgment by the attachment of the goods. To insist on earlier enforcement would be to ignore the commercial and practical realities which affect the procedures for enforcement, and the time periods within which they must be applied. Section 34(3) itself made no reference to any limitation in the time period within which enforcement was to be made and there were no grounds for importing into it any time limitation.

That section 34(3) did not involve any time limitation for the enforcement of a claim was also clear from a consideration of the intention with which the section as a whole was enacted. The intention was to afford protection to creditors of a trader who might wish to dispose of his property without paying his debts or who might prefer one creditor over another. The purpose of issuing a notice of the sale of the trader's business is to alert creditors of the change of ownership, thereby allowing them an opportunity to enforce their claims against the existing trader prior to that person dissipating the proceeds of the sale of the business. Given that the underlying objective of these provisions is to protect creditors, and that without there being any obligation to publish a notice in terms of subsection 3, the need for any time

ADVANCE MINING HYDRAULICS (PTY) LTD v BOTES N.O.

JUDGMENT BY FABRICIUS AJ
TRANSVAAL PROVINCIAL DIVISION
7 OCTOBER 1999

2000 (1) SA 815 (T)

An order requiring the attendance of a person at interrogation proceedings which is made in terms of section 69 of the Insolvency Act (no 24 of 1936) may only be made when it is clear that property belonging to the insolvent estate is being concealed or some person is withholding property belonging to the insolvent estate. A person compelled to attend such an inquiry must be informed of his right to legal representation at the inquiry.

THE FACTS

The directors and shareholders of Advance Mining Hydraulics (Pty) Ltd had been directors and shareholders of Henbase (Pty) Ltd, a company which had been put into liquidation. They were ordered by the liquidator to attend the first meeting of creditors of Henbase. They did so, taking with them documentation pertaining to the affairs of Henbase.

The meeting was postponed and they, together with the company's auditor, were ordered to appear at the later date, with certain financial records relating to the company. They were not informed of the purpose of the postponed meeting. At the postponed meeting, the liquidator's attorney examined the auditor and one of the directors regarding the affairs of Henbase. Thereafter, the attorney requested, and was granted, an order in terms of section 69 of the Insolvency Act (no 24 of 1936) empowering the liquidator to attach certain assets on the property of Advance Mining Hydraulics.

Advance and its directors then applied for an order setting aside the entire proceedings which took place before the magistrate, Botes, and reviewing and setting aside the order which was granted in terms of section 69. They based their application on the allegation that they had not been informed that the postponed meeting would be an enquiry, nor that they were entitled to legal representation at the enquiry.

THE DECISION

Section 69(3) provided no grounds for the order that was given against Henbase because the circumstances were not those under which such an order could be given. The circumstances in which the section would provide grounds for such an order were (i) where some person was concealing property belonging to the insolvent estate and (ii) where some person was withholding property belonging to the estate. It had not been shown that either of these circumstances existed. The order was therefore improperly given.

As far as the allegation that the directors of Advance had not been informed of their right to legal representation was concerned, it was clear that no notice had been given to the directors regarding this right. Section 65 of the Insolvency Act and section 415 of the Companies Act (no 61 of 1973) provide grounds for compelling the giving of evidence by directors in insolvency proceedings, but they also provide for their assistance by a legal representative. Given the inquisitorial nature of such proceedings, it is essential that an interrogee be informed of his right to such representation. The right to such notification would also be in keeping with the spirit and objects of the Bill of Rights as enshrined in the Constitution.

The order granted was set aside.

HEES N.O. v SOUTHERN LIFE ASSOCIATION LTD

A JUDGMENT BY CLAASSEN J
WITWATERSRAND LOCAL DIVISION
24 NOVEMBER 1999

2000 (1) SA 943 (W)

Insurance

The nomination of a beneficiary under a life policy which is taken out prior to the insured's marriage in community of property is not tacitly revoked by the marriage. A joint will in terms of which parties married in community of property mass their estates and bequeath their property to a certain beneficiary does not have the effect of revoking the nomination of a beneficiary as provided for in a life policy taken out by either of them.

THE FACTS

Hees nominated his brother as the beneficiary to the proceeds of two life policies which he took out in 1991 and 1992 with Southern Life Association Ltd as insurer. The policies provided that the appointment of a beneficiary could be revoked upon written notice to this effect being received by the head office of Southern Life before the death of the insured.

In March 1997, Hees married the applicant in community of property. Later that month, they executed a joint will in which they nominated the survivor of them to be the sole heir of their joint estate on the death of the first-dying. On 1 June 1997, Hees committed suicide.

The applicant contended that she was entitled to the proceeds of the life policies and not Hees' brother, because his nomination as beneficiary became ineffective upon her marriage to Hees in community of property and because the effect of the joint will was to revoke his nomination as beneficiary. She applied for an order that the proceeds of the life policies be paid to her by Southern Life.

Southern Life opposed the application on the grounds that it had at no stage received notification of the revocation of Hees' brother as beneficiary under the policies.

THE DECISION

A life insurance policy taken out prior to a marriage in community of property does not vest in the joint estate when the marriage takes place. The insured's rights in respect of the policy, such as the right to surrender it or obtain a loan upon the strength of it, does vest in the joint estate, but the policy itself and the right to receive money because of it, does not.

The only other basis upon which it could be said that a marriage in community of property would have the effect of vesting the right to the proceeds of a life policy in the joint estate would be that the marriage tacitly revokes the nomination of the beneficiary under the policy. However, there is no authority for this proposition and the weight of principle would go against it. When comparing such a situation with that of a bequest in a will, where a marriage in community of property does not effect a revocation, consistency would suggest that in the former case, revocation would similarly not take place. The mere fact that the insured concludes a marriage in community of property does not indicate a change of intention on his part regarding the nominated beneficiary.

As far as the joint will was concerned, the weight of authority was in favour of holding that its effect would not be to revoke the nomination of the beneficiary of one of the testators, where that nomination had resulted in a stipulatio alteri (provision in favour of a third party) the benefit of which had been conferred on the beneficiary and where revocation thereof could, in terms of the policy, be revoked only upon specific conditions provided for in it. There was no reason to deviate from this authority in the present case. The joint will had not revoked the nomination of the beneficiary as stated in the life policy.

The application was dismissed.

FRANKEL POLLAK VINDERINE INC v STANTON N.O.

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
29 MARCH 1996

2000 (1) SA 425 (W)

Enrichment

An action based on the allegation that a party has disposed of the property belonging to the plaintiff must allege that the defendant knew of the plaintiff's title to the property and that the defendant's knowledge was either direct or could be inferred from the defendant's awareness of the possibility that the plaintiff held title to the property.

THE FACTS

Frankel Pollak Vinderine Inc sold shares belonging to Ernest Stanton. The sale had taken place on the strength of instructions given by a certain Stafford, and was not authorised by Stanton.

After Stanton's death, his executor brought an action for damages against Frankel, and claimed that Frankel had constructive notice of the fact that Stanton had not authorised the sale and delivery of the shares. In support of this, Stanton alleged that Frankel knew that Stafford dealt with it as agent and not as principal, and knew that Stafford was not a registered portfolio manager in terms of the Stock Exchange Control Act (no 1 of 1985) and not legally entitled to hold listed securities on behalf of others. It was also alleged that Frankel did not have a power of attorney from Stanton authorising Stafford to deal with his shares and that Frankel failed to take steps to verify Stafford's instructions.

The executor contended that Frankel ought not to have dealt with the shares. Having done so recklessly, alternatively negligently, it was liable for the payment of damages in the sum of R49 000 being the market value of the shares.

Frankel excepted to the claim on the grounds[1] that the constructive notice alleged in the particulars of claim was not supported by the allegations contained therein, and that in any event, the presence of constructive knowledge on its part would not render it liable to Stanton in the circumstances of the case. This part of the exception was based on the contention that as agent it would not be liable to any third party for any loss suffered unless it had had knowledge of the true position.

THE DECISION

One party is entitled to recover damages against another who has wrongfully disposed of property belonging to that party if the other party knew of that party's title to the property. This is a right of action defined by the actio ad exhibendum. The question was whether its requirement of 'knowledge' on the part of the defendant included 'constructive' knowledge, ie knowledge which can be attributed to the defendant even if it was not actually known by that party.

Mere acquisition of the property does not give rise to this right of action. Knowledge of the owner's right to it is necessary for success of the action. Such knowledge may be direct knowledge, but it may also be constructive knowledge in the sense that the person foresees the possibility of a particular result but proceeds to execute some action regardless of such foresight (dolus eventualis). It may also be knowledge attributed to a person who, mala fide, deliberately shuts its eyes to the facts which would bring such knowledge to its attention.

Stanton had alleged that Frankel possessed such knowledge when it alleged that it knew Stafford was not a registered portfolio manager and did not have a power of attorney authorising him to deal with the shares. This however, was not an averment that Stafford was administering or holding in safe custody on behalf of another person investments in listed securities in contravention of section 4(1) of the Stock Exchanges Control Act. Such behaviour on the part of Stafford would, in any event, not give rise to constructive knowledge on Frankel's part that Stafford was dealing in shares without the authority of their owner. A stock broker is not required to ensure that the person who purports to act on behalf of another in disposing of shares belonging to the other has the authority to do so.

There was no basis upon which it could be said that Frankel had constructive knowledge of Stafford's alleged lack of authority.

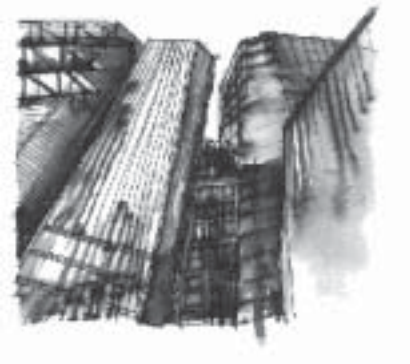
The exception was upheld.

ROSS v SOUTH PENINSULA MUNICIPALITY

A JUDGMENT BY JOSMAN AJ
(DESAI J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
3 SEPTEMBER 1999

2000 (1) SA 589 (C)

Property



An action for ejectment from premises occupied by a person as their home requires proof that the circumstances justify the ejectment. A mere allegation that the occupier occupies the premises without the right to do so will be insufficient for these purposes.

THE FACTS

The South Peninsula Municipality brought an action for ejectment of Ross from premises occupied by her. Its claim was based on the allegations that the municipality was the owner of the premises, that Ross was in occupation of them and that she had no right to be in occupation.

Ross appealed an order given in favour of the municipality, arguing that she was protected by section 26(3) of the Constitution of the Republic of South Africa Act (no 108 of 1996). The section provides that no-one may be evicted from their home without an order of court made after considering all the relevant circumstances. Ross contended that in view of this provision, the allegations as made in the summons were insufficient to establish the municipality's case against her. She contended that section 26(3) obliges the municipality to set out the circumstances justifying the eviction from her home.

THE DECISION

The introduction of section 26(3) brought about a change in the onus of proof resting upon the person bringing an action for ejectment from the home of an occupier. Given that our system of jurisprudence follows an adversarial form and not an inquisitorial form, the plaintiff is required to show that the ejectment is justified in the circumstances of the case.

In the action brought by the municipality against Ross, it was alleged only that she occupied the premises without the right to do so. This was insufficient to show that the circumstances entitled the court to give an order of ejectment. To entitle the court to give such an order, the relevant circumstances need to have been demonstrated. As they were not, the municipality was not entitled to an order of ejectment.

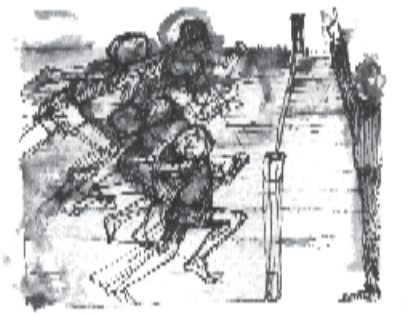
The appeal was upheld.

ABAKOR LTD v CRAFCOR FARMING (PTY) LTD

A JUDGMENT BY MAGID J
NATAL PROVINCIAL DIVISION
11 OCTOBER 1999

2000 (1) SA 973 (N)

Competition



A trader which indicates to the customers of its competitor that its competitor is to terminate the services it has hitherto been offering its customers, with the innuendo that this is a result of financial difficulties being experienced by the competitor thereby defames the competitor and engages in unfair competition against it.

THE FACTS

Abakor Ltd owned an abattoir which provided services to a company in which the directors and shareholders of Crafcor Farming (Pty) Ltd had a controlling interest. For some years, the abattoir had been experiencing financial difficulties. It embarked on a programme of cost-cutting and increases in through-put and slaughter fees. A dispute arose between the company and Abakor.

Crafcor then addressed a letter to certain persons who had an interest in abattoir services, in which it stated that in view of the imminent closure of the abattoir, it was forced to build a cattle abattoir on one of its properties. It indicated that it intended to seek the necessary statutory permissions for the establishment of the abattoir and requested the recipient's approval of the proposed plans.

Abakor received notice of the letter and it immediately addressed Crafcor with a demand that it furnish the names and addresses of its recipients, that they be informed that the abattoir was not closing down and that it apologise to them for the statement made in the letter. Crafcor responded by apologising for any embarrassment which might have been caused to Abakor but indicating that the letter was sent in order to explain the reason for the establishment of the proposed abattoir.

Abakor then applied for an interdict preventing Crafcor and its director from publishing false and/or defamatory statements concerning the abattoir and from stating that the abattoir was to be closed down.

THE DECISION

The words 'imminent closure' of the abattoir were not per se defamatory, but in the context of the case, contained the innuendo that closure was caused by Abakor's financial situation. That innuendo was defamatory of a trader; it also constituted unfair competition against Abakor. As such, Abakor was entitled to interdict Crafcor from repeating the statement to anyone who might use the services of its abattoir.

In view of an undertaking given by Crafcor that it would not repeat the statement, confirmation of the interdict was not necessary but discharge thereof could be ordered. Abakor had however been compelled to bring the interdict proceedings because of the attitude initially adopted by Crafcor and costs therefore had to be awarded in Abakor's favour.

TRANSITIONAL LOCAL COUNCIL OF RANDFONTEIN v ABSA BANK LTD

JUDGMENT BY GAUTSCHI AJ
WITWATERSRAND LOCAL DIVISION
18 FEBRUARY 2000

2000 CLR 186 (W)

Banking

A party which takes a deposit from another at the premises of the depositor in the same manner as it would have taken the deposit at its own premises and makes arrangements for the collection of the item deposited according to methods chosen by it thereby obtains ownership of the item so deposited and bears the risk of loss should the item be stolen. The party which holds the item as a gratuitous deposit will only be liable to repay the depositor the sum of its loss if it has been grossly negligent in its holding of the item or has exhibited bad faith in the circumstances of the loss.

THE FACTS

Absa Bank Ltd provided banking services for the Transitional Local Council of Randfontein, including the taking of deposits and the conduct of a cheque account. One of the services performed by the bank was the taking of deposits at the premises of the council by an employee of the bank.

On 29 December 1995, one of the bank's employees attended at the premises of the council and verified the deposit of an amount of R321 101,11 consisting of cheques and a cash amount of R104 788,76. The employee completed a deposit slip recording the deposit, date stamped it. The council intended to deposit the total amount in its bank account. After sealing the cash, the money was put into a safe at the council's premises to await collection by a security firm and delivery thereof to the bank. The security firm had been engaged by the bank to attend to the delivery of money, this arrangement having superseded an earlier one in which the bank employee had attended to this task. Within an hour, the cash was stolen.

The bank considered the loss to be that of the council, and refused to credit the council's account with the sum of R104 788,76. The council brought an action against the bank to compel it to credit its account with this amount. The bank took the view that since the cash had not been handed to the security firm, it had not been deposited with it and the risk of loss had not passed to it.

In a conditional counterclaim, the bank claimed that the council had been under a duty of care to take care of the cash held by it following the verification of the deposit and had negligently breached the duty by failing to take sufficient precautionary measures to prevent unauthorised entry into the safe where the cash had been kept.

THE DECISION

The main issue was whether or not the bank took the cash into its possession.

When the bank employee attended the premises of the council in order to record the deposit, she performed all the acts that she would normally have performed if the transaction had taken place at the bank. Having done that, the money was sealed in a manner which made it impossible for the council to use it. The deposit slip then recorded that the bank had received the money. It was a result of the bank's choice of operation that the money was then left with the council for later delivery to the bank by a party engaged by the bank to do so. The bank could have taken the money using the services of its employee, but had chosen to follow the method of using the security firm. Accordingly, the council had made a deposit of cash to the bank, and ownership thereof passed to the bank at the point that it was taken. It followed that the loss which arose through the theft of the money was the theft of the bank's money and not the council's. For that reason, the bank was obliged to record the deposit as a credit in the council's account with itself.

As far as the counterclaim was concerned, it appeared to be a claim based in delict and not contract, ie was based on the allegation that the council owed the bank a duty of care breach of which would constitute an actionable wrong quite independently of any contract between the parties. Irrespective of the absence of any owner's risk clause, which would have removed liability for loss from the bank as owner, the bank was required to prove that the council had been negligent in the circumstances. The council had been a gratuitous depositary and was therefore liable for bad faith or gross negligence in its actions in regard to the deposit.

The evidence did not show that the council had been grossly negligent. Security measures which had been adopted for the preservation of property at the place where the money was stolen might have been improved upon. However, there was no evidence that had they been so improved, the theft would not have taken place. Assessing the council's actions against the actions which could be expected of a reasonable person. A reasonable person would have taken precautions to prevent a member of the public from entering the premises where the money was deposited but not a member of the council's own staff, who would have had to have access to that area. Whether or not better control of the key to the safe would have prevented the theft was not a matter which had been determined by the evidence.

Since it had not been shown that the council's behaviour was grossly negligent, the counterclaim had to fail.

STANDARD BANK OF SA LTD v OK BAZAARS (1929) LTD

JUDGMENT BY GAUTSCHI AJ
WITWATERSRAND LOCAL DIVISION
17 MARCH 2000

2000 CLR 259 (W)

In proving that a party has suffered damages as a result of a misstatement made by another party to it, the party alleging damages must show that the statement which was made was false, that the party to whom the statement was made was induced to act upon it, and it had intended that the statement would be acted upon. It is also necessary that it be shown that the statement was made negligently and unlawfully and resulted in loss to the extent of the damages claimed.

THE FACTS

OK Bazaars (1929) Ltd issued a letter of undertaking in favour of the Standard Bank of SA Ltd in which it confirmed that it had purchased goods to the value of R1,8m from KTC Resources (Pty) Ltd, and undertook to pay that amount 60 days after delivery of the goods to Hyperama stores. The letter of undertaking stated that the OK would pay by cheques drawn in favour of KTC.

On the strength of the undertaking, Standard Bank agreed to finance the purchase of the goods by KTC from the supplier in Spain. It established a letter of credit in favour of the Spanish supplier's bank, after receiving confirmation that the letter of undertaking had been signed. Although it had been the intention of the parties that KTC would supply the goods, OK Bazaars had in fact purchased the goods from Samarkand Trading (Pty) Ltd. Samarkand was controlled by a person who also controlled KTC and who had customarily done business with the bank on behalf of KTC and under that company's name. When the documentation necessary for payment under the letter of credit was presented, it appeared that the invoice from the Spanish supplier was addressed to Samarkand and not KTC. KTC waived the discrepancy, and the bank paid the beneficiary bank.

Simultaneously, KTC presented invoices in respect of the same goods to the OK. The OK paid them, issuing cheques to Samarkand in whose name the invoices had been raised. The OK considered KTC to be the same business entity as Samarkand.

The bank brought an action for payment in terms of the letter of undertaking, alternatively for payment of the amount paid out under the letter of credit. The latter cause of action was based on the allegation that if no contract between the OK and KTC had been concluded, the OK had negligently misstated the position so as to give the bank the impression that such a

contract had been concluded and had, as a result, been induced to establish the letter of credit upon which it had later made payment. KTC was liquidated and the OK refused to make payment to the bank in terms of the letter of undertaking.

THE DECISION

As the OK had contracted with Samarkand and not KTC, the bank's first alternative cause of action could not succeed. On the basis of the second alternative cause of action, the bank had to establish that the OK had made a statement which was false, which it was induced to act upon, and which the OK had intended the bank to act upon. It was also necessary for the bank to show that the statement had been made negligently and unlawfully and had resulted in loss to the extent of the damages it claimed.

The OK had made a misstatement when it issued the letter of undertaking: the OK had not in fact purchased the goods from KTC but from Samarkand. The statement was made in order to induce the bank to act upon it, as was evident from the preamble 'We understand that you have agreed to finance the purchase of the goods from the supplier in Spain on the strength of our undertaking ...'.

Once the statement was made, the bank made payment in terms of the letter of credit, relying on the letter of undertaking. The fact that the letter of undertaking specified that payment was to be made to KTC and not the bank merely indicated that KTC had been nominated to receive payment although the beneficiary was in fact the bank. The letter of undertaking therefore was a document upon which the bank could rely and did rely when making payment in terms of the letter of credit.

The OK had been negligent in not verifying the information given to it by KTC's controller. It would have been an easy matter for it to have done so and its failure to do so constituted negligence. Its action could also be characterised as unlawful.

The damages resulting from the OK's misstatement could be measured by the amount the bank had paid under the letter of credit, ie US$210 080,35.

The action succeeded.

ABSA BANK LTD v UNIBANK SAVINGS AND LOANS LTD

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
22 JUNE 1999

2000 CLR 231 (W)

A bank under curatorship is not entitled to terminate an agreement merely because of the occurrence of the curatorship. The curator is normally obliged to honour the bank's obligations under any such agreement and cannot depend on the provisions staying proceedings against a bank under curatorship as enacted in section 69(6) of the Banks Act (no 94 of 1990).

THE FACTS

Absa Bank Ltd entered into two agreements with Unibank Savings and Loans Ltd in terms of which Absa provided to Unibank the services of two of its employees. Unibank was obliged to pay Absa the salary and other benefits paid to the employees by Absa following the issue of invoices to Unibank by Absa.

On 8 May 1996, Unibank was placed under curatorship in terms of section 81 of the Mutual Banks Act (no 124 of 1993). The two employees continued the performance of their services to Unibank, but on 20 March 1997, the curator informed them that their services would no longer be required and Absa was also informed.

Absa claimed that is was entitled to payment from Unibank of the amounts it had paid to the two employees in terms of their contract of service with it. Unibank's curator refused to pay these amounts, contending that it was entitled to repudiate the contract of service under the authority of section 69(6) of the Banks Act (no 94 of 1990). Absa applied for an order compelling it to do so.

THE DECISION

Section 69(6) of the Banks Act provides that while a bank is under curatorship all legal process against the bank will be stayed and not be proceeded with without the leave of the court. This section does not authorise the repudiation of any agreement by a bank under curatorship. It also does not bring about the termination of an agreement merely by virtue of the coming into being of the curatorship, ie ipso iure. The termination of the agreements by the curator therefore constituted a repudiation of Unibank's obligations and was not justified in terms of the Banks Act.

It was also incorrect to contend that because of the curatorship of the bank, it had become factually or legally impossible for Unibank to comply with its obligations under the service agreements. The effect of the curatorship was to transfer the management of the bank from its directors and management to the curator. This did not nullify any of the bank's obligations under the service agreements.

Unibank also argued that Absa was not entitled to insist on specific performance of the agreements in the circumstances as it had no interest in continuation of the agreement and ought to have attempted to mitigate its damages as an alternative. Whereas this might be so in our law, Absa had shown that it was unable to utilise the services of its two employees. Between Absa and Unibank, the party which would suffer undue hardship in such circumstances was Absa. A court would therefore exercise its discretion to order specific performance in favour of the bank.

The application was dismissed.

COLUMBUS JOINT VENTURE v ABSA BANK LTD

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
17 DECEMBER 1999

2000 (2) SA 491 (W)

A collecting bank's duty of care to the true owner of a cheque extends to a duty not to open an account for a person whom it does not know without making inquiries as to the identity of that person, and taking some measures to ensure that loss is not caused to the true owner by the activities of its customer. Such a duty of care must be founded on the principles of delictual liability, ie must ensure that, in the case of a cheque, (i) the bank received payment of the cheque on behalf of someone not entitled to it, (ii) in receiving payment, the bank acted negligently and wrongfully, (iii) the bank's conduct caused the true owner to sustain loss, and (iv) the damages claimed represent the proper compensation for the loss.

THE FACTS

Columbus Joint Venture employed Alexander Bertolis as a group legal advisor. While employed in that capacity, Bertolis opened a business current account with the Allied Bank Division of the bank in the name of Stanbrooke & Hooper. Bertolis indicated to the bank that the account was being opened in order to facilitate the business operations which were to follow with the execution of a franchise agreement between himself as franchisee, and Stanbrooke & Hooper as franchisor.

Stanbrooke & Hooper was a firm of solicitors situated in Brussels, Belgium, but it had no knowledge of the agreement nor of the fact that the account had been opened. Bertolis was not authorised to open the account for the firm and the account was at all times conducted by Bertolis alone and for his benefit. The bank did not make any inquiries as to the existence of the firm, nor of whether it knew that the account had been opened. It did know that Bertolis held a current account in his personal capacity at another branch of the bank.

Over a period of some 2½ years, Bertolis issued fictitious invoices in the name of Stanbrooke & Hooper to the bank, purporting to be in respect of professional legal services rendered by that firm in regard to Columbus' legal affairs. By completing relevant cheque requisitions and verifying the invoices, Bertolis caused Columbus to draw 39 cheques on First National Bank in payment of the invoices. Columbus believed that the invoices were payable and that the account rendered to it was that of Stanbrooke & Hooper. The cheques were made payable to that firm, crossed and marked 'not transferable'. The total of the cheques so drawn amounted to R777 302,40. A telegraphic transfer of R43 662 was also effected in favour of the account.

The cheques incorporated an instruction to any collecting bank to collect the cheque only for the named payee.

Columbus brought an action against Absa based on these facts. After a stated case had been made by the parties, the court was asked to determine various questions of law, principally whether the bank acted unlawfully and negligently in opening the account and collecting the cheques.

THE DECISION

Columbus alleged that the bank acted unlawfully and negligently in opening the account in that it had not directed enquiries to Brussels to establish whether a firm of solicitors with the name Stanbrooke & Hooper existed, and if so whether the franchise agreement correctly recorded a real agreement which had been entered into between it and Bertolis. It further alleged that the bank should have enquired whether or not it was competent for anybody to practice law in South Africa in terms of a franchise agreement as recorded in that furnished by Bertolis, and should have enquired whether a business or practice was being carried on in South Africa under the name Stanbrooke & Hooper.

There is no doubt that in principle, a collecting bank is under a duty of care in the collection of cheques. This was not directly applicable to the present case, where the question was whether or not the collecting bank's duty of care extended to the opening of an account. The harsh imposition of liability merely because a bank has collected a cheque for someone not entitled to it has been amended by legislation, firstly in section 81 of the Bills of Exchange Act (no 34 of 1964).

A bank would normally make inquiries of a potential customer, to ascertain the customer's identity and standing, and to protect itself in the event of it affording the customer facilities such as drawing against uncleared effects. This is not the same as the bank's duty to third parties however, and a bank's liability in that regard must be founded on the principles of delictual liability, ie it must be shown that (i) the bank received payment of the cheque on behalf of someone not entitled to it, (ii) in receiving payment, the bank acted negligently and wrongfully, (iii) the bank's conduct caused the true owner to sustain loss, and (iv) the damages claimed represent the proper compensation for the loss.

It could not be shown that the bank had acted negligent or wrongfully in the opening of the account. It had displayed reasonable care in opening the account. Bertolis was an existing client of the bank. The personal particulars he had given were correct, and if his identity had been checked against the references he had given, there would have been no indication that he was someone other than who he said he was. It was not certain whether some of the documentation had been referred to when the account was opened, but it was clear that Bertolis was no stranger to the bank, and the bank had been entitled to open the account for him on the strength of the information he had given it.

The grounds of negligence relied on by Columbus were without substance. It would impose too great a duty on the bank to require that it verify the agreement shown to it by Bertolis. The terms of the agreement were not untoward. While the name of the account was to be different from Bertolis' name, the reason for this was demonstrated in the agreement he had shown the bank. The bank was not under a duty to ensure that Bertolis was in fact doing the business he said he was doing.

CAPE ATHOS SHIPPING LTD v BLUE EMERALD SHIPPING LTD

A JUDGMENT BY THIRION J
DURBAN AND COAST LOCAL DIVISION
8 DECEMBER 1999

2000 (2) SA 327 (D)

Shipping

An arrest of a ship will be effected without reasonable or probable cause where the arresting party is aware of obstacles to the arrest which cannot be removed prior to the arrest.

THE FACTS

Cape Athos Shipping Ltd became the owner of the MV *Cape Athos* at a time when it was under a bareboat charter concluded with Blue Sapphire Shipping Ltd. This charterparty had been concluded simultaneously with others between owning companies associated with Cape Athos Shipping Ltd by a common parent, Compagnia de Navigatie Maritima Petromin SA, a Romanian State-owned company, and chartering companies associated with Kassos Maritime Enterprises Ltd, a Greek company. One of the chartering companies was Blue Emerald Shipping Ltd.

Disputes between Petromin and Kassos arising from the charterparties culminated in an agreement to settle the disputes. This included the referral to auditors Ernst & Young of a determination of accounts paid and received by both parties, the terms of the joint instructions of the parties to the auditors to be finalised between them within 30 days. The agreement provided that Petromin would pay $1 750 000 as payment on account of such sums as may be owed by it, and would pay such sum as certified by Ernst & Young to be owing by it, subject to a state maximum. Kassos would pay such sum as certified by the auditors as owing to Kassos in terms of the final audit.

Clause 8 of the agreement provided that each party undertook that they would not arrest or detain any vessel in the ownership, management or control of the other party or otherwise take any other action whatsoever against the assets of any such party or company in connection with the subject-matter of the agreement.

After the auditors had submitted an interim report, differences arose between the parties. Petromin indicated that it intended to commence arbitration proceedings in terms of the provisions of the agreement. Two months later, the *Cape Athos* entered Durban harbour. Blue Emerald and its associated companies, including Blue Sapphire, applied for its arrest as security for their claim against Cape Athos Shipping Ltd in respect of the arbitration proceedings or proceedings in the High Court in England. They did so after considering the effect of clause 8. Their legal representatives considered that this clause prevented an arrest of the ship, but contended that Kassos had failed to co-operate with the audit contemplated in the agreement which was a breach of their obligations under it. It was an implied term of the agreement that in the event of such breach, the other party would no longer be bound by clause 8. Cape Athos Shipping Ltd, Petromin, and the other ship-owning companies applied for the arrest to be set aside. The arrest was set aside on the grounds that it was in conflict with clause 8 of the agreement.

Cape Athos Shipping Ltd then brought an action for damages against Blue Emerald and the other charterers arising from the arrest and detention of the Cape Athos. It based the action on the provisions of section 5(4) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) which provides that any person who without reasonable or probable cause obtains the arrest of property or an order of court shall be liable to any person suffering loss or damage as a result thereof, for that loss or damage.

THE DECISION

Reasonable or probable cause for the arrest of property is constituted by an honest belief that the property is susceptible to arrest. Blue Emerald contended that the Cape Athos was susceptible to arrest because clause 8 of the agreement was no longer binding on it and its associated companies.

The implied term contended for by Blue Emerald was unsustainable. The accounting function of the auditors as provided for in the agreement was of a subordinate nature compared with the disputes between the parties relating to the interpretation of the terms of the agreement. Even with a proper audit, there would have been substantial differences between the parties. The purpose of clause 8 was to prevent the arrest of each others' ships while arbitration proceedings were pending, and it was this very purpose which had been thwarted by the arrest of the *Cape Athos*.

The fact that Blue Emerald had acted on legal advice in effecting the arrest of the *Cape Athos* and had made full disclosure of clause 8 was also relevant, but this did not prevent the arrest from having been improperly secured. The fact that the applicant itself was in default in furnishing the auditors with information required under the agreement was also relevant, and ought to have been disclosed in circumstances where the respondent was not present to oppose the application.

The applicants in the arrest of the ship could not have believed that clause 8 was probably no longer of force or effect. The arrest they had effected was therefore without reasonable or probable cause and was set aside.

Whether in a given case a reasonable person would have accepted the legal advice and would have acted on it remains a question of fact. Moreover, the value to be attached to the legal adviser's advice would depend also on whether the client had put all the relevant facts before the legal adviser. It would also depend on the circumstances under which the advice was given. The test is whether a reasonable person would have believed that the advice was probably correct.

COETZEE v VRYWARINGSVERSEKERINGSFONDS VIR PROKUREURS

A JUDGMENT BY LOMBARD J
ORANGE FREE STATE
PROVINCIAL DIVISION
11 NOVEMBER 1999

2000 (2) SA 262 (O)

Insurance

An insurer which is obliged to indemnify an insured by virtue of the operation of section 156 of the Insolvency Act (no 24 of 1936) is entitled to repudiate a claim on the same grounds as it would be entitled to repudiate were the claim brought without the use of the provisions of this section. Where on a proper interpretation of the policy of insurance, it appears that the parties intended that the insured would be entitled to claim for costs of an action for payment under the terms of the policy, a claimant utilising the provisions of section 156 is equally entitled to payment of the costs of such an action.

THE FACTS

Coetzee brought an action against Botha for damages arising from Botha's negligent handling of a claim for damages he had instructed Botha to institute on his behalf. Botha had allowed the claim to prescribe.

After Coetzee had begun his action against Botha, Botha's estate was sequestrated. The Fidelity Fund for Attorneys was then substituted for Botha as defendant in terms of section 156 of the Insolvency Act (no 24 of 1936). The Fidelity Fund had insured in respect of all claims and claimants' costs and disbursements and restitutionary costs arising from any insured event. Coetzee obtained judgment against the Fund for the damages which he could prove arising from the events giving rise to his claim, as well as costs.

The parties agreed that damages in the sum of R1m were obtainable by Coetzee, but differed as to whether or not Coetzee was entitled to costs of the action including the costs awarded in the judgment he had already obtained. They sought an order as to whether or not Coetzee was entitled to costs in terms of section 156 of the Act.

THE DECISION

Section 156 provides that whenever an insurer is obliged to indemnify an insured in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards a third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.

This section does not create new rights. It merely provides for a procedure which enables an insured to obtain preference by entitling the insured to claim direct from an insolvent's insurer. Any right held by the insurer to repudiate remains applicable to any such claim. The Fund would therefore be entitled to repudiate a claim for costs if this was not provided for in the insurance policy under which it provided cover against the negligence of Botha.

Upon a proper interpretation of the terms of the insurance policy, it was clear that costs were to be included in the cover provided by it. This is what the parties had intended, and were this not so, the references to costs in the policy would be contradicted by other provisions of the policy.

THE DAVID TRUST v AEGIS INSURANCE COMPANY LIMITED

A JUDGMENT BY NIENABER JA (HEFER, SMALBERGER, MARAIS JJA, and MTHIYANE AJA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2000

UNREPORTED

An insurance policy which insures a professional partnership against legal liability in connection with any claim first made on the insured by reason of any dishonest or fraudulent act or omission of a partner insures against a failure to pay a client of the firm as a result of a breach of mandate by one of the partners, irrespective of whether or not the failure to pay is also a result of the insolvency of the firm. A firm of accountants may incorporate in the scope of the mandate given to it by a client the obligation to collect and deposit money belonging to the client in investments chosen by the firm.

THE FACTS

The David Trust and others instructed a firm of accountants, Katz Salber, to attend to the running of their business affairs. This involved the preparation of financial statements, the payment of accounts, the invoicing of clients, the collection of money and the banking of surplus funds.

At a certain stage, Katz Salber began placing surplus funds in the money market, pooling the money of the various trusts for which they rendered their services. At this stage, Katz Salber no longer charged a fixed fee for their work, but charged a commission of 6% on the interest earned in the money market.

Over a period of years, one of Katz Salber's partners siphoned off some of the money thus invested in the money market. It was eventually discovered that the fund which should have stood at some R5m actually amounted to only R9 000. Earlier discovery of this had not taken place because no-one had checked the financial statements, which were prepared by the dishonest employee, against the funds standing to the credit of the trusts in the bank account. When the discovery was made, Katz Salber was sequestrated, as were the estates of its partners, and the responsible employee was convicted of theft.

Katz Salber had taken out professional indemnity insurance with Aegis Insurance Co Ltd and representatives of Lloyds of London. The policy provided that the insurers were bound to indemnify the insured, subject to a limit of R1 500 000, against any claims first made on the insured during the period of insurance for any (i) negligent act, error or omission, (ii) breach of contract amounting to breach of duty in the practice of the profession, (iii) failure unintentionally and in good faith to account for monies had and received, and (section 2 of the policy) against any legal liability in connection with any claim first made on the insured by reason of any dishonest or fraudulent act or omission of any partner of the firm. The policy gave cover in connection with a wide-ranging catalogue of professional activities associated with that of accountants.

The David Trust and the other parties then brought an action against Aegis and the Lloyds representatives, basing their action on section 156 of the Insolvency Act (no 24 of 1936). The section provides that whenever an insurer is obliged to indemnify an insured in respect of any liability incurred by the insured toward a third party, the third party shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability toward a third party to the maximum amount for which the insurer is bound to indemnify the insured.

Aegis and the Lloyds representatives defended the action on the grounds that in terms of the policy, they were not liable to indemnify Katz Salber, and consequently not the trusts either in terms of section 156.

THE DECISION

The mere failure to pay to the trusts the money invested on their behalf did not create a legal liability on the part of the firm toward the trusts. The failure to pay was a result of breaches of the mandate given to the firm by the trusts. It was this failure which created the liability of the firm toward the trusts. Irrespective of whether or not the failure to pay was also a result of the insolvency of the firm, the provisions of the policy therefore directly applied to the situation: in section 2, it insured against legal liability in connection with any claim first made on the insured by reason of any dishonest or

fraudulent act or omission of a partner.

The fact that the firm deposited money belonging to its clients in the money market did not make it a deposit-taking institution, whose activities were not contemplated or covered by the insurance policy. The firm acted as its clients' agent in investing the money, thereby fulfilling a role which it accepted when undertaking to conduct their business generally.

The question also arose whether the actions of the firm amounted to a 'breach of contract amounting to a breach of duty in the conduct of the profession'. The insurers contended that the act of taking deposits was not a part of the services performed in the conduct of the profession of an accountant and that accordingly, the partner's action did not amount to a breach of duty in the conduct of his profession.

The insurers' argument could however, not be accepted. The profession of the accountant as performed by Katz Salber included the deposit of money as this was something that was done 'in connection with' the activities of an accountant as referred to in the policy. The deposit of money was not made with the firm itself but with an outside entity and as such, was properly considered, an activity conducted in connection with the activities of an accountant. Since the embezzlement of the money by the partner responsible had been done in the course of those activities, there had been a breach of contract amounting to a breach of duty in the practice of the profession of the insured.

The action succeeded.

Historically and factually Katz Salber offered them a conspectus of accounting services of which the payment of surplus funds into the money market pending their own decision to withdraw it, was but a single aspect. That service, broadly speaking, consisted of administering the funds of all the plaintiffs, keeping accounts, collecting and banking income, making disbursements, investing surplus funds in the money market with Investec, preparing draft annual financial statements, preparing and submitting income tax returns, paying the Receiver of Revenue, and so forth. Katz Salber did not simply act as the plaintiffs' debtor and their relationship was not simply that of debtor and depositor. Their relationship was one of mandate into which the plaintiffs entered with Katz Salber qua *accountants.*

FOURIE v HANSEN

A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL DIVISION
24 JANUARY 2000

[2000] 1 All SA 510 (W)

A contracting party who does not read the documentary record of the

Contract

agreement being entered into will not be bound to terms and conditions which he would not expect to be contained in the agreement, ie those which a reasonable person would not expect to find therein.

THE FACTS

The second defendant, Avis Car Hire, rented a motor vehicle to a certain De Waal and gave delivery to Hansen who signed the hire agreement. Clause 10 of the hire agreement provided that Avis would not be liable for any damage arising from any defect in or mechanical failure of the vehicle, nor for any loss of or damage to property transported or left in the vehicle, nor for any indirect damage, consequential loss, loss of profits or special damages.

Clause 10 formed part of a larger number of terms and conditions which were printed in small print on the reverse side of the hire agreement. Hansen did not read these terms and conditions when he signed the agreement, but signed it upon being told that his signature was a condition for delivery of the vehicle to him. He did not inform De Waal of the existence of the document containing the terms and conditions.

While the vehicle was being used under the hire agreement, it was involved in an accident which was caused by a tyre blowout. The tyre was discovered to be extensively worn. De Waal was a passenger in the vehicle when the accident took place and he suffered injuries as a result. He brought an action for damages against Avis as well as Hansen, the driver of the vehicle.

Avis defended the action inter alia on the grounds that it was protected by clause 10 and that its provisions prevented De Waal from successfully claiming damages against it.

THE DECISION

There was little evidence that Hansen acted as De Waal's agent in entering into the hire agreement. In particular, there was no evidence that De Waal consented to the terms of clause 10.

Even if Hansen were seen to have been De Waal's agent in signing the hire agreement, Avis would have to show that De Waal knew of the provisions of clause 10. It was accepted by both parties that Hansen had not read the provisions recorded on the reverse side of the hire agreement. In such circumstances, he could only be taken to have assented to terms which were not unexpected, ie only those terms which a reasonable person would expect to find therein.

The exemption clause created by clause 10 was not what a reasonable person would expect, ie that a car hire company would be exempted from responsibility for its breaches of contract. If such a company did require exemption in those circumstances, it should give proper notice to this effect to those who wish to hire vehicles from it. This it could do by printing the clause in a different size, or in red or underlined. The fact that the signatory signed below a confirmation that he had read and agreed to the terms and conditions on both sides of the agreement did not change this conclusion.

The defence raised by Avis was rejected and the matter proceeded to determination of the quantum of damages.

SETON CO v SILVEROAK INDUSTRIES LTD

A JUDGMENT BY
HARTZENBERG J
TRANSVAAL PROVINCIAL
DIVISION
15 NOVEMBER 1999

2000 (2) SA 215 (T)

A party alleging that enforcement of a foreign arbitral award would be contrary to public policy who is required to prove that fact by extraneous evidence must proceed in the jurisdiction where the award was made in order to prove the allegation.

THE FACTS

Seton Co and Silveroak Industries Ltd entered into a joint venture for the purpose of the production of leather for use in automotive upholstery. In terms of their agreement, Silveroak undertook that no member of its group would have an interest in any concern engaged in the manufacture of bovine leather automotive parts, a non-competition agreement. The joint venture was then put into operation.

Seton alleged that Silveroak breached the non-competition agreement and brought arbitration proceedings against it in Paris. The result was an award in favour of Seton for payment of R40 549 876 in damages for breach of contract.

Seton applied to have the award recognised by the South African High Court. Silveroak opposed the application on a number of grounds, including that enforcement of the award was to be refused on the grounds of public policy, it having been obtained by fraud.

THE DECISION

The Recognition and Enforcement of Foreign Arbitral Awards Act (no 40 of 1977) provides that a foreign arbitral award may be made an order of court, but that a court may refuse an application for such an order if it finds that the enforcement of the award would be contrary to public policy in South Africa.

The provisions of this Act entitle a court to refuse to recognise a foreign arbitral award where it is clear that enforcement would be contrary to public policy. Where however, extraneous evidence is required to show that enforcement would be contrary to public policy, as in the case of fraud, the respondent must proceed in the jurisdiction of the court where the award was made. This was the position in the present case, where the French courts had jurisdiction in regard to the award which had been made. Accordingly, it would be necessary for Silveroak to proceed against Seton in those courts to have the award set aside.

The South African High Court was therefore not entitled to refuse the recognition of the award and it was to be made an order of court.

DRIVE CONTROL SERVICES (PTY) LTD v TROYCOM SYSTEMS (PTY) LTD

Contract

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
25 FEBRUARY 2000

2000 (2) SA 722 (W)

Goods which are purchased subject to the reservation of ownership in them to the seller pending payment of the purchase price may not be attached to found or confirm jurisdiction for a claim to be brought against the purchaser since the purchaser does not have title to the goods.

THE FACTS

Drive Control Services (Pty) Ltd applied for ex parte, and obtained, an order for the attachment of computer hardware and related items and all other goods belonging to Troycom Systems (Pty) Ltd in the possession of a third party. The application was made in order to found or confirm the jurisdiction of the court in respect of a claim to be instituted against Troycom for payment of R177 755,30. Troycom's goods were duly attached in terms of the order.

Troycom applied urgently for the setting aside of the attachment, and N-Trigue Trading CC joined the application as an intervening party. Both of these parties alleged that the goods were those of N-Trigue, N-Trigue having sold the goods to Troycom on terms that the purchase price would be payable within 30 days of delivery and that goods would remain the property of N-Trigue until fully paid for. Troycom had not paid the purchase price to N-Trigue in respect of the goods.

Under their usual arrangements, N-Trigue would invoice Troycom for any orders for goods made by Troycom, Troycom would arrange delivery of the goods to premises in Harare, and would ensure that the goods, the customs documents and delivery notes were in order before making payment to N-Trigue.

Troycom initially asked for an order for costs of its application, but later abandoned this, in view of the fact that a claim for costs would be subject to attachment to found or confirm jurisdiction by Drive Control Services.

THE DECISION

The fact that a supplier of goods may accept that ownership of the goods supplied will pass to the buyer where the goods are to be resold and the proceeds thereof used for payment of the purchase price was not relevant in the present case. This was because in the present case, the goods were not intended for immediate resale and there was no reason to conclude that Troycom would not be able to make payment before it eventually sold the goods. Furthermore, there was an express provision reserving N-Trigue's ownership of the goods until payment was made. There was no reason to consider that this provision was inconsistent with the parties' real intentions.

As far as the costs order was concerned, although Troycom had abandoned its request for costs, the possibility of it having not done so and the consequent advantage this would have given to Drive Control Services (ie in affording it a basis upon which it could obtain an order of attachment to found or control jurisdiction) was a matter of concern.

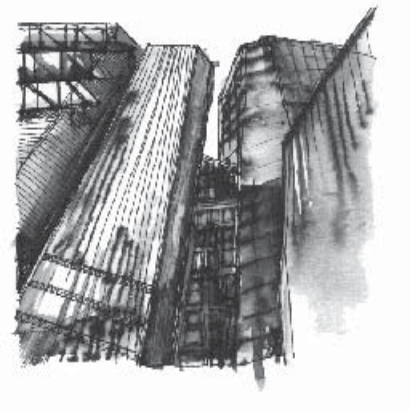
The attachment was set aside.

FAIRCAPE PROPERTY DEVELOPERS (PTY) LTD v PREMIER, WESTERN CAPE

A JUDGMENT BY DAVIS AJ
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
29 SEPTEMBER 1999

2000 (2) SA 54 (C)

Property



The negligent exercise of a public function by a public authority may give rise to a claim for damages on the grounds that such exercise is performed wrongfully, ie contrary to the constitutional principle that a public authority is accountable to the public it serves.

THE FACTS

Faircape Property Developers (Pty) Ltd purchased property subject to an application for the removal of certain title deed conditions, which had been made by the seller, being approved. The application was considered by the Urban Planning Committee of the City of Cape Town, which recommended to the Provincial Administration of the Province of the Western Cape that the application be approved. The Minister of Agriculture, Planning and Tourism of the Western Cape then approved the application and Faircape took transfer of the property.

When the Minister approved the application, he did so in terms of the Removal of Restrictions Act (no 84 of 1967), acting pursuant to powers conferred upon him by section 2(1) of that Act. The section provides that the Minister may, if satisfied that it is desirable to do so in the interest of the establishment or development of any township or in the interest of any area or in the public interest, alter, suspend or remove any restrictive title deed condition. Section 4(2) provides that after consideration of the application, the recommendation of the townships board and objections and other relevant documents and particulars, the competent authority may grant or refuse the application.

The Minister's approval of the application was later attacked on the grounds that the Minister failed to apply his mind properly to the application. (See 1998 *Current Commercial Cases*, page 117.) His decision to approve the application was set aside and Faircape was interdicted from proceeding with the construction of flats on the property. Faircape then reapplied for the removal of the title deed restrictions and, some eighteen months later, the application was approved.

Faircape then claimed R1 054 407 against the Premier of the Province, alleging that it had suffered losses in this amount in consequence of the Minister having breached a duty of care to apply his mind properly to the first application. The Premier excepted to the claim on the grounds that the Minister owed Faircape no duty of care in respect of the decision taken by him pursuant to the provisions of the Act.

THE DECISION

For the exception to succeed, it would be necessary to show that upon every interpretation of the claim made by Faircape, no cause of action was shown.

A cautious approach to the possible liability of a public authority for actions negligently done in the course of performing a public function would require that for liability to be shown, it must be shown that the legislature intended that a claim for damages would result from the losses caused by the negligence of the authority. However, this approach need not be adopted, where it was clear that the public function had been exercised wrongfully. Where this had happened, the public authority was to be held accountable for its actions.

Applying this approach, the negligent decisions of a public authority would appropriately, and in view of the constitutional principle that a public authority is accountable to the public it serves, be considered wrongful conduct. The question of liability could not be decided simply on the basis of whether or not liability for the exercise of statutory powers was a possibility contemplated by the legislature.

Since this was a possible basis upon which Faircape's claim could succeed, the interpretation of its particulars of claim could reasonably support a claim in delict against the Premier. The exception was dismissed.

KRIEL N.O. v LE ROUX

JUDGMENT BY GROSSKOPF JA (HEFER JA, SMALBERGER JA, VIVIER JA, and MELUNSKY AJA concurring)
SUPREME COURT OF APPEAL
22 MARCH 2000

UNREPORTED

A deed of sale which can be interpreted so as to identify the property sold sufficiently complies with section 2(1) of the Alienation of Land Act (no 68 of 1981). In identifying the property, it is possible to have regard to provisions of the sale agreement which indicate the intentions of the parties in regard to the property sold, including provisions relating to the subdivision of the property.

THE FACTS

Le Roux sold to Kriel, in his capacity as trustee of a trust, certain fixed property. The agreement was recorded in writing, and described the property as the western portion of erf 186R as indicated on annexure 'A' which was still to be subdivided. Annexure 'A' was a sketch plan, not drawn to scale, of a four-sided figure, with the names of two roads printed between two sets of parallel lines. A line was drawn through the middle of the figure from north to south, the first part of which was a solid line and the rest a dotted line. The solid line represented an existing wall. Clause 9.2 of the agreement provided that the offer was subject to subdivision of the property which the seller would attend to immediately. The seller also undertook to build walls on the boundaries of the property and between the two portions after subdivision.

Kriel contended that the property could not be identified nor its position determined from the description of it as given in the written contract, and that it therefore did not comply with the requirements of section 2(1) of the Alienation of Land Act (no 68 of 1981). The section provides that no alienation of land is of force or effect unless it is recorded in a deed of sale signed by the parties thereto or their agents.

THE DECISION

Although the description of the property did not include the suburb or town in which it was situated, this was something which could be determined by a Deeds Office search which would show where Le Roux's existing property was situated. This would be evidence independent of the discussions which took place between the parties, would be an objective manner of identifying the property, and would accordingly be an admissible method of determining this aspect of the sale agreement.

The identification of the property by reference to the diagram attached to the agreement of sale could be achieved. From an examination of these documents, the dividing line between the two parts of the property could be observed, by virtue of the solid line depicting the wall. The western portion of the property could be distinguished from the eastern portion and the property's boundaries thereby sufficiently identified. Having been identified in this manner, the property was sufficiently described for the purposes of compliance with the Alienation of Land Act.

The sale was valid and effectual.

CAPE KILLARNEY PROPERTY INVESTMENTS (PTY) LTD v MAHAMBA

A JUDGMENT BY HLOPHE DJP
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
1 OCTOBER 1999

2000 (2) SA 67 (C)

THE FACTS

Cape Killarney Property Investments (Pty) Ltd obtained an order in the form of a rule nisi calling upon the respondents, 542 persons, to show cause why an order should not be made evicting them from its property and demolishing the structures erected by them thereon, on a date to be determined in the order. The rule informed the respondents that Cape Killarney's application was being instituted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) ('the Act') and was brought on the allegation that they were in unlawful occupation of the property. It further informed them that they were entitled to defend the application at its hearing on 28 July 1999.

It was also ordered that service of the order was to be effected by delivering a copy of the order to each respondent in person, or failing that, by delivering and leaving a copy of the order at the structures referred to in the application. It was also ordered that anyone wishing to defend the application was to give notice thereof and would thereafter be entitled to receive a copy of the notice of motion with supporting affidavits.

The respondents then applied for an order that the rule nisi should be set aside.

THE DECISION

Section 4(2) of the Act provides that at least 14 days before the hearing of the proceedings for eviction of an unlawful occupier, the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

The 'hearing' referred to in this section includes the granting of a rule nisi. The notice required by this section was therefore notice which would be required in the present proceedings. However, no notice of the application to apply for the rule nisi had been given. In view thereof, there had not been proper compliance with section 4(2) and for that reason alone, the order should not have been granted.

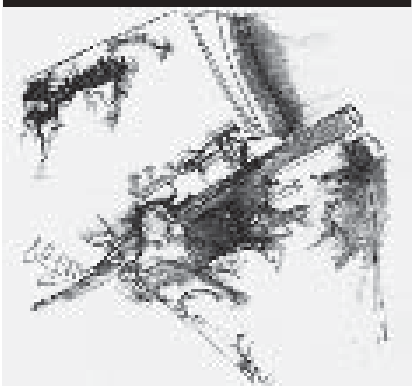
The notice required by section 4(2) must also be written and effective. When the order was served on the respondents it was given in English, not accompanied by a Xhosa translation, and was not accompanied by a verbal broadcast to cater for those respondents who were illiterate. In order for the notice to be effective,

PAGE v ABSA BANK LTD

A JUDGMENT BY LEACH J
EASTERN CAPE DIVISION
10 SEPTEMBER 1999

2000 (2) SA 661 (E)

Suretyship



A principal debtor who pays portion of a debt in respect of which a suretyship obligation subsists effectively extinguishes the surety's liability to that extent even though a balance of indebtedness remains payable to the creditor.

THE FACTS

Absa Bank Ltd lent money to Page's father and Page undertook suretyship obligations toward the bank in respect of repayment of the loan. These obligations limited the extent of his liability to R190 000 together with interest and costs.

The bank brought an action against the principal debtor and Page for repayment of the loan and judgment was granted against them jointly and severally for payment of R597 056,57, Page's liability being limited to R190 000 together with interest thereon. The bank then gave notice of the attachment of money of the principal debtor held in the principal debtor's attorney's trust account. The attorney responded by furnishing a cheque for R219 741,51 which was made up of the R190 000 jointly and severally owed by the principal debtor and Page, together with interest thereon. The attorney stated that the amount settled that portion of the order made against Page.

The bank was unable to recover the balance of the amount owing by the principal debtor. It contended that it was entitled to further payment from Page and attached a Mercedes Benz truck belonging to him.

Page applied for the attachment to be set aside.

THE DECISION

In order to determine if the payment of R219 741,51 extinguished Page's liability toward the bank, the effect of that payment had to be determined.

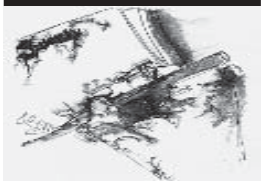
The bank contended that as long as the principal debt remained unpaid, it was entitled to look to Page for payment up to the limit of his suretyship obligation. The payment of R219 741,51 having been made by the principal debtor and not Page, it was entitled to consider that the balance remained payable by Page subject to that limit.

This contention however, failed to take into account the well-established general principle that a payment by a debtor ought to be appropriated to the most onerous portion of his debt. Because the surety has a right of recourse in the event of him making payment in terms of his suretyship obligations, the most onerous portion of a debt which is secured by a suretyship obligation is that portion so secured. Accordingly, payment by the principal debtor is to be allocated first to that portion. In the present case, this would be the portion in respect of which payment to the bank was actually made.

The effect of the payment of R219 741,51 was therefore to extinguish Page's liability toward the bank. The attachment was set aside.

ABSA BANK LTD v SCHARRIGHUISEN

Suretyship



A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
15 DECEMBER 1999

[2000] 1 All SA 318 (W)

A surety who has not discharged the principal debt has only a notional a right of recourse against an insolvent estate. Since such a claim is conditional and unliquidated, it cannot be proved against the insolvent estate of the principal debtor.

THE FACTS

Absa Bank Ltd applied for confirmation of a provisional order of sequestration earlier given against Scharrighuisen.

Scharrighuisen's liabilities amounted to R111 297 905, including liabilities in respect of his obligations as surety for certain principal debtors. His assets amounted to R73 170 000. Not included in these assets was a right of recourse as surety, which Scharrighuisen alleged should be included as an asset in his estate. This was an amount of R73 841 692 which was arrived at by adding the total value of the assets of the principal debtors for whose debts Scharrighuisen stood surety. The principal debtors were insolvent at this time.

Scharrighuisen opposed the confirmation of the order on the grounds that when his right of recourse as surety was taken into account, his liabilities did not exceed his assets so that he was not in fact insolvent.

THE DECISION

The surety's 'right of recourse' is not a right held by a surety which arises merely because the surety is a surety. It is a right which a surety may exercise against a principal debtor in certain circumstances, including some where the surety has not yet paid the debt owing by the principal debtor, but it does not necessarily entail a simple right to recover that for which the surety has stood surety. It includes other remedies such as the right to compel the principal debtor to discharge its indebtedness to the creditor.

In view of this, it is incorrect to value the surety's right of recourse as the gross value of the principal debtor's assets. The fair value of the surety's right of recourse is determined by (a) how much the creditor will be able to recover from the principal debtor, (b) the shortfall which will be recovered from the surety by the creditor, and (c) whether anything will remain to satisfy the surety's right of recourse against the principal debtor.

Where the principal debtor is insolvent, the value will also be determined by the extent of the dividend obtainable from its insolvent estate. In the present case, Scharrighuisen's claim against the insolvent estates of the principal debtors was conditional and unliquidated. Accordingly, no value could be placed on it.

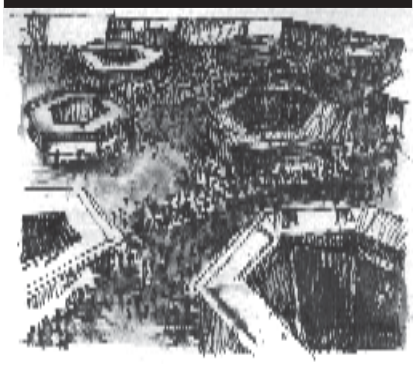
Confirmation of the order was granted.

G & C CONSTRUCTION v DE BEER

A JUDGMENT BY DU PLESSIS J
TRANSVAAL PROVINCIAL DIVISION
18 OCTOBER 1999

2000 (2) SA 378 (T)

Corporations



An acceptance of terms of a contract indicated by a person on behalf of a close corporation does not constitute an 'order' as referred to in section 23(2)(a) of the Close Corporations Act (no 69 of 1984). Personal liability for the debts of a close corporation is imposed by section 63(a) of that Act only when the other contracting party is not aware of the fact that it is dealing with a close corporation.

THE FACTS

On behalf of a close corporation, De Wet arranged for the hire of certain equipment. De Beer was the sole member of the close corporation. At the time, De Wet did not inform G&C that he was contracting on behalf of the close corporation.

G&C sent a fax to De Wet setting out the terms of hire and acceptance of the terms was indicated by a signature to the fax which was then faxed back to G&C. The close corporation was again not referred to in this communication.

The equipment was delivered to the close corporation and used. The first months of hire were paid for, but subsequently the close corporation was placed in liquidation, and it failed to pay certain months of hire.

By the time that the close corporation defaulted on its hire payments, G&C was aware that the hirer was a close corporation.

G&C brought an action against De Beer for payment of the unpaid hire payments, alleging that he was personally liable to it in terms of sections 23(2)(a) and 63(a) of the Close Corporations Act (no 69 of 1984).

THE DECISION

Section 23(2)(a) imposes personal liability on a member of a close corporation if the member issues an order for goods and services without the name of the close corporation on the order. However, in the present case, it could not be said that what was sent to G&C was an order. The parties themselves never considered it to be an order. This section therefore provided no basis for imposing personal liability on De Beer.

Section 63(a) imposes personal liability on a member of a close corporation where the name of the close corporation is used without the abbreviation 'CC'. Such liability is imposed on a member who is responsible for or who authorised or knowingly permitted the omission of the abbreviation. This section imposes personal liability on the member only while the other contracting party does not know that he is dealing with a close corporation. Such liability is not imposed at any other time.

In the present case, G&C had become aware of the fact that it was dealing with a close corporation by the time the default took place. It followed that section 63(a) could provide no basis for personal liability in this case.

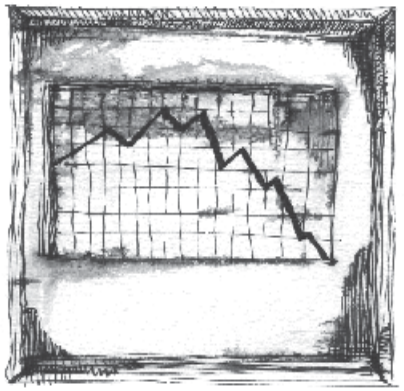
The action was dismissed.

M&V TRACTOR & IMPLEMENT AGENCIES BK v VENNOOTSKAP DSU CILLIERS & SEUNS

A JUDGMENT BY OLIVIER J
NORTHERN CAPE DIVISION
19 NOVEMBER 1999

2000 (2) SA 571 (NC)

Insolvency



The application of an intervening creditor to pursue an application to sequestrate must make out a complete case for sequestration on its own, although it may rely on facts appearing in the papers of the main application.

THE FACTS

M&V Tractor & Implement Agencies BK brought an application for the sequestration of a partnership, Vennootskap DSU Cilliers & Seuns and associated persons. It obtained a provisional order of sequestration but prior to the extended return date of the order, entered into settlement negotiations involving various creditors with a view to preserving the expected income from the partnership's farming activities.

Kelrn Vervoer (Edms) Bpk then applied as an intervening creditor in the application for the sequestration of the partnership. It alleged that it was owed R1,4m and that a settlement agreement earlier signed by one of its directors was not authorised by its other two directors. It sought an order to join the application against the partnership, and a final order of sequestration against it.

The partnership opposed the application brought by Kelrn on the grounds that it was defective in certain respects, including that the application had not been properly authorised by all the directors of Kelrn, two of them having been out of the country at the time the decision to bring the application was made. It also opposed the application on the grounds that the provisions of section 9(3) of the Insolvency Act (no 24 of 1936) had not been properly complied with. The section provides that an application for sequestration must furnish the full names, date of birth and identity number of the debtor, details of the debtor's marriage if applicable, the amount and basis of the claim, and whether or not security is held.

THE DECISION

The fact that the application brought by the intervening creditor was brought without the authority of the directors as required by Kelrn's articles of association rendered the application defective. Kelrn had attempted to ratify the decision to bring the application only after a challenge to it had been made by the respondents. However, Kelrn's application had to stand or fall on the allegations made in its founding affidavit and its defects could not be remedied at a later stage in its replying affidavit.

As the application by an intervening creditor in a sequestration application is a self-standing application, bearing the unique characteristic that is brought under the same application as the existing one, and possibly relying on facts which appear from the papers in the existing proceedings, it must make out a complete case for the sequestration of the respondent if it is to succeed. In the present case, it was incomplete to the extent that the proper authority for bringing it had not been secured. It was also incomplete to the extent that it failed to comply with section 9(3) of the Insolvency Act.

The application to intervene was dismissed.

NEL N.O. v THE MASTER

A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL DIVISION
22 MARCH 2000

2000 (2) SA 728 (W)

An intervening application for the winding up of a company stands independently of the first application for the winding up of the company. The date of commencement of an application for winding up is to be taken as the date on which the first successful application is complete. This will be the date on which an intervening application results in a final order winding up the company and not the date on which the first application secured a provisional order which was later discharged.

THE FACTS

On 7 April 1998, a certain Van Niekerk filed an application for the winding up of Prop Plant Hire (Pty) Ltd. The following day, the company was placed under a provisional winding up order and Nel was appointed a joint provisional liquidator. Before the return day, Van Niekerk withdrew from the application and NBS Boland Bank Bpk gave notice that it wished to intervene in the matter.

On 2 June 1998, NBS presented its application for intervention and for the final winding-up of the company. On that day, the court discharged the application originally brought by Van Niekerk, and placed the company under a final winding-up order as sought in the NBS application. Nel and another were appointed joint liquidators.

Later, Nel and the other joint liquidator applied for an order that the commencement of the company's winding up was to be taken as 8 April 1998 and not 2 June 1998. The application was opposed by two creditors.

THE DECISION

Section 348 of the Companies Act (no 61 of 1973) provides that a winding-up shall be deemed to commence at the time of the presentation to the court of the application for the winding-up.

The effect of the intervention of a creditor in an application of this nature is to introduce a new applicant, who is not entitled merely to stand on the back of another application which is no longer being proceeded with. The intervening creditor's application stands on its own and must be brought as a separate and self-standing application. The dominant purpose of the intervention is to avoid delay and unnecessary expense, to avoid a hiatus between the grant of one order and the next, and to avoid an appreciable interval during which the debtor becomes revested with its assets.

An intervening application does not revive the first application.

In the present case, the first provisional order which was granted effectively created a concursus creditorum. However, the provisional order was eventually discharged, and the effect of this was to nullify the concursus creditorum earlier established. The order granted on 2 June 1998 created a new concursus creditorum and therefore could not be seen as confirmation of the provisional order which was first granted. There were two separate applications for the winding up of the company. The first failed and the second succeeded. It was the second that was therefore to be taken as the relevant application when determining the date on which the concursus creditorum was established.

The commencement of the company's winding up was 2 June 1998 and not 8 April 1998.

RUTHERFORD v FERGUSON

JUDGMENT BY PRETORIUS AJ
ORANGE FREE STATE
PROVINCIAL DIVISION
11 NOVEMBER 1999

2000 (2) SA 275 (O)

An application to set aside an order of sequestration which is made following the confirmation of the liquidation and distribution account must join those creditors who have been paid dividends, must state the financial position of the insolvent estate, and indicate why the applicant did not oppose the application for his sequestration or appeal the grant of the order of sequestration.

THE FACTS

On 18 July 1996, Rutherford's estate was placed under an order of sequestration. At a later stage, he brought an action against the trustees for a declaration that the court which gave the order lacked the jurisdiction to make the order.

Rutherford alleged that the court did not have the jurisdiction to make the order because he was not domiciled within the area of the court's jurisdiction when the petition for sequestration was lodged, he did not own property situated within the area of jurisdiction of the court and he was not ordinarily resident nor carrying on business within that area within the 12 months immediately preceding the lodgement of the petition.

The trustees excepted to the claim on the grounds that it showed no existing, future or contingent right which could be the subject of a declaration of rights.

THE DECISION

In view of the time lapse between the date of sequestration and Rutherford's present action, it was reasonable to assume that the liquidation and distribution account was submitted to the Master and confirmed by him, and dividends were paid to creditors. In these circumstances, section 112 of the Insolvency Act (no 24 of 1936) were relevant. The section provides that when a trustee's account has been opened to inspection by creditors and no objection has been lodged, or objections which have been lodged have been dealt with, the Master shall confirm the account and his confirmation shall be final save as against a person who has been permitted to reopen it.

The implication of this section was that creditors of the estate would be interested in the action brought by Rutherford. None of them had however, been notified of the action.

Rutherford's action had also failed to give information as to the financial position of the insolvent estate, thus giving no indication of any possible benefit resulting from a declaration of nullity. It had omitted to indicate why the appeal procedures of section 150 of the Act had not been employed, whether or not Rutherford had opposed the sequestration application, the extent to which the liquidation and distribution of the assets had progressed, what dividend was paid to creditors and why those creditors who might have been paid dividends were not joined in the action.

Rutherford's claim was therefore improperly founded and the exception was upheld.

SACKSTEIN N.O. v S.A. REVENUE SERVICE

A JUDGMENT BY ERASMUS J
SOUTH EASTERN CAPE
LOCAL DIVISION
15 DECEMBER 1999

2000 (2) SA 250 (SECLD)

A liquidator is entitled to information and documentation from the S.A. Revenue Service concerning parties associated with the company of which he is a liquidator where such information and documentation may be given by an official of the S.A. Revenue Service in the performance of his duties under the provisions of section 4(1) and section 6(1) of the Income Tax Act (no 58 of 1962).

THE FACTS

The S.A. Revenue Service (S.A.R.S.) claimed some R10m from Armsec Professional Services (Pty) Ltd, being additional Value Added Tax, additional Tax, Penalties and Interest thereon. It failed to obtain satisfaction of a judgment obtained for payment thereof and brought an application for the liquidation of the company. The company was placed in liquidation and Sackstein was appointed the liquidator.

Sackstein wished to investigate claims by S.A.R.S. that prior to liquidation, Armsec had been stripped of its assets which were transferred to other trading entities operated by the ninth respondent. S.A.R.S. was of the view that it could not disclose to Sackstein the information at its disposal substantiating its claims, in view of section 4(1) of the Income Tax Act (no 58 of 1962). This section provides that every person employed in carrying out the provisions of the Act shall preserve and aid in preserving secrecy with regard to all matters that come to his knowledge in the performance of his duties in connection with those provisions, and shall not communicate any such matter to any person other than the taxpayer or his lawful representative nor permit such person to have access to any records in their custody except in the performance of his duties under the Act or by order of court.

Section 6(1) of the Act similarly provides that a person employed in carrying out the provisions of the Act shall not disclose to any person any matter in respect of any other person that may come to his knowledge in the exercise of his powers under the Act, and shall not permit any person to have access to any records in his possession or custody, except in the exercise of his power or performance of his duties under the Act or by order of court.

Sackstein applied for an order compelling S.A.R.S. to disclose and deliver to him all documents, records and information in its possession containing information relevant to the other respondents.

THE DECISION

The purpose of the provisions of section 4(1) and 6(1) is to facilitate the collection of revenue, by encouraging the flow of information between the taxpayer and the tax collector. They are designed to assist the tax collector in the performance of its primary function.

The allegations made by Sackstein to support the order sought under these two sections were lacking in detail as to the precise method by which Armsec's assets were transferred to businesses controlled by the ninth respondent. They were insufficient to provide a basis for the court to exercise its discretion to order the disclosure of information under these sections.

However, both sections authorised the disclosure of information by the Commissioner of S.A.R.S. in the exercise of his powers or performance of his duties without the necessity of interference by the court by the issue of a court order. This authorisation arose from the exceptions provided for at the end of each section, which qualified the restrictions on communication of information or allowing access to information earlier provided for in them. Officials of S.A.R.S. were bound to preserve the secrecy of information coming to their knowledge in the performance of their duties but were entitled to disclose tax matters to persons other than the taxpayer concerned if this was done in the performance of their duties under the Act.

This meant that in the present case, S.A.R.S. could communicate information pertaining to the other respondents to Sackstein and allow him access to documentation in the custody of S.A.R.S.

SPENCE v THE MASTER

A JUDGMENT BY VAN DIJKHORST J
TRANSVAAL PROVINCIAL DIVISION
23 FEBRUARY 2000

2000 (2) SA 717 (T)

A creditor in value in liquidation proceedings involving a close corporation holds the right to decide whether a co-liquidator should be appointed in terms of section 78(1)(a)(iii) of the Close Corporations Act (no 69 of 1984).

THE FACTS

At the first meeting of creditors in the insolvent estate of Oliva Properties CC, Absa Bank Ltd submitted a claim for R14 254 005,32. This claim, together with nine others, were admitted by the Master of the High Court. Its value far surpassed the value of the other nine claims.

The Master then upheld a contention by the bank that in terms of section 78(1)(a)(iii) of the Close Corporations Act (no 69 of 1984) the creditors should first vote on whether or not a co-liquidator should be appointed, and thereafter nominations for a co-liquidator could be considered. The bank voted that no co-liquidator should be appointed and the other creditors voted that one should be appointed. The Master then ruled that as the creditor in value had voted against the appointment of a co-liquidator, no nominations for the appointment of a co-liquidator would be considered.

Spence, the sole member of Oliva Properties and a creditor, applied for the setting aside of the Master's decision and that the first meeting be re-opened to allow the nomination of a co-liquidator.

THE DECISION

Section 78(1)(a)(iii) of the Close Corporations Act provides that a liquidator shall summon a meeting of creditors for the purpose of deciding whether or not a co-liquidator should be appointed and, if so, nominating a person for appointment. Spence contended that this section was to be read subject to section 54(3)(b) of the Insolvency Act (no 24 of 1936). It provides that if one person has obtained a majority of votes in value and another a majority of votes in number, both such persons shall be deemed to be elected trustees.

Section 54(3)(b) however, could not be read as affecting section 78(1)(a)(iii) as the latter section follows a two-tiered approach, the first being a prerequisite for the second. This approach to the appointment of a co-liquidator stood independently of the procedures provided for in section 54. These procedures are applicable to individuals and companies but not to close corporations. If applied in the present case, there would be a conflict between the two sections.

Section 78(1)(a)(iii) fell outside the scope of section 54. The will of the creditor in value prevailed. The application was accordingly dismissed.

CADBURY (PTY) LIMITED v BEACON SWEETS & CHOCOLATES (PTY) LIMITED

JUDGMENT GIVEN IN THE SUPREME COURT OF APPEAL ON 16 MARCH 2000 BY HARMS JA (VIVIER JA, MARAIS JA, STREICHER JA AND FARLAM AJA concurring)

UNREPORTED

Trade Mark

A trade mark which incorporates a description of the product in relation to which the trade mark is held and which does not distinguish the product in question as that of the trade mark holder does not give the trade mark holder the right to exclusive use of that description.

THE FACTS

Beacon held a registered trade mark in a plate of sweets marketed by Beacon under the name Liquorice Allsorts. The plate of sweets was positioned next to a little man made of the sweets and under a prominent display of the name Liquorice Allsorts. The mark was subject to a disclaimer that it gave no right to the exclusive use of the plate of sweets separately from the mark.

Beacon allowed retailers to use the name Liquorice Allsorts on packaging of its sweets without requiring that its trade mark be appended thereto.

Cadbury applied for an order that a further disclaimer be added that the registration of the mark gave no right to the exclusive use of the name Liquorice Allsorts separately and apart from the mark. Its application was based on section 15 of the Act which provides that if a trade mark contains matter which is not capable of distinguishing the goods or services in respect of which the trade mark is registered, the court may require the proprietor to disclaim any right to the exclusive use of such matter.

Beacon opposed the application.

THE DECISION

Whether or not the term Liquorice Allsorts was capable of distinguishing the product in question as Beacon's product was the determining factor in deciding whether or not the disclaimer proposed by Cadbury should be registered.

The term was one which described the sweets in question, but it was not a term which distinguished them as Beacon's sweets. This was apparent from the fact that it was impossible to think of another description of the sweets. Being a definitive description of the sweets, it was not a description which bore any necessary relationship to Beacon, and did not identify them as Beacon's sweets.

The fact that Beacon spent large sums of money advertising its sweets and obtained annual sales of R33m from the sweets did not prove that the term distinguished the sweets as Beacon's. Such marketing efforts could not render the mark distinguishing as required by the Act. The further fact that Beacon's sweets were sold by retailers under the name Liquorice Allsorts without using Beacon's trade mark in relation thereto was also an indication that the term was descriptive of the sweets as sweets and not as Beacon's sweets.

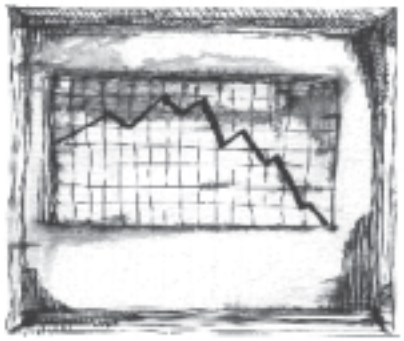
Cadbury's application was granted.

KERBYN 178 (PTY) LTD v VAN DEN HEEVER

A JUDGMENT BY NUGENT J
WITWATERSRAND LOCAL DIVISION
27 MARCH 2000

2000 CLR 241 (W)

Insolvency



The validity of a warrant issued to bring property into the possession of a trustee or liquidator in terms of section 69(3) of the Insolvency Act (no 24 of 1936) cannot be questioned on the grounds that the property subsequently attached was not that of the insolvent estate. Such a warrant may be set aside on the grounds that the terms of the section were not adhered to upon the issue of the warrant, ie that the magistrate issuing the warrant did not have reasonable grounds for suspecting that property of the insolvent estate was at a particular place. The assets of a business which have been attached under this section must be returned to any person who is able to establish a better title to them, but where the liquidators claim that the assets are those of the insolvent estate, they may be returned subject to an order for their preservation pending the outcome of an action finally determining whose property they are.

THE FACTS

Wheels Parts Distributors (Pty) Ltd carried on business assembling and distributing motor vehicles in association with other local and foreign companies. In 1998, a division was formed in the company for the purpose of supplying commodities to mining ventures in the Democratic Republic of the Congo. The division was known as 'Wheels Mining'. Its business was conducted separately from that of Wheels Parts. Unlike the business conducted by Wheels Parts, it was a highly profitable business.

In November 1999, Wheels Mining was moved to nearby premises where it continued to carry on the business it had previously conducted. From that point, it did so on behalf of a hitherto dormant company, Kerbyn 178 (Pty) Ltd, which was controlled by the same person who controlled Wheels Parts, Mr Helgard Muller Rautenbach. The business continued to use the equipment which had been used by Wheels Mining, former employees of Wheels Mining continued their employment with Kerbyn, and existing orders placed with Wheels Mining where substituted with orders placed with Kerbyn.

In January 2000, Wheels Parts was placed in liquidation. At that point, the provisional liquidators applied for warrants to be issued in terms of section 69(3) of the Insolvency Act (no 24 of 1936) authorising them to take possession of the business of Wheels Mining. The warrants were executed and Kerbyn was excluded from continuation of the business and from the premises at which it conducted the business. The money in its bank account was placed under attachment. The liquidators contended that the transfer of the business to Kerbyn was a disposition which could be set aside under the provisions of the Insolvency Act and Kerbyn accepted that this was so.

Kerbyn alleged that the warrants issued by the relevant magistrates were invalid. It applied for an order setting them aside. The liquidators brought a conditional counterclaim for an order that any property returned to Kerbyn be preserved pending the outcome of an action to determine who was entitled to the property of the business.

THE DECISION

Section 69(3) of the Insolvency Act authorises the issue of a warrant to bring property into the possession of a trustee or liquidator if it appears to the magistrate issuing the warrant from a statement made under oath that there are reasonable grounds for suspecting that any property, book or document belonging to the insolvent estate is (inter alia) at a particular place.

Kerbyn's principal reason for contending that the warrants were invalid was that the property of which they authorised the attachment was not the property of the insolvent estate. This however, was not a relevant consideration in determining whether or not the warrants were invalid, as the magistrates who issued them were not bound to determine whether or not the property was that of the insolvent estate. They were bound merely to have a reasonable grounds for suspecting that property of the insolvent estate was at the particular premises where it was alleged the property was. The statements relied upon by them did provide reasonable grounds for such a suspicion, even if in fact no property of the insolvent estate was there.

Kerbyn also contended that the warrants should not have been issue without first permitting it to be heard. Since the effect of the warrants was to deprive the subject of property, even if temporarily, Kerbyn would have the right to be heard. However, it must have been intended that the statute would exclude the right as in many cases, giving the right to be heard would defeat the purpose of the section.

While the warrants under which the liquidators obtained the property were validly issued, the question remained whether the liquidators were entitled to retain this property. If they were not, they would have to relinquish possession to anyone holding a better title to it.

Kerbyn accepted that the transfer of the business to itself was a disposition which could be set aside under the provisions of the Insolvency Act. However, it also contended that after the business had been transferred to it, it had conducted the business for its own account and all that remained of the business earlier conducted by Wheels Mining were a few fixed assets. The liquidators were entitled to retain any such items but were not entitled to retain 'the business' merely because it incorporated such items. A business is a combination of assets and it would be necessary to distinguish between the assets to determine which were a part of the business and which were not.

In determining which assets of the business were properly regarded those of the insolvent estate, as opposed to those of Kerbyn, it had to be accepted that the inherent probabilities pointed to the disposition of the assets of Wheels Mining in favour of Kerbyn having been done in fraud of creditors. The disposition was accordingly liable to be set aside under the actio Pauliana, and the proceeds of the disposition were liable to be returned to the insolvent estate.

In order to ensure that the liquidators retained only property which was that of the insolvent estate, and in order to accommodate their counterclaim for preservation of the property, it was appropriate to order that they make an inventory of the property comprising the business conducted under the name 'Wheels Mining Services', vacate the premises where the business had been conducted, retain possession of the fixed assets agreed to be those of the business, and return those other assets taken into their possession under the warrants. Pending the outcome of the action for recovery of the assets of the business, Kerbyn was interdicted from dealing with any of the property remaining in its possession.

In my view the legislature must have intended to exclude a right by the affected person to be heard. To afford such a right would, in many cases defeat the very purpose of the section. There will also be cases in which the trustee or liquidator will not even be aware of the identity of the affected person. Furthermore, the very grounds upon which such a warrant may be issued are inconsistent with the existence of a right by the affected person to be heard. In my view Putter v Minister of Law and Order N.O. *1988 (2) SA 259 (T), which held that there was such a right, was wrongly decided, and I agree with the contrary conclusion in* Phillp Business Services CC v De Villiers, *supra.*

COTHILL v CORNELIUS N.O.

A JUDGMENT BY McARTHUR J
TRANSVAAL PROVINCIAL DIVISION
7 MARCH 2000

[2000] 3 All SA 101 (T)

The solvent spouse of an insolvent person is entitled to rely on the right against dispossession in a case where the trustee of the insolvent person has unlawfully removed his/her assets. Such a removal will not be lawful merely because section 21(1) of the Insolvency Act (no 24 of 1936) provides that all the property of a solvent spouse vests in the trustee as if it were the property of the sequestrated estate.

THE FACTS

Cothill's estate was sequestrated on 20 January 1999 and Cornelius was appointed the trustee. An inquiry into the affairs of the estate was held, at which Cothill and his wife were subpoenaed to attend. The information obtained at the inquiry led Cornelius to believe that Cothill and his wife were conniving with each other to hide Cothill's assets or dissipate them. The following day, the trustee and her attorney attended certain business premises at Stanger Industrial Park in order to remove movable property situated there. After certain discussion had taken place between the trustee, her attorney, Cothill and his attorney, the property was removed. The discussions had ended without agreement between the parties.

Cornelius and her attorney then went to Cothill's flat in Salt Rock and made an inventory of its contents.

The premises at Stanger Industrial Park were the place where Cothill's wife alleged she ran a business, Specialised Security Systems, retaining there all the business' machinery and stock-in-trade, and employing Cothill as a supervisor of the manufacturing operations. At the same premises, she ran another business known as Merlin Foods CC. Both businesses used the same facilities at the premises.

Cothill then brought an urgent application for the return of the property which had been taken.

THE DECISION

Cothill's application was based on the allegation that she and Merlin Foods CC, which was joined as a co-applicant, had been spoliated (dispossessed) of their assets and were entitled to their immediate return. It had to be determined whether or not the dispossession was lawful or unlawful.

As far as the assets of Merlin Foods were concerned, these were clearly unlawfully attached as there was no basis in law for their attachment. They therefore had to be returned to it.

As far as Mrs Cothill's assets were concerned, Cornelius depended on section 21(1) of the Insolvency Act (no 24 of 1936) which provides that all the property of a solvent spouse vests in the trustee as if it were the property of the sequestrated estate. This section however, does not in itself authorise the removal of the property of the solvent spouse's property. Section 69(1) of the Act obliges the trustee of an insolvent estate to take into his/her possession all movable property belonging to the estate, but this cannot be done before the Deputy Sheriff has made an inventory of the estate assets as provided for in section 19(1). That section makes no provision for the assets of the solvent spouse.

There being no statutory basis upon which Cornelius could remove Mrs Cothill's assets, the common law prevailed and the Cothill was entitled to rely on her right not to be unlawfully dispossessed of her assets. Even if Cornelius had relied on section 69(3), which entitles the removal of property belonging to a third party, the procedure of obtaining a warrant from a magistrate would have been necessary.

The application was granted.

SIMON v DCU HOLDINGS (PTY) LTD

JUDGMENT BY DE VILLIERS J
TRANSVAAL PROVINCIAL DIVISION
28 FEBRUARY 2000

2000 (3) SA 202 (T)

Section 34(3) of the Insolvency Act (no 24 of 1936)'s provision for the avoidance of the transfer of a business where a person has a claim against a trader in connection with the business includes the avoidance of such a transfer where the claim relates to the transaction giving rise to the transfer itself. Notices given in terms of section 34(1) do not comply with that section where the business is transferred less than 30 days after the issuing of the notices, whether or not the date of transfer is provided for as being beyond that period.

THE FACTS

Simon and his partner sold their printing business to DCU Holdings (Pty) Ltd for R40m in July 1993. DCU paid R20m. A dispute arose between the parties, which was settled with the conclusion of a deed of settlement between Simon and DCU.

The settlement agreement provided that DCU would pay a sum of R2,8m by means of 28 post-dated cheques separated by monthly intervals, each indorsed that they were one of a series the dishonour of any one causing the remainder in the set to become immediately due and payable. Each were also to be indorsed by Absa Bank Ltd guaranteeing payment to Simon on due date.

DCU did not furnish the post-dated cheques and could not secure Absa's indorsement to them. However, it paid 12 of the 29 instalments on due date, then refused to pay any further instalments. Simon claimed payment of the balance due in terms of the settlement agreement, alleging that it was an implied term of the agreement that in the event of DCU failing to furnish the post-dated cheques, the full balance would become immediately due and payable. DCU alleged that it was an implied term of the agreement that it would be excused from payment of the balance if Simon acted contrary to the best interests of shareholders in a related company.

Simon also claimed an order that DCU's transfer of the printing business to Bangiswani Printing Co (Pty) Ltd was void as it was contrary to section 34 of the Insolvency Act (no 24 of 1936), the notices of the transfer having failed to comply with the provisions of that section. DCU published notices of the intended transfer on 7 November 1997. The transfer of the business was to take place on 1 or 12 December 1997. Transfer in fact took place on 1 December 1997.

THE DECISION

The implied term contended for by DCU could not be accepted as it would be in direct contradiction to the recorded terms of the settlement agreement. There was therefore no reason to deny Simon's claim for payment of the balance owing in terms of the agreement.

As far as the claim based on section 34 was concerned, sub-section 3 thereof was directly applicable. It provides that if any person who has a claim against a trader in connection with a business in respect of which notices of transfer have been issued, has before transfer, instituted proceedings against the trader in any court of law and this was known to the transferee, the transfer shall be void as against him for the purpose of enforcement of the claim.

This sub-section applied directly to the present case. The words 'in connection with a business' referred to the claim being made in respect of the business, in contradistinction to non-business related private liabilities, and did not exclude claims unrelated to the transaction upon which Simon was bringing his claim.

Sub-section 1 of this section was also applicable. The sub-section provides that where a trader transfers any business belonging to him without timeously publishing notices of the intended transfer, the transfer will be void against his creditors for a period of six months after such transfer. The section does not refer the date of transfer provided for in the agreement, but the actual transfer. In the present case, this was 1 December, a date within the 30-day period referred to in the sub-section.

Simon's claims were granted.

VAN ROOYEN v VAN ROOYEN

A JUDGMENT BY JENNETT J
SOUTH EASTERN CAPE
LOCAL DIVISION
20 APRIL 2000

[2000] 2 All SA 485 (SE)

In determining whether or not sequestration will be of advantage to creditors, a court will take into account the fact that the application for sequestration is a friendly sequestration application and will scrutinise more carefully the allegations made regarding the value of the assets in the estate. It will also take into account the position taken by other creditors and the extent to which they contend that sequestration will not be to their advantage.

THE FACTS

Van Rooyen brought an application for the sequestration of the respondent, Van Rooyen's, estate. In it, Van Rooyen alleged that the respondent had certain judgments granted against her at the instance of various creditors, and that she was making monthly payments to them in terms of court orders to that effect. She alleged that the respondent owed her R12 765 composed of various debts due to her.

Van Rooyen also alleged that the respondent earned R800 per week and generated other income at a rate of approximately R2 000 per month. She alleged that the respondent owned a motor vehicle valued at R19 400 as well as other assets valued at R8 300.

The application was a 'friendly' sequestration but there was no evidence of collusion between the parties.

An intervening creditor opposed the application inter alia on the grounds that Van Rooyen had not shown that there would be an advantage to creditors if the respondent's estate was sequestrated.

THE DECISION

The sequestration of the respondent's estate might have been to her own advantage, but this was irrelevant to the inquiry. The advantages suggested by Van Rooyen were that: (i) a trustee could be appointed to ascertain precisely what the extent of the respondent's assets was, (ii) a trustee could ensure that all excess earnings could be utilised for the benefit of the general body of creditors, and (iii) the various creditors who had obtained judgment would be dealt with on an equal footing, none of them being preferred above another.

As to the first point, as the sequestration was a friendly sequestration, it could have been expected of Van Rooyen to know the extent of the respondent's assets already. Furthermore, inquiries in this regard would have been conducted prior to the court orders for the monthly payments.

As to the second point, although provision is made in section 23(5) of the Insolvency Act (no 24 of 1936) for the distribution of excess earnings, this was a very cumbersome method of doing so. There was no reason why Van Rooyen should not simply obtain a judgment against the respondent and secure its claim against her estate in the same way as other creditors had done.

As to the third point, Van Rooyen's share in any distribution of income in the manner suggested would be minimal, and accordingly of little advantage to her.

As far as the assets in the estate were concerned, as these were of small value and the sequestration was a 'friendly' one, proof of their value was required beyond the mere say-so of the applicant. The respondent had only two creditors besides Van Rooyen. Both of them having expressed the view that sequestration was not in their interests, this had to be taken into account in deciding whether or not sequestration would be to the advantage of creditors.

Since there was no advantage to creditors in the sequestration of the respondent's estate, the application had to be refused.

ENERGY MEASUREMENTS (PTY) LTD v FIRST NATIONAL BANK OF SOUTH AFRICA LTD

A JUDGMENT BY REYNEKE J
WITWATERSRAND LOCAL DIVISION
9 DECEMBER 1999

[2000] 2 All SA 396 (W)

Banking

A bank has a duty when opening an account to take steps aimed at preventing the account from being used as a conduit for stolen cheques. This duty amounts to more than just ascertaining the identity of the prospective customer and requires the bank to make an informed decision, backed by further inquiries as might be suggested by the information at its disposal, on whether or not to open the account.

THE FACTS

On 10 February 1998, a person introducing himself as Eugene Wayne applied for the opening of a business cheque account at the Rivonia Branch of First National Bank of South Africa Ltd. The account was to be opened in the name of Tradefast 8 (Pty) Ltd trading as Energy Measurements.

Wayne completed an application form and furnished the bank with a certificate of incorporation, memorandum and articles of association, a notice of registered office, postal address, certificate to commence business and other official documentation. He also furnished the bank with a certified copy of his identity document. He informed the bank official who interviewed him that the company did not have an existing bank account as he had previously been resident in the United States for a few years. He also furnished a projected income statement which indicated the company had a lease in respect of a motor vehicle.

After the application had been made, the bank official ran a number of credit checks on the bank's computer which was linked to certain credit bureaux. The information gleaned from these sources showed no adverse information concerning the applicant. It did however, indicate that Wayne had been resident in Cape Town the previous year.

The account was then opened and a cheque made out in favour of Energy Measurements (Pty) Ltd in the sum of R274 496,04 was deposited to the account. Within two days after the deposit, a series of withdrawals were made which reduced the credit balance in the account to almost zero by the beginning of March. On 13 March, another cheque made in favour of Energy Measurements in the sum of R104 310 was deposited to the account. Another series of withdrawals resulted in the reduction of the credit balance to almost zero.

The two cheques had been stolen by an employee of Energy Measurements after they were received from two of that company's debtors. Energy Measurements had obtained delivery of the cheques before they were stolen. Tradefast had been registered as a shelf company and control thereof transferred to Wayne some time before the opening of the account.

Energy Measurements alleged that the bank had been negligent in opening the account in the name of Tradefast without making further inquiries into the company, its financial status, history and its nature of business. It alleged the bank had also been negligent in collecting the cheque on behalf of a person not entitled to it, had failed to take steps to ascertain whether the documentation presented by Wayne was authentic and did not close the account timeously. It claimed damages in the sum of the cheques.

THE DECISION

The duty of a collecting bank not to infringe a person's legally recognised right is firmly established in South African law. The question was whether this duty extends to the opening of an account and if so, what this duty entails. The standard of care which a collecting bank must exercise is measured by the practice of a reasonable person carrying on the business of banking and doing so in a way which is calculated to protect itself and others against fraud.

The evidence showed that bankers were well aware that accounts were opened in order to serve as conduits for the proceeds of theft and fraud, and that staff were trained to be made aware of this risk when opening an account for a new

customer. Banks therefore foresee the possibility of a bank account being used for the purpose of causing loss to the owners of stolen cheques.

A bank therefore is required, as a minimum, to ascertain the identity of a prospective client and obtain information to establish the bona fides of the prospective customer. However, merely establishing the identity of the customer with reference to the official company documentation to ensure that it is in fact incorporated and registered, and the obtaining of an identity document, is not sufficient. This is the more so where the applicant is not known to the bank. Obtaining credit checks merely to ascertain whether there are any judgments or adverse credit references would only serve to protect the bank and would not reduce the risk to owners of cheques. A bank is required to consider all the documentation available to it and apply its mind thereto. It must verify the bona fides of the prospective customer and make inquiries to independent and verifiable references, even at the risk of offending the customer.

The officials at the Rivonia Branch of the bank did not do so. If they had scrutinised the documentation given to them, they would have noticed certain discrepancies which would have put them onto further inquiry. These discrepancies were that the income statement indicated the lease of a motor vehicle. The relevant creditor could have been contacted as a verifiable trade reference. Furthermore, the credit check showed that Wayne had been resident in the country within the period he had stated he had been resident in the United States. The income statement's indication of revenue already generated could have led to inquiries with the clients from whom such revenue had been generated.

The bank had therefore been negligent in opening the account and had failed in its duty to take care to prevent losses to the owners of cheques.

STANDARD BANK OF SOUTH AFRICA LIMITED v NAIR

JUDGMENT GIVEN IN THE DURBAN AND COAST LOCAL DIVISION ON 27 JUNE 2000 BY GALGUT J

2000 CLR 378 (D)

A bank which pays a cheque to a person not entitled to payment after the cheque has been deposited, without indorsement, to an account of a person other than the named payee may depend on section 79 of the Bills of Exchange Act (no 34 of 1964) to show that it was not negligent in paying the cheque, even if it is a branch of the same bank which collected the cheque. If the bank compensates its customer for the loss it has suffered from the incorrect collection of the customer's cheque, where the bank is a joint wrongdoer with another party, the customer will not be able to cede its claim for damages flowing from the collection as the compensation will result in it having nothing to cede to the bank. The bank may however, claim in delict.

THE FACTS

Over a period of two years, Bissessur stole cheques from his employer, FG Knights & Son CC (FGK) which had drawn the cheques on the Greyville branch of the Standard Bank of South Africa Ltd. He delivered them to Nair and the other defendants who deposited them to their personal accounts at the Verulam branch of the bank. The Standard Bank was also the drawee bank in respect of the cheques. After they had been cleared, the defendants would pay Bissessur the proceeds and retain a fee of 5%. The cheques were marked 'not negotiable' and were not indorsed.

When FGK discovered what had been happening, they turned to the bank for payment. FGK and the bank entered into a settlement agreement in terms of which the bank paid FGK the sum of R534 467,77 being the total loss suffered by FGK, and took cession of FGK's right of action against Bissessur, Nair and the other defendants.

The bank brought an action against Nair and the other defendants basing its action on section 81(1) of the Bills of Exchange Act (no 34 of 1964).

THE DECISION

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

Nair contended that the cheques were not paid by the bank in circumstances which did not render it liable in terms of the Act, and that in this regard, section 79 of the Act did not assist the bank. That section

provides that if a banker on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, the banker paying the cheque shall be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Normally, a paying bank will not be negligent in paying a cheque where it does not know whether the cheque presented to it by a collecting bank has been deposited to the account of the named payee. In the present case, the fact that the paying bank was also the collecting bank did not mean that as paying bank, it knew the cheques were deposited by persons other than the named payee. The onus might have rested on the bank to show that it was not negligent in paying the cheques, but it had discharged this onus in that there was no evidence that the bank's employees at the branch where the cheques were paid knew that the cheques had been deposited for payment to an account other than that of the payee.

The bank was therefore able to depend on section 79 to show that it was not negligent and could assert that it was not liable to FGK in terms of section 81(1). FGK was therefore entitled to sue Nair based on section 81(1), and the bank was consequently entitled to take cession of FGK's right to do so.

Nair also contended that FGK had suffered no loss in terms of section 81(1) as it had received compensation for its loss from the bank.

For the purposes of FGK's loss, the bank, Nair and the other defendants were joint wrongdoers. This meant that payment by the bank to FGK of the amount of its claim against the bank was not merely a matter between those two parties, but affected the bank's right to claim against Nair and the other defendants. The fact that FGK had been paid meant that it had nothing to cede to the bank. In consequence, the bank held no rights against the defendants based on the cession.

The bank claimed in the alternative against Nair and the defendants, basing this claim on alleged breaches of contract by them, alternatively alleged delicts committed by them

The evidence showed that Nair and the other defendants did owe the bank a duty of care, and in doing what they did acted negligently and in breach of their duty of care. The defendants were therefore liable to the bank for payment of its loss, apportioned appropriately in terms of the Apportionment of Damages Act (no 34 of 1956).

The position in the instant case was therefore that, for the purposes of FGK's loss, the plaintiff and the defendants were joint wrongdoers, and the payment by the plaintiff to FGK was as a result not res inter alios acta. The payment made good FGK's loss and in the circumstances the limitation placed on FGK's claim by section 81(1) whereby the amount claimable was the loss or the amounts of the cheques, whichever is the lesser, resulted in FGK having had nothing more to cede to the plaintiff.

XENOPOULOS v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
13 MARCH 2000

[2000] 2 All SA 494 (W)

Contract

An election involves the abandonment of some right in favour of another and is therefore a form of waiver. An election is however not shown to have taken place merely because a party states that it has elected to follow a certain course as it must also be shown that the intention was to waive the right to follow the alternative course.

THE FACTS

In terms of an agreement entered into between Xenopoulos and the Standard Bank of South Africa Ltd, the net liabilities of TGE (Pty) Ltd had to be determined. Clause 3.4 of the agreement provided that TGE's auditors would determine and audit the actual net liabilities of the company as at 21 August 1994 subject to review by the bank's auditors at the bank's discretion.

Acting in terms of clause 3.4, TGE's auditors then issued a report to the members of the company, attaching a certificate which stated the net liabilities to be R4 044 591. The bank disputed the correctness of the certificate and contended that the liabilities were more than this.

On 20 January 1995, the bank wrote to Xenopoulos' attorney indicating the bank's view of the actual liabilities, and stating that the bank had elected not to involve its outside auditors in reviewing TGE's auditors' calculations but that those calculations had been reviewed by its Accounting Division.

Xenopoulos contended that the liabilities were correctly stated by TGE's auditors, with the consequence that he was entitled to payment of R255 409 in terms of the agreement. A summons was issued on 30 June 1995 claiming this amount and an amount due to the second plaintiff.

The bank's chief accountant then requested the bank's external auditors to carry out an independent audit of the TGE net liability statement. The result of this was a determination of the net liabilities in the sum of R5 195 625. The bank contended that this determination was the appropriate one to follow, and pleaded to the claim brought by Xenopoulos raising various defences based on the proper interpretation of the agreement, in particular clause 3.4 thereof.

The parties then approached the court for an adjudication of a stated case as to whether or not the effect of the bank having, on 20 January 1995, elected not to involve its auditors in reviewing TGE's auditors' calculations, was to forego the bank's right to have that determination reviewed by its own auditors.

THE DECISION

An election may be distinguishable as a form of waiver, but it remains a waiver nevertheless. The position taken by Xenopoulos was that the bank had elected to proceed without the review of its auditors as provided for in clause 3.4 and had thereby foregone the right to refer to them for external review. This amounted to the position that the bank had waived its right in having made that election. An election, in the field of contract law, is the choice of a remedy or right which cannot be exercised without forfeiting another remedy or right.

The question was whether or not the bank waived its right of external review. The fact that the letter of 20 January 1995 used the word 'elected' was not decisive of this. It had also to be shown that the bank communicated to Xenopoulos an offer to waive the right of external review and that this offer was accepted.

The bank had made its own investigations at a time when it was in discussion with Xenopoulos regarding the dispute between them. It did so in an attempt to deal with the dispute and not because it had decided not to exercise its right of external review. It would be unusual for the bank to have simply abandoned this right. There was therefore no evidence that the bank had waived its right of external review.

The bank had not waived its right of external review.

DRIVE CONTROL SERVICES (PTY) LTD v TROYCOM SYSTEMS (PTY) LTD

Contract

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
25 FEBRUARY 2000

Goods which are purchased subject to the reservation of ownership in them to the seller pending payment of the purchase price may not be attached to found or confirm jurisdiction for a claim to be brought against the purchaser since the purchaser does not have title to the goods.

THE FACTS

Drive Control Services (Pty) Ltd applied for ex parte, and obtained, an order for the attachment of computer hardware and related items and all other goods belonging to Troycom Systems (Pty) Ltd in the possession of a third party. The application was made in order to found or confirm the jurisdiction of the court in respect of a claim to be instituted against Troycom for payment of R177 755,30. Troycom's goods were duly attached in terms of the order.

Troycom applied urgently for the setting aside of the attachment, and N-Trigue Trading CC joined the application as an intervening party. Both of these parties alleged that the goods were those of N-Trigue, N-Trigue having sold the goods to Troycom on terms that the purchase price would be payable within 30 days of delivery and that goods would remain the property of N-Trigue until fully paid for. Troycom had not paid the purchase price to N-Trigue in respect of the goods.

Under their usual arrangements, N-Trigue would invoice Troycom for any orders for goods made by Troycom, Troycom would arrange delivery of the goods to premises in Harare, and would ensure that the goods, the customs documents and delivery notes were in order before making payment to N-Trigue.

Troycom initially asked for an order for costs of its application, but later abandoned this, in view of the fact that a claim for costs would be subject to attachment to found or confirm jurisdiction by Drive Control Services.

THE DECISION

The fact that a supplier of goods may accept that ownership of the goods supplied will pass to the buyer where the goods are to be resold and the proceeds thereof used for payment of the purchase price was not relevant in the present case. This was because in the present case, the goods were not intended for immediate resale and there was no reason to conclude that Troycom would not be able to make payment before it eventually sold the goods. Furthermore, there was an express provision reserving N-Trigue's ownership of the goods until payment was made. There was no reason to consider that this provision was inconsistent with the parties' real intentions.

As far as the costs order was concerned, although Troycom had abandoned its request for costs, the possibility of it having not done so and the consequent advantage this would have given to Drive Control Services (ie in affording it a basis upon which it could obtain an order of attachment to found or control jurisdiction) was a matter of concern.

The attachment was set aside.

ORVILLE INVESTMENTS (PTY) LTD v SANDFONTEIN MOTORS

A JUDGMENT BY LEWIS AJ
TRANSVAAL PROVINCIAL DIVISION
16 OCTOBER 1999

2000 (2) SA 886 (T)

A misrepresentation which induces a contract will lead to rescission of the contract even if the person to whom the misrepresentation is made fails to act reasonably in examining the terms of the contract which would have dispelled the misrepresentation.

THE FACTS

Orville Investments (Pty) Ltd purchased a business known as Sandfontein Motors from a Mr R Botha for R780 000. The sale took place after the parties had entered into negotiations with each other regarding the business, its profitability and its right of occupation at the premises from which it carried on business, a petrol filling station.

During these negotiations, Mr Botha informed Mr J Wheeler, the sole shareholder and representative of Orville, that the business had a lease in respect of its tenancy at the premises and that the business had the right to renew the lease until 2010. This was in fact false as the lease terminated on 31 March 2000. The sale agreement entered into between the parties annexed the lease but Wheeler did not examine its terms and signed the agreement without looking at them.

During the same negotiations, Botha informed Wheeler that the petrol station had been selling petrol at a rate of 250 000 litres per month. The same statement had been made in an advertisement for the sale of the business. The business in fact had sold petrol at a lower amount than this.

After the sale of the business, Orville discovered that the lease terminated on 31 March 2000 and that sales of petrol were not as much as 250 000 litres per month. It brought an action against Botha as previous owner of Sandfontein Motors claiming rescission of the sale agreement and repayment of the R780 000 paid as the purchase price.

THE DECISION

The fact that the sale agreement annexed the lease and did not guarantee the right of renewal until 2010 did not detract from the fact that a misrepresentation had been made. In the face of a fraud, the reasonableness or otherwise of the person to whom a misrepresentation has been made is irrelevant.

The effect of the misrepresentation was to induce Wheeler on behalf of Orville to enter into the sale agreement. He had relied on what was said to him by Botha.

As far as the representation regarding the volume of sales of petrol was concerned, there was insufficient evidence to show that this induced the agreement.

Because of the misrepresentation regarding the duration of the lease, Orville was entitled to rescission thereof.

The order of rescission sought by Orville was granted.

PETE'S WAREHOUSING AND SALES CC v BOWSINK INVESTMENTS CC

A JUDGMENT BY KROON J (PICKERING J and LEACH J concurring)
EASTERN CAPE DIVISION
2 MARCH 2000

[2000] 2 All SA 266 (E)

An implied term may not be excluded from an agreement where a reasonable interpretation thereof would allow the incorporation of such a term.

THE FACTS

Pete's Warehousing and Sales CC rented premises from Bowsink Investments CC. Clause 11 of the lease provided that Pete's would be responsible for complying with the requirements of the local authority in connection with the business conducted at the premises and would be obliged to satisfy and bear the costs of all such requirements. Clause 12 provided that Bowsink did not warrant or represent that the premises were fit for the purpose of the business to be conducted in terms of the lease, and that there would be no obligation on it to perform any work to the premises so that the premises comply with such conditions as might be imposed by any authority. Pete's would be liable for obtaining all the necessary permits, licences, authorities or other consents for the conduct of its business.

Bowsink brought an action against Pete's, alleging that it had unlawfully repudiated the lease. In its plea, Pete's contended that it had cancelled the lease but had done so on the grounds that Bowsink had breached a material term of the lease in not placing or maintaining the premises in a condition reasonably fit for the purpose for which they were let. Pete's alleged that the lease contained a residual implied term that Bowsink would be obliged to place the premises in a condition reasonably fit for the purpose for which they were let.

Bowsink excepted to the plea on the grounds that the residual implied term contended for would be in direct conflict with the clear and unequivocal terms of clause 12. The exception was upheld and Pete's appealed.

THE DECISION

On the face of it, the provisions of clause 12 of the lease were inconsistent with the implied term sought to be introduced by Pete's. However, the question which had to be answered was whether or not, on a proper construction of the lease, it could reasonably be interpreted as not excluding the implied term alleged by Pete's.

Clause 12 could be interpreted in a manner which would not exclude the implied term. When looked at in the light of the nature and purpose of the contract and the context of the words in the contract as a whole, it was possible to perceive the possibility that the implied term was incorporated in the parties' agreement. The provisions of clause 11 significantly preceded those of clause 12. Since these, and subsequent provisions of clause 12, concerned themselves with compliance with conditions imposed by the local authority, this was a significant pointer to the fact that clause 12 as a whole was intended to deal with that topic alone. The clause could therefore be reasonably interpreted as providing that the limitation of warranty applied only to the obligation to comply with the requirements of the local authority.

The clause also had to be interpreted restrictively as it sought to limit the common law obligations of the landlord.

The appeal was upheld.

HURTER v CLINIC HOLDINGS LTD

A JUDGMENT BY VAN OOSTEN J
WITWATERSRAND LOCAL DIVISION
7 JANUARY 2000

2000 CLR 308 (W)

A term of a contract which one party seeks to import as an implied term, following conclusion of the contract, will not be implied where the proposed implied term provides a different basis for ordering the contractual relationship between the parties from that as recorded in the contract. Even if such an implied term merely meets an apparent omission, it will not be imported into the contract where the omission does not create an indeterminate situation which is incapable of providing for the affairs of the contracting parties.

THE FACTS

Hurter and the other plaintiffs were managers of hospitals owned by Clinic Group Hospitals (Pty) Ltd. They claimed that a written agreement had been concluded between them and Clinic Holdings Ltd, in terms of which an incentive bonus would be paid to them based on the amount by which actual operating profit exceeded a budgeted operating profit which was set by a budget committee and a bonus committee. They claimed that the agreement was recorded in a document entitled *Executive Incentive Scheme Rules* and had been accepted by all the parties thereto.

The plaintiffs did not receive their incentive bonuses and they issued summons against Clinic for payment. Prior to the hearing of the matter, the plaintiffs amended their particulars of claim to allege that certain implied terms could be added to the agreement. These were terms directed at providing for the situation arising where the budget and bonus committees were not in fact appointed as envisaged in the agreement. They were to provide that the functions and determinations of the budget committee would not apply and the annual budget approved by Clinic's board of directors would be used for calculating the incentive bonus, furthermore that the calculation of bonuses would be based on amended meanings to be attributed to the factors used for such calculation. The agreement without the proposed implied terms did not contain any provision for what would happen if the committees were not appointed.

Clinic opposed the amendment.

THE DECISION

At this stage in the proceedings between the parties, the test was whether or not the terms could reasonably be implied.

The boards envisaged in the agreement were to function independently of the board of directors, and were to have specific discretionary powers. The implied terms proposed that in the absence of the committees, a completely different basis for computing the bonuses would be used, ie the determinations of budget by the board of directors would used and the powers of the committees would not be employed. These terms were significant departures from the terms of agreement recorded in the *Executive Incentive Scheme Rules* with which they could not readily be reconciled, as the functions of the committees, both in approving budgets and setting targets, would be abandoned. There was therefore a significant discrepancy between the terms of agreement as recorded and those proposed to be implied and therefore no basis for the importation of the implied terms. The terms could not reasonably be implied.

To the argument that the proposed implied terms merely filled a gap brought about by an omission in the agreement as recorded, the answer was that this gave no reason to ignore the express terms of the agreement as recorded. The absence of any provision for the situation where the appointment of the committees did not take place did not constitute a hiatus requiring the importation of implied terms.

When considering what would have been said had the contingency of the failure of appointment of the committees been raised by the parties at the time the agreement was concluded, in all probability the parties would not have said that the terms now sought to be implied would have been agreed. On that basis too, the implied terms could not be imported. The complexity of the proposed implied terms also provided a reason for their rejection.

The amendment was refused.

INDUSTRIAL PROPERTY DEVELOPMENT (PTY) LTD v MMW TECHNOLOGY (PTY) LTD

Contract

A JUDGMENT BY BASHALL AJ
WITWATERSRAND LOCAL DIVISION
2 MARCH 2000

2000 CLR 395 (W)

A party cancelling a contract and claiming damages must take into account the compensating advantages of the cancellation when calculating the damages it claims. An agreement to agree is not necessarily unenforceable but will be so where the future agreement is dependent on a contingency not yet determined or determinable by the parties.

THE FACTS

Industrial Property Development (Pty) Ltd (IPD) brought an action against MMW Technology (Pty) Ltd based on a contract for the re-design and erection of certain premises and the subsequent letting thereof to MMW. IPD alleged that MMW had failed to pay rent in terms of the contract but in breach thereof had failed to do so. IPD alleged that it had cancelled the contract and claimed damages.

MMW raised an exception to the claim based on the contention that IPD was not entitled to claim as damages the rental MMW had not paid without alleging that it had rendered its own performance in terms of the contract, or tendered to do so. IPD amended its particulars of claim to allege that it had commenced complying with its own obligations.

MMW contended that IPD could not claim from MMW the full amount of what was due to it without taking into account the benefit of not having to complete and not completing its own reciprocal obligations.

IPD also proposed to amend its claim by alleging that the parties had agreed to enter into a lease agreement in accordance with terms and conditions contained in an annexure and further terms and conditions deemed to be mutually acceptable by the parties. The annexure provided, inter alia, for the determination of gross rental by reference to the areas to be occupied by MMW following the completion of a space planning exercise and the agreement of both parties. Provision was also made for the participation of MMW in an overall design process prior to the final derivation of construction drawings. The agreement was to be supplemented by the lease agreement.

MMW contended that this amendment alleged that the parties had entered into an agreement to agree and that such agreements are unenforceable.

THE DECISION

A party alleging breach of contract by the other party must take into account both the detrimental and the beneficial consequences of the breach, when determining the damages flowing from the breach. Compensating advantages of the breach must be taken into account, and in the present case this required IPD to do so in formulating its claim against MMW. The first amendment proposed by IPD to its particulars of claim could therefore not be allowed.

As far as the second amendment was concerned, an agreement to agree was not necessarily unenforceable as this is simply an agreement to make a contract in the future. Such an agreement will be enforced if it is not too vague. However, the provisions contained in the annexure were deficient in that the rent was to be determined by the lettable area, which itself was dependent on further agreement between the parties.

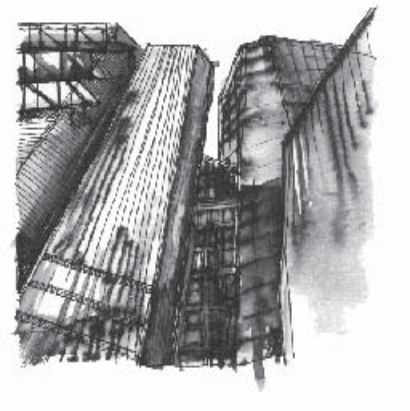
The amendments would introduce allegations which were excipiable. They were therefore refused.

ROSEN v EKON

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
17 APRIL 2000

[2000] 3 All SA 24 (W)

Property



A guarantee for payment of the balance of the purchase price of property which has been sold functions as a means of payment and not as security for payment. Accordingly, it may be stated to be revocable and such a guarantee will when furnished constitute sufficient compliance with the purchaser's obligations under an agreement of sale requiring the furnishing of such a guarantee.

THE FACTS

Ekon sold a residential property to Rosen for R1,4m. In terms of an annexure to the agreement, Ekon also sold furniture and equipment at the property to Rosen for R350 000.

Rosen paid the deposit of R100 000 and the balance was to be paid in terms of clause 4.2. This clause provided that the balance was to be paid against registration of transfer and was to be secured by a financial institution's guarantee in favour of Ekon or conveyancer, payable free of exchange on the transfer date.

Two guarantees were delivered timeously by Absa Bank Ltd, one in favour of the existing bond holder for the amount with interest owing to it, and the other in favour of the conveyancer attending to transfer. In each case, the guarantee provided that Absa held at the disposal of the beneficiary the relevant sum, which would become payable upon receipt of a written advice from the attorneys attending to the registration of a mortgage bond in favour of Absa of the cancellation of the existing mortgage bond, the registration the mortgage bond and transfer of the property into Rosen's name. Absa reserved to itself the right to cancel the guarantees at any time prior to such registrations by giving written notice to that effect.

Ekon refused to implement the agreement on the grounds that the right to cancel the guarantees rendered them worthless and failed to provide him with security. A second ground for his refusal was that the agreement of sale was tainted with illegality in that the sale of the moveables was a sham and had been effected in order to reduce the purchase price of the fixed property so saving payment of the full amount of transfer duty.

Rosen brought an application to enforce the agreement.

THE DECISION

The guarantee referred to in the agreement was in fact a form of documentary credit. Such a document is normally irrevocable because this is required to assure the seller that it does not take the risk of losing ownership of its goods without an unassailable right (save in the case of fraud) to payment. In the case of the sale of fixed property however, the guarantee does not function as security but as a form of payment. This is because the procedures of transfer and payment do not give rise to any serious risk on the part of the seller that transfer will be effected without payment. The seller does not need a guarantee before lodging its documents for the transfer of the property, and the only risk then assumed by the seller is that the guarantee might be revoked between lodgment and transfer. Transfer without payment would then only be possible with the active participation of the seller's own conveyancer.

Since the guarantee functioned as a means of providing for payment rather than as security, the delivery of the revocable guarantee constituted compliance with Rosen's obligations under the sale agreement. Ekon was not in danger of parting with ownership of his property without payment. By accepting the guarantee as provided for by Absa, he did not accept any risk greater than that which the sale agreement contemplated, such as the risk of cancellation of the sale as a result of breach. The sale agreement made alternative provisions for such an eventuality.

The revocability of a guarantee constitutes a protection for banks and other financial institutions which might establish such guarantees and thereafter discover that the person in whose favour the guarantee has been established is not creditworthy, or that the property to be its security is unacceptable as security for some reason. There was no reason to overturn the practice of retaining the revocability of such guarantees.

As far as the allegation of illegality was concerned, Rosen disputed the allegations made by Ekon and there was insufficient basis upon which a definitive finding could be made. However, the powers vested in the Receiver of Revnue made it possible for him to investigate the position and enforce payment of whatever transfer duty he considered was payable, despite what the parties had stated in their agreement. That remedy would be applied by him and did not require the assistance of the court.

The application was granted.

CAPE KILLARNEY PROPERTY INVESTMENTS (PTY) LTD v MAHAMBA

A JUDGMENT BY HLOPHE DJP
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
1 OCTOBER 1999

2000 (2) SA 67 (C)

Notice of eviction given in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) must be notice which the respondents understand, and must accordingly be given in the language spoken by them and notified to them effectively.

Note:
This judgment was reported in the previous issue of *Current Commercial Cases.* It was however, truncated in the publication process. The full report is reprinted here.

THE FACTS

Cape Killarney Property Investments (Pty) Ltd obtained an order in the form of a rule nisi calling upon the respondents, 542 persons, to show cause why an order should not be made evicting them from its property and demolishing the structures erected by them thereon, on a date to be determined in the order. The rule informed the respondents that Cape Killarney's application was being instituted in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) ('the Act') and was brought on the allegation that they were in unlawful occupation of the property. It further informed them that they were entitled to defend the application at its hearing on 28 July 1999.

It was also ordered that service of the order was to be effected by delivering a copy of the order to each respondent in person, or failing that, by delivering and leaving a copy of the order at the structures referred to in the application. It was also ordered that anyone wishing to defend the application was to give notice thereof and would thereafter be entitled to receive a copy of the notice of motion with supporting affidavits.

The respondents then applied for an order that the rule nisi should be set aside.

THE DECISION

Section 4(2) of the Act provides that at least 14 days before the hearing of the proceedings for eviction of an unlawful occupier, the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction.

The 'hearing' referred to in this section includes the granting of a rule nisi. The notice required by this section was therefore notice which would be required in the present proceedings. However, no notice of the application to apply for the rule nisi had been given. In view thereof, there had not been proper compliance with section 4(2) and for that reason alone, the order should not have been granted.

The notice required by section 4(2) must also be written and effective. When the order was served on the respondents it was given in English, not accompanied by a Xhosa translation, and was not accompanied by a verbal broadcast to cater for those respondents who were illiterate. In order for the notice to be effective, it needed to have given the respondents an opportunity to understand the case brought against them, and this required that they be given a Xhosa translation of the application. Had this been done, the respondents would have known the nature of the case brought against them.

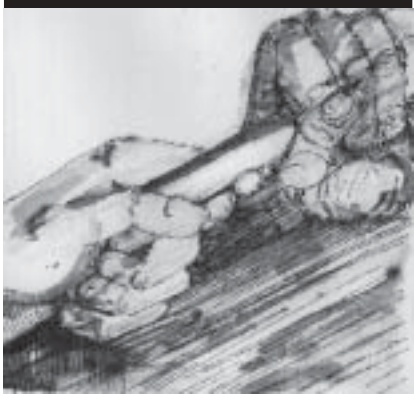
As service was ineffective, the rule nisi should not have been granted. The rule nisi was discharged.

NEDCOR BANK LTD v HYPERLEC ELECTRICAL & MECHANICAL SUPPLIES CC

A JUDGMENT BY VAN DER WESTHUIZEN J
TRANSVAAL PROVINCIAL DIVISION
18 JUNE 1999

2000 (2) SA 880 (T)

Cession



A cession which is obtained merely in order to answer a claim brought against the cessionary by its creditor is unlawful and against public policy.

THE FACTS

Hyperlec Electrical & Mechanical Supplies CC owed Nedcor Bank Ltd R596 990,29, a result of an overdraft facility on a bank account given to it by the bank. In a registered letter, the bank demanded payment of this amount from Hyperlec. It then applied for an order winding up the corporation. A provisional order was granted. Confirmation thereof was opposed by Hyperlec.

In opposing the confirmation of the order, Hyperlec contended that it had a counterclaim against Nedcor based on a cession to it by Interest Settlement Corporation (Pty) Ltd (ISC) of claims against Nedcor amounting to some R800 000. These claims were made up of numerous amounts ceded to ISC by various customers of Nedcor who were allegedly overcharged by it when it debited their accounts with interest.

The court considered various arguments put forward by the parties as to whether or not the order should be confirmed.

THE DECISION

The cession to Hyperlec was not necessarily simply a sham or fictitious or simulated. However, even if the intention was genuinely to cede, a further question was whether or not the cession was unlawful or immoral or against public policy.

The cession was unlawful or against public policy. Whereas it was not necessarily fraudulent, it was a doubtful practice for a debtor to seek out a multitude of persons to whom the creditor owed money so that their claims could be ceded in exchange for something of value to the debtor. Looking at the purpose of the cession, it was unlawful or against public policy.

The debts of which the ISC took cession were also questionable.

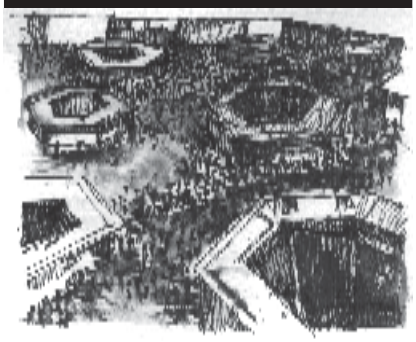
Hyperlec had not shown that it had a bona fide defence to the debt alleged to be due. The order was therefore confirmed.

SOUTH AFRICAN PHILIPS (PTY) LTD v THE MASTER

A JUDGMENT BY
NTSHANGASE AJ
NATAL PROVINCIAL
DIVISION
30 JULY 1998

2000 (2) SA 841 (N)

Companies



An enquiry under section 417 of the Companies Act (no 61 of 1973) may not be held where the company in question has been wound up pursuant to a creditors' voluntary winding up.

THE FACTS

Lamax (Pty) Ltd was wound up pursuant to a special resolution by creditors of the company. The winding up was a creditors' voluntary winding up effected under section 351(1) of the Companies Act (no 61 of 1973).

The Master then decided to convene an enquiry into the affairs of the company in terms of section 417 of the Act, following an application for such an enquiry made by the fourth respondent.

South African Philips (Pty) Ltd opposed the Master's decision, and brought an application to review and set it aside. It contended that the enquiry procedures provided for in section 417 of the Act could not be applied in the case of a creditors' voluntary winding up.

Section 417 of the Act provides that in any winding up of a company unable to pay its debts, the Master or the court may, at any time after a winding up order has been made, summon before him or it any director or officer of the company or person known or suspected to have in his possession any property of the company or believed to be indebted to the company or any person whom the Master deems capable of giving information concerning the trade, dealings, affairs or property of the company.

THE DECISION

Sections 351 and 152(2) of the Insolvency Act (no 24 of 1936) gave indications that the provisions of section 417 would not apply in the case of a creditors' voluntary winding up. The former confers on the liquidator of a company all powers given to him under the Act but did not similarly extend powers to the Master or the company's creditors. Section 152(2) indicates a difference in treatment of the trustee's powers and allows an interrogation without the necessity of obtaining an order to that effect.

When properly interpreted, section 417 was intended to apply only in the circumstances described by it, ie in the case of a company unable to pay its debts. The reference to 'any time after a winding up order has been made' did not open the application of the section to any situation arising after that time, but remained qualified by the requirement that the company be wound up in circumstances where it is unable to pay its debts. It was to be distinguished from section 415 which did not incorporate such a qualification.

The application was granted and the Master's decision set aside.

CARLISLE v ADCORP HOLDINGS LTD

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
7 FEBRUARY 2000

2000 CLR 261 (W)

An application in terms of section 252 of the Companies Act must show that the actions complained of affect the complainant as shareholder. Where the conduct complained of relates to the management of the company, the complainant must show that this conduct affects him directly as shareholder and not indirectly.

THE FACTS

Carlisle owned 19% of the issued share capital of the Production Management Institute of South Africa (Pty) Ltd ('the company') and Adcorp Holdings Ltd held the remaining 81%. The company had purchased a business originally conducted by a company controlled by Carlisle, a personnel training institute, and certain rights held by Carlisle connected to the conduct of the business including the right to deliver tuition on behalf of foreign educational institutions and the right to a monthly journal and certain tuition course material.

Upon the sale of the business, Carlisle and Adcorp took up their respective shareholdings in the company and entered into a shareholders' agreement. In terms of this agreement, Lowe & Worthington, a partnership, was appointed to provide management services to the company and to ensure that the business was properly operated and managed.

After implementation of the sale agreement, Carlisle alleged that as a result of a number of instances of bad management, the company's affairs were being conducted in a manner which was unfairly prejudicial, unjust or inequitable to him. These included destroying a relationship which the company had earlier established with an exhibition organiser resulting in the loss of certain income-producing opportunities, and the abandoning of publication of a monthly journal. Carlisle asserted that the company had gone from showing a net profit in excess of R4m in 1998 to showing a net loss of R1m in 1999.

Carlisle then brought an application for an order directing Adcorp to purchase his shares in the company for some R8m. He based his claim on the provisions of section 252 of the Companies Act (no 61 of 1973). The section provides that any member who complains that a particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in such a manner, the member may apply to court for such order as it thinks fit with a view to bringing to an end the matters complained of.

Adcorp contended that on the basis of the allegation made by Carlisle, there were no grounds for the relief he claimed.

THE DECISION

In order to show that section 252 is applicable, a person making an application in terms of the section must show that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him. The conduct against which complaint is made must be conduct directed at him as member of the company. Conduct which refers to the management of the company, and of which complaint is made on the grounds that it is bad or inappropriate management, is not necessarily such conduct. It is conduct of which the company itself may level complaint, but not the shareholder in terms of section 252.

Even in circumstances where a shareholder such as Carlisle was excluded from management of the company, there would be no grounds for complaint in terms of section 252. Being a shareholder, he would be bound by the wishes of the majority of shareholders.

The complaints made by Carlisle were complaints against the management of the company and were therefore not the complaints which section 252 would require for a successful application, according to its provisions. It could not be said that the affairs of the company were being conducted in a manner which was unfairly prejudicial or unjust toward him as shareholder. While it was true that conducting the

business of the company against the terms of the Shareholders' Agreement was a basis upon which he could bring a complaint in terms of section 252, Adcorp's response that it intended to return the company to profitability meant that the matter could not be decided without further evidence, which Carlisle had admitted he did not have at the stage of bringing the application. That meant that he was without the evidential basis required for a successful application in terms of section 252.

It was, in any event, not 'just and equitable' that the order should be granted. Carlisle had other remedies available to him as shareholder, in terms of the Shareholders' Agreement and in terms of the Companies Act. Although section 252 might be applied in circumstances where the rights of a shareholder are provided for in a shareholders' agreement, a complainant would have to show that the remedies provided for in it are inadequate, and the that it is just and equitable that the relief claimed should be granted.

The application was dismissed.

EX PARTE LIQUIDATOR OF VAUTID WEAR PARTS (PTY) LTD

A JUDGMENT BY VORSTER AJ
WITWATERSRAND LOCAL DIVSION
8 MAY 2000

2000 CLR 366 (W)

A scheme of arrangement which is essentially an arrangement between the proposer and the creditors of a company in an arrangement referred to in section 311 of the Companies Act (no 61 of 1973) if it involves the reduction of claims by creditors against the company.

THE FACTS

The liquidator of Vautid Wear Parts (Pty) Ltd applied for leave to convene meetings of creditors under section 311 of the Companies Act (no 61 of 1973). The meetings were intended to consider an arrangement proposed by a director and shareholder of the company.

The arrangement proposed that the director would pay R100 000 to the liquidator and that the director would be discharged of all liability under section 424 of the Act. The Master of the High Court would be disentitled from exercising his powers under section 424. The proposer was entitled to notify the liquidator that he wished to abandon the arrangement at any time, and upon doing so, the liquidator would be entitled to decide whether to abandon it or proceed with it.

The court raised the questions whether the application concerned an arrangement contemplated in section 311 of the Act, whether the Master could be deprived of his locus standi under section 424, and whether it was proper that the proposed arrangement could be abandoned at any time prior to its sanctioning in terms of the Act.

Prior to judgment, the applicant indicated that the arrangement would be amended by the deletion of references to the Master.

THE DECISION

A compromise ordinarily occurs between a company and its creditors, although the compromise includes an arrangement of the widest character. The compromise must not amount to merely a transfer of claims from one creditor to another and it must involve the company as a relevant and necessary participant. Involvement of the company may include its revival, a cancellation of a material contract to which it is a party, or a reduction in its liabilities.

In the present case, the

compromise was essentially between the proposer and the creditors, but the concurrence of the company, the liquidator and the Master was sought in order to avoid a multiplicity of actions which might arise based on section 424. The company was involved only to the extent that the claims of the creditors would be reduced by the payment to be made by the proposer. This reduction was sufficient to warrant the conclusion that the company was a participant in the arrangement. Although the involvement was not a very active involvement, this had to be seen in the light of the fact that control of the company had passed to the liquidator. An amendment to the deed of arrangement could ensure that the company's involvement would be recorded as intended by the parties.

As far as the Master was concerned, there were no grounds for depriving him of the locus standi to bring proceedings under section 424.

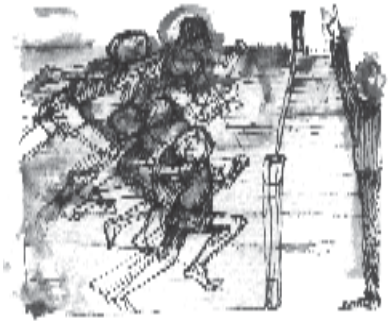
It seems to me that the scheme now before me involves the company in the reduction in the company's liabilities as part of the basic content of the scheme. As was stated by Van Heerden JA in Namex*, a reduction involve the company and it is a factor that must be considered in the context of the whole scheme. what was meant by the learned Judge of Appeal, in my view, is that one must consider whether the reduction is part of the basic content of the scheme or whether it is merely an ancillary and severable part thereof. Thus considering it, I am of the view that the present scheme is, for the reasons stated by Van Heerden JA in* Namex*, an arrangement between the company and its creditors. Admittedly it is not a very active involvement but this is attributable to the fact that upon liquidation, control over the company passes to the liquidator (see Van Heerden JA in* Namex *at 283B-C) and in casu there is the additional consideration that the company is not itself a competent applicant for section 424 relief. If the scheme is defective, it is defective because the company is not itself a party to the arrangement. See* Ex Parte Cyrildene Heights *(supra).*

STANDARD BANK INVESTMENT CORPORATION LTD v THE COMPETITION COMMISSION

A JUDGMENT BY SCHUTZ JA (HEFER JA, NIENABER JA, HARMS JA and MARAIS JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2000

2000 (2) SA 797 (A)

Competition



A monopolistic act will not be subject to the regulations of the Competition Act (no 89 of 1998) if the act is subject to or authorised by public regulation. An example of this is the act of one bank in attempting a merger of itself with another bank, in which case the Minister of Finance is authorised to regulate the matter in terms of the Banks Act (no 94 of 1990).

THE FACTS

Nedcor Ltd announced its intention to bring about the merger of itself and the Standard Bank Investment Corporation Ltd, and began taking steps to bring this about. Standard, a registered bank, held control of Liberty Life Association of Africa Ltd, a long-term insurer, and Nedcor was controlled by Old Mutual plc. Standard opposed the proposal and took the view that its merits should be assessed and determined by the Competition Commission in terms of the Competition Act (no 89 of 1998).

Section 3(1) of the Competition Act provides that the Act applies to all economic activity within, or having an effect within, the Republic, except—

...

(d) acts subject to or authorised by public regulation

The Competition Act provides that it was enacted to promote and maintain competition in the Republic.

Nedcor took the view that the exception provided for in this section was applicable as the proposed merger was subject to section 37 of the Banks Act (no 94 of 1990). That section provides that the permission of the Registrar of Banks or the Minister of Finance is required for the acquisition of shares in a bank in certain proportions specified in the section. The proportions which would result from the Nedcor proposal exceeded 49% of the shares in Standard, thus requiring the permission of the Minister of Finance to the acquisition. In terms of section 37(2)(b) of that Act, the permission of the Minister of Finance would not be granted unless he was satisfied that the proposed acquisition would not be contrary to the public interest and would not be contrary to the interests of the bank concerned or its depositors.

Nedcor also contended that as transfer of control of a long-term insurer was proposed, the Long-Term Insurance Act (no 52 of 1998) would apply, requiring the approval of the Registrar under that Act to the transfer of control.

Standard and Liberty contended that the exception provided for in section 3(1) did not apply, and that the Act applied to the merger.

THE DECISION

Section 3 of the Competition Act's reference to 'all economic activity' included the proposed bank merger as this was clearly an economic activity. The question was whether the merger was also an act subject to or authorised by public regulation.

'Public regulation' is, as defined in the Competition Act, any legislation issued by a regulatory authority, ie an entity established in terms of legislation responsible for regulating an industry or sector of an industry. Because the Minister of Finance is appointed in terms of section 91 of the Constitution, and is given wide powers of regulation over the banking industry in terms of section 90 of the Banks Act, he is certainly such an entity. The fact that he possesses such powers and is authorised to approve a merger is an indication that his office is a regulatory authority as contemplated in the Act. Accordingly, on a literal interpretation of the exception, the proposed merger fell within its definition and the Act did not apply to it.

The same conclusion followed from the Long-Term Insurance Act, since it requires the approval of the Registrar to the transfer of control over a long-term insurer.

Standard and Liberty contended that a literal interpretation of the exception should not be applied. They contended that the spirit of the Competition Act should be applied and its object achieved by

allowing the Competition Commission to consider the proposed merger in terms of the principles set forth in that Act.

While a purposive construction of legislation was to be wholeheartedly supported, its application could not be accepted if the result of so doing would merely be to introduce a multiplicity of competing and conflicting interpretations. To adopt a purposive approach to the legislation to the point of excluding the regulatory functions of the Minister of Finance as an exception provided for in section 3(1)(d) would raise the question of what basis was employed to effect the exclusion: the exclusion would require some indication of when an exclusion would not apply, ie which acts would be subject to or authorised by public regulation.

The Act excluded from its operation 'acts subject to or authorised by public regulation'. The 'acts' referred to were not all acts, but monopolistic acts, ie those which the Act would have applied to, monopolistic or anti-competitive agreements or practices. The exclusion of acts as provided for in section 3(1)(d) was therefore an exclusion not of all acts subject to public regulation but of those which could be considered to be monopolistic.

Since the proposed merger was subject to the public regulation provided for in the Banks Act and the Long-Term Insurance Act, the Competition Act did not apply. Standard's contention was dismissed.

The act of merging two banks by the acquisition by one of the majority of the shares in the other is clearly an 'act.' Because the Minister of Finance must grant his 'permission', the act of acquisition has to be 'authorised by' him. As this is so it is unnecessary to consider the exact import of the phrase 'subject to.' The next enquiry is whether authorisation by the Minister is authorisation ' by public regulation.' This enquiry takes one to the definition of 'public regulation.' This definition falls into at least two parts, but the one presently relevant is 'any license, . . . or similar authorisation issued by a regulatory authority *. . .' If the Minister is a 'regulatory authority', then this part of the definition is satisfied. That part of the definition of 'regulatory authority' which reads 'an entity established in terms of national . . . legislation . . . responsible for regulating an industry, or sector of an industry' is satisfied, provided that the Minister is an 'entity'. As to whether the Minister is an 'entity', he clearly is. According to the Shorter OED an entity is a 'being.' The nature of the being is indefinite. It may be a person, the holder of an office, a board, an institution. It may also be a Minister of Finance. The relevant part of the definition is satisfied because the Minister's post is established under section 91, read with section 85 (2) of the Constitution of the Republic of South Africa, 1996; and because under the Banks Act he has wide powers of regulation over the banking industry (s 90) and particularly over bank mergers (see sections 37 and 54).*

MARTIN HARRIS & SEUNS OVS (EDMS) BPK v QWA QWA REGERINGSDIENS

A JUDGMENT BY NIENABER JA
(HEFER JA, HARMS JA, MARAIS JA and MPATI JA concurring)
SUPREME COURT OF APPEAL
23 MARCH 2000

2000 (3) SA 339 (A)

Contract

Breach of contract in the form of mora creditoris (a failure by the creditor to perform) takes place only if a time within which performance by the creditor must take place is either provided for in the contract or established by the issue of a demand. Prescription against a claim arising from a construction contract does not run from the date of issue of an architect's certificate but from the date on which the final contract price becomes due.

THE FACTS

Martin Harris & Seuns OVS (Edms) Bpk agreed to carry out certain construction work for the Qwa Qwa Regeringsdiens. The contract was concluded in 1978 and provided for a contract price of R8955500 and a completion period of six years.

Martin Harris alleged that it suffered damages as a result of delay in the execution of the contract and interruption of the construction programme with associated loss of production and profit. It alleged that the delays were caused by Qwa Qwa's agents, a contractor which had to complete certain excavation works, and an engineer and architect appointed to supervise the works.

The contract provided that the excavations were to be the subject of a separate contract and it was expected of the contractor that it would be aware of the terms of that contract. It also provided that the contractor was obliged to check the ground surface specifications and ensure that they were correct before commencing its work.

Martin Harris then brought an action against Qwa Qwa for payment of damages alleging that a tacit term could be imported into the contract to the effect that Qwa Qwa had been obliged to complete the excavation work before commencement of the work. Qwa Qwa denied that such a tacit term could be incorporated into the contract and in a counterclaim, it contended that in respect of certain claims for piece work, which had arisen upon completion of that work in October 1986, prescription had run against them and were time-barred.

THE DECISION

In view of the express provisions of the contract regarding the excavation work, Martin Harris could not depend on any tacit term to establish any obligation on Qwa Qwa to ensure that excavation works were complete. Qwa Qwa had not warranted that the ground would be fully excavated before construction began. On the contrary, the contract specifically envisaged that completion might not have taken place. Martin Harris' case based on incomplete excavation work could therefore not be sustained.

As far as the allegations regarding the engineer and the architect were concerned, it could be accepted that there was a tacit term that they were obliged to supply drawings and specifications. If they were not supplied, Qwa Qwa would have committed a breach of contract in the form of mora creditoris. However, for Qwa Qwa to have committed a breach of contract in this form, it would have been necessary for it to become obliged to supply the drawings and specifications upon a certain date. No date was specified in the contract, neither was any date created by demand having been made on it. While the contract did provide for the consequences of delay in certain circumstances, Martin Harris had not based its case on its rights in terms of these provisions.

As far as the defence based on prescription was concerned, the provision for periodic payments upon production of an architect's certificate as provided for in the contract, did not provide Qwa Qwa with a basis for such a defence. The date on which the architect's certificates were produced was not the date on which the contract price became payable as the certificates only served to indicate the percentage of the total contract price which could be paid as an interim payment. The certificate did not entitle Martin Harris to payment as its entitlement to payment would only arise upon completion of the whole contract. Prescription therefore did not run from the date of issue of the certificate but from the date of completion of the work.

The action and counterclaim were dismissed.

SAMCOR MANUFACTURERS v BERGER

Contract

A JUDGMENT BY LE ROUX J
TRANSVAAL PROVINCIAL DIVISION
11 MARCH 1999

2000 (3) SA 454 (T)

One person may act for two parties in the conclusion of a contract where it is shown that the two parties independently exercised their unfettered wills in the conclusion of the contract.

THE FACTS

Samcor Manufacturers concluded dealership and floorplan agreements with a motor vehicle dealer for the supply of motor vehicles and spare parts. Berger signed a deed of suretyship as security for the obligations of the dealer.

It was Samcor's practice upon delivery of a motor vehicle, to cede its claim against the dealer to Samcor Wholesale (Pty) Ltd, which financed the sale of the motor vehicle to the purchaser. Notice of the cession was given on the invoice issued to the purchaser. In the event of default on the part of the purchaser, a re-cession to Samcor Manufacturers would take place. When this happened, Samcor Manufacturers would pay Samcor Wholesale the amount of its claim and commence proceedings for the recover of the debt.

Berger became liable as surety in respect of the obligations of a dealer whose debt had been ceded to Samcor Wholesale and re-ceded to Samcor Manufacturers in accordance with the business practice adopted by these companies. It brought an action against him for payment of R734 773,64 alleged to be owing under its obligations thereunder. Berger defended the action on the grounds that the party representing Samcor Wholesale and Samcor Manufacturers in the cession and re-cession was the same person and that this rendered these contracts impermissible in law.

THE DECISION

There is no clear authority that the same person may act on behalf of two parties in concluding a contract between them. Some authority points against the acceptability of this, on the basis that a person cannot as representative conclude a contract with himself.

However, if it is accepted that a contract cannot be concluded by the same person on behalf of both parties then the basis for this is that there is no consensus, ie a separate and distinct meeting of two wills. Where it is shown that there were two wills but they were implemented through one person, the difficulty that one person cannot conclude a contract with himself is avoided. In that case, one person does not decide for both sides whether to conclude the contract or not. Two different parties, each with an unfettered will, reach agreement with one person being the instrument for the conclusion of that agreement.

The cession and re-cession had been validly effected.

FIRST NATIONAL BANK OF SA LTD v EAST COAST DESIGN CC

Contract

A JUDGMENT BY KONDILE J
DURBAN AND COAST LOCAL
DIVISION
5 MAY 2000

[2000] 3 All SA 1 (D)

A party to whom a sum of money is owed and is paid with money to which the payor has no right cannot be required to repay the money on the basis of unjust enrichment since its receipt of the money amounts to payment of an existing debt.

THE FACTS

East Coast Design CC entered into a contract with Roux for the performance of certain building works at his property. Roux stole and forged cheques to the value of R360 000, which were the property of BP Southern Africa and gave them to East Coast. East Coast took them in part payment of the contract price. The contract had provided that East Coast was entitled to a deposit of R360 000 which was not refundable. East Coast had not fully performed in terms of the contract, but alleged that it had refused other work because of the contract with Roux, and that the value of its performance to date was R500 328,21.

Because the drawee bank, First National Bank of SA Ltd, had incorrectly performed its mandate to BP by paying the cheques, it reimbursed BP and brought an action against East Coast claiming that it had been unjustly enriched by the payment. East Coast accepted that it was liable to repay R73 437,46 but refused to repay the balance of R286 562,54.

THE DECISION

In determining what value East Coast had given, it was permissible to have regard to the entire circumstances of the contract, including the fact that East Coast had refused other work in favour of the work to be done for Roux. It was also significant that the contract provided for a non-refundable deposit of R360 000. These facts showed that East Coast received the payment from Roux in return for value which it gave, and not gratuitously. This meant that despite the fact that East Coast had received payment from a party from which it had not claim, it had not been unjustly enriched.

The bank's alternative basis for its claim was that the condictio furtiva (unjust enrichment resulting from theft) applied. However, there was no evidence that East Coast had taken the cheques with the intention of stealing them.

The action was dismissed.

EX PARTE HAY MANAGEMENT CONSULTANTS (PTY) LTD

Contract

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
10 APRIL 2000

2000 (3) SA 501 (W)

A foreigner's choice of domicilium address in South Africa and a choice of applicable law as that of South Africa are compelling reasons to consider that that party has consented to the jurisdiction of the court.

THE FACTS

Hay Management Consultants (Pty) Ltd entered into an agreement with a company incorporated in terms of the laws of England. The agreement gave Hay the right to operate consulting services in South Africa and other African countries, and it incorporated various obligations on both parties in regard to the execution of the agreement.

Clause 15 of the agreement provided that the proper law of the agreement would be the law of South Africa. In terms of clause 16 the parties chose domicilium addresses, the defendant's being given as an address in South Africa.

Hay wished to bring an action against the defendant arising from alleged breaches of the agreement. These consisted in a failure to honour its obligations in regard to the notification of changes in operating procedures and practices and the supply of updated software, and in notifying persons in other countries of its alleged failure to comply with the terms of the agreement and advising them not to communicate with it. Hay's action was for an order of specific performance and an interdict. It applied for the attachment of certain claims of the defendant against itself to confirm or found jurisdiction in respect of the action.

The court raised the question whether the attachment was necessary, in view of the fact that the defendant had chosen a domicilium within South Africa and had made South African law applicable to the agreement, thereby submitting to the jurisdiction of the court.

THE DECISION

As regards claims sounding in money, a consent to the jurisdiction of the court is sufficient if the plaintiff is an incola of the court or there is a ratio jurisdictionis. In the present case, the claim was not one sounding in money. It was a claim for specific performance and for an interdict.

On the face of it, the court did not have jurisdiction in respect of the claim for an interdict. The alleged delicts were being committed by the defendant in England by communications to persons in foreign countries and the court had no control over this. The court's lack of jurisdiction could not be cured by an attachment. Even if the court did have jurisdiction in respect of this claim, its jurisdiction could not be confirmed as the claim was not one sounding in money.

As far as the claim for specific performance was concerned, if the choice of South African law and the South African domicilium address amounted to a consent to jurisdiction of the South African court, the court might have jurisdiction in respect of this claim. There were compelling reasons to think that these choices amounted to a consent to the court's jurisdiction. However, in the absence of a response from the defendant, this could not be determined at this stage. As the application had been brought without notice to the defendant, its response was required, particularly as to whether or not it consented to the jurisdiction of the court, in order to take the matter further.

PINCHAS v PIENAAR

Contract

A JUDGMENT BY CLOETE J (BORUCHOWITZ J and ELOFF AJ concurring)
WITWATERSRAND LOCAL DIVISION
29 OCTOBER 1999

[2000] 3 All SA 632 (W)

A foreign judgment will be enforced in South Africa where the enforcement thereof does not amount to the enforcement of a foreign penal provision or principles of law which would be considered against public policy in South Africa.

THE FACTS

Pinchas obtained a judgment against Segal in an Israeli court for payment of the equivalent amount of US$10 000, as well as interest and 'linkage' from the date of filing of the claim to date of payment. Costs and lawyer's fees were also awarded against him. Segal subsequently died and in proceedings for enforcement of the judgment, was substituted by Pienaar, his executor.

Pinchas applied for an order enforcing the judgment in a South African court. The application was refused on the grounds that the amount awarded was calculated arbitrarily and amounted to a penalty, because the 'linkage' provision escalated the face value of the debt unconscionably, and because the statute on which the claim was based was contrary to principles of South African law.

'Linkage' was a method of adjusting the amount of a judgment in accordance with cost of living changes. It was applied to the amount of a judgment by dividing the cost of living index as at date of payment by the cost of living index as at the date on which the claim was filed. The statute on which the claim was based was the Contracts (General Part) Law 5753-1973 which entitles a party to claim damages when a contract has not been entered into in good faith and not in a customary manner.

Pinchas appealed.

THE DECISION

The enforcement of the Israeli judgment would not amount to the enforcement of a foreign penal statute. The equities imposed by the Israeli statute under which Pinchas obtained his judgment might be considered unacceptable in a South African legal context, but could not be considered penal merely because of that.

There was also nothing unacceptable about the application of a foreign currency conversion as ordered by the Israeli court. The law applicable in determining which currency a debt is to be paid in is the law of the country in which the debt is to be paid, or the law applicable to the contract giving rise to the debt. On either basis, the law of Israel was to be applied in the present case.

As far as the application of 'linkage' was concerned, this was a measure designed to ensure that the depreciation of currency does not benefit a judgment debtor. It was consistent with the widely accepted principle that a debt may be revalued as at the time of payment in response to fluctuations in the value of the currency. It could not be considered unacceptable as against public policy in South Africa. As the contract in question in this case was negotiated in Israel, entered into there and performed there, Israeli law applied to it including the principle of 'linkage'.

The Israeli statute could not be considered contrary to public policy in South Africa.

The appeal was upheld.

REGENT INSURANCE CO LTD v MASEKO

A JUDGMENT BY CLAASSEN J
WITWATERSRAND LOCAL
DIVISION
14 FEBRUARY 2000

2000 (3) SA 983 (W)

Insurance

To prove that there has been a waiver of a contractual right, it must be proved that the parties to the contract mutually agreed upon the waiver of the right. It is insufficient to show that one of the parties was under the impression that the contractual right had been waived by the other party.

THE FACTS

Regent Insurance Co Ltd insured Maseko's motor vehicle against accidental damage. The policy contained a term in clause 4 that if Regent repudiated a claim, any legal action was to commence within 90 days otherwise all benefits under the policy would be forfeited.

On 12 December 1995, Maseko's motor vehicle was involved in an accident. Maseko lodged a claim under the policy. On 22 January 1996, Regent repudiated his claim on the grounds that Maseko had failed to maintain the vehicle in a roadworthy condition as required by the policy. In February 1996, Maseko's attorney telephoned Regent to explain that the vehicle's tyres had been changed after the accident and that good ones had been removed and worn ones fitted prior to the vehicle being inspected by Regent's assessor. Regent advised him to obtain a sworn statement to this effect from the police who had been aware of the change of the tyres.

Maseko's attorney obtained the impression that Regent's advice meant that it was affording an extension of time within which to commence legal action, if any. He then made certain inquiries with one of Regent's clients to attempt to apply pressure to meet the claim. In October 1996, Regent informed Maseko's attorney that it maintained its repudiation of the claim.

Maseko issued summons against Regent for payment of his claim. Regent raised the special plea that in terms of clause 4, all benefits under the policy had been forfeited 90 days after its initial repudiation in January 1996. Maseko contended that Regent's advice that a sworn statement should be obtained from the police amounted to a waiver of its contractual right to repudiate on the basis of clause 4.

THE DECISION

Waiver is a form of contract and as such, requires a consensus between both parties. In the present case, this meant that it would have been necessary for Regent to communicate to Maseko that it was prepared to waive its right to repudiate on the basis of clause 4.

Seeing that there was no communication between these parties after the telephone conversation of February 1996, the only means by which Regent could have made such a communication would have been by paying the claim. Regent had not stated that by furnishing the sworn statement from the police, Maseko would be entitled to payment of the claim. Regent's position as given in the telephone conversation of October 1996 was that it maintained its repudiation of the claim. This could not be construed as a waiver of the right to repudiate.

The onus of showing that a waiver has taken place rests on the party alleging it. Maseko had failed to discharge this onus. The special plea was upheld.

FARR v MUTUAL & FEDERAL INSURANCE CO LTD

Insurance

A JUDGMENT BY LOUW J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
11 OCTOBER 1999

2000 (3) SA 684 (C)

An exclusion in an insurance policy which excludes cover in respect of claims by a person normally resident with the insured and a member of the policy holder's family applies to a claim by a person who is not married to the policy holder and not a dependent of him but who retains a permanent relationship with the policy holder.

THE FACTS

Mutual & Federal Insurance Co Ltd insured Farr's motor vehicle against loss or damage and provided an indemnity in respect of liability to third parties. Clause 2.1 provided that in the event of an accident caused by or in connection with the vehicle, the insurer would indemnify the policy holder against all sums, costs and expenses for which the policy holder became legally liable upon death or bodily injury to any person.

An exclusion provision of the policy provided that the insurer would not be liable for death of or bodily injury to a member of the policy holder's family normally resident with him.

The motor vehicle was involved in a collision and a passenger was injured. Mutual & Federal refused to provide an indemnity in terms of the policy on the grounds that the passenger was a member of Farr's family normally resident with him, and that the exclusion provision applied. The passenger was a resident at Farr's flat and had been so for ten years. He and Farr were two single individuals who had maintained an intimate relationship over that period.

Farr applied for an order that Mutual & Federal was obliged to pay any claim which might be brought by the passenger.

THE DECISION

It was clear that the passenger was normally resident with Farr. It was accordingly only necessary to consider whether or not he could be considered a member of the policy holder's family, as referred to in the policy.

The exclusionary clause was included in the policy in order to reduce the risk to the insurer, since the risk was increased by accepting liability for injury caused to a person more likely to be a passenger in the vehicle. In order to make this effective, it would have to apply to all conceptions of a 'family' including that of a same-sex relationship established over a period of time.

This conclusion was also supported by the fact that it amounted to equal treatment of policy holders, those maintaining a conventional heterosexual relationship and those not doing so.

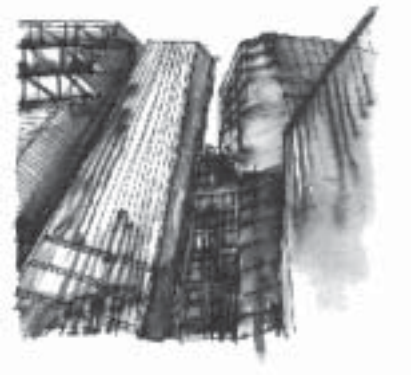
The application was dismissed.

VISAGIE v GERRYTS

JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
7 APRIL 1999

2000 (3) SA 670 (C)

Property



A court will prefer a practical and realistic valuation of property for the purposes of assessing damages, and will not favour the valuation of property according to cost calculations based on the estimated cost of effecting the existing improvements to the property. It will favour a comparison of similar property transactions.

THE FACTS

On 12 November 1996, Gerryts gave Visagie an option to purchase certain property known as 'Leeudrift' for R820 000. Visagie exercised the option and claimed transfer of the property against payment of R820 000. Gerryts contended that the option was subject to an express agreed suspensive condition that it would be effective only if the second defendant had not exercised a right of pre-emption he held in respect of the property, and that he had exercised that right on 13 November 1996. He refused to give transfer of the property.

Visagie brought an action for transfer of the property to him, alternatively payment of R1,4m being the value of the property as at 12 November 1996. Gerryts raised the defence of the suspensive condition, and alleged that the value of the property was not R1,4m but R775 000. Visagie later abandoned his claim for transfer of the property and claimed only damages based on the valuation of the property of R1,4m.

The expert witness called by Visagie to prove the value of the property based his valuation on the electrical installations calculated by reference to the installation costs thereof, the value of the buildings based on building costs less depreciation, the lucerne crops based on their nett annual income and the pasturage based on an average price per hectare obtained from similar transactions in the area.

The expert witness called by Gerryts depended on comparable land sale transactions in the area, adding a nominal amount of R50 000 in respect of improvements to the property. He concluded that the value of the property was worth R680 000.

THE DECISION

To assess Visagie's damages it was necessary to determine the market value of the property. The court was entitled to depend on the opinions of the expert witnesses as it did not have knowledge of market conditions in the area where the property was situated, and required the proper inferences to be drawn from the facts which were placed before it. The opinions of the experts could be useful in that respect.

Although the fact that Gerryts' expert witness had applied an arbitrary figure to the value of the buildings, he arrived at his valuation on a more practical level than did Visagie's expert witness. Even if there was an upward adjustment on the price he assessed as the average value of pasturage, the figure he would have arrived at would not have exceeded the purchase price as recorded in the option. The fact that purchasers of such property did not place a separate value on improvements was also consistent with the opinions of the other expert witness and appeared to be more realistic. The comparison method of assessing a value of property had also been preferred in the past by our courts.

On an assessment of the evidence given by both experts, it appeared that Visagie had not proved that the value of the property exceeded R820000. Gerryts was entitled to an order of absolution from the instance.

BOSMAN N.O. v TWORECK

JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
1 DECEMBER 1999

2000 (3) SA 590 (C)

Rights held under a right of precarium can be terminated only upon proper notice being given. The period of notice depends on the length of enjoyment of the rights of precarium and the nature of the right.

THE FACTS

Tworeck leased certain fixed property to Bosman in his capacity as trustee of a trust. Bosman had occupied the property for some eight years previously. A road passed over the leased area to an area which was used by Tworeck's daughter, the second respondent. Although the lease made no provision for the use of the road, Bosman did not object to the use of the road by Tworeck and his daughter and their families. The trust was obliged to maintain the road but Tworeck was obliged in terms of the lease, to make a contribution to its maintenance.

Usage of the road increased as a result of the cultivation of herbs being undertaken by the third respondent on adjoining land. A year after conclusion of the lease, Bosman then gave notice that he intended to close the gate giving access to the road. A few weeks later, he locked the gate. Tworeck then removed the gate. Bosman requested that Tworeck give him an undertaking that the road would not be used without his permission but Tworeck refused to give this.

Bosman then sought an order that the respondents be prevented from using the road without his permission and reinstall the gate.

THE DECISION

The lease did not give the respondents the right to use the road and it would appear that the right of usage of the road had been in the nature of a precarium. Such a right can be terminated upon reasonable notice, the period of which would depend on the length of enjoyment of the right, the nature of the right and the particular facts of the case.

Taking into account the period of time during which the road was used, the notice period given by Bosman was insufficient. The respondent were therefore entitled to continue using the road under their rights of precarium.

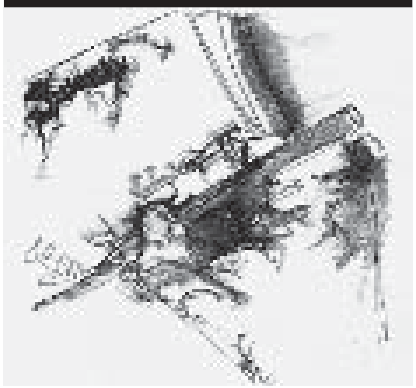
Tworeck was however obliged to reinstall the gate as the removal amounted to an act of spoliation. It could not be characterised as a counter-spoliation after Bosman had locked the gate because Bosman had merely locked the gate. The complete removal of the gate was not necessary to regain possession as only the lock could have been removed for that purpose.

SPUR STEAK RANCH LTD v MENTZ

A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
7 DECEMBER 1999

2000 (2) SA 755 (C)

Suretyship



The surety's defence that it has been prejudiced by the actions of the creditor calls for an examination of the whole factual matrix surrounding the alleged prejudice, including evidence which might be considered inadmissible in proving a contract in that it violates the parole evidence rule.

THE FACTS

Spur Steak Ranch Ltd and Strand Distributors (Pty) Ltd entered into an agreement in terms of which Strand was to supply Spur with cooked lamb and mutton over a period of time. The agreement incorporated a loan of R1m by Spur to Strand to enable Strand to purchase the raw materials necessary to commence production.

The loan made by Spur to Strand was to be made by continuing advances over time, the balance owing from time to time attracting interest at the call account rate paid by Nedbank, Cape Town branch. Further advances would cease as from 30 April 1997, from which time Strand would repay the loan then outstanding in monthly instalments of R75 000. The full amount outstanding would become payable if any instalment was not made.

After clause 1.4 of the agreement, the words 'see annexure A' were inserted and initialled. Annexure A specified in detail, the quality and sizes of the meat to be supplied, as well as the method of production and its distribution. This annexure was added to the agreement subsequent to the signing of the agreement itself.

The agreement provided that F. Mentz would be jointly and severally liable as surety and co-principal debtor with Strand.

The agreement was implemented, but it was terminated before all the product was supplied in terms of it. Spur brought an action for repayment of the loan by Mentz in terms of his suretyship obligations. Mentz defended the action on the grounds that Spur had caused prejudice to him by not taking delivery of the full amount of the product provided for in the agreement but only one third of it. This failure had resulted in Strand being unable to make the payments required of it, resulting in its liquidation. As surety he was prejudiced by the actions of the creditor and accordingly not obliged to pay the amount due by the principal debtor.

In a replication, Spur responded with the allegation that Strand had failed to provide the product according to the specifications referred to in annexure 'A' and this had entitled it to refuse to accept delivery thereof.

Mentz contended that annexure 'A' could not be considered part of the agreement as it was not integrated in it at the time the agreement was entered into and did not constitute a written variation of the agreement. He excepted to Spur's replication.

THE DECISION

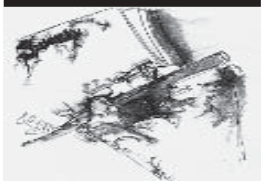
The defence that a surety has been prejudiced by the actions of the creditor depends on evidence showing such prejudice. Such evidence might not relate to the terms of a contract under which the principal debtor might have become liable toward the creditor, but might relate to the greater factual matrix relating to the relationship between principal debtor and creditor. In such circumstances, it is permissible for the creditor to put forward such evidence, and this is what Spur was doing in referring to annexure 'A'.

A court is entitled to examine all the evidence relating to the surety's defence of prejudice caused by the creditor, and was accordingly entitled to examine the evidence shown in annexure 'A'.

The exception was dismissed.

BOSHOFF v SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY

Suretyship



A JUDGMENT BY COMRIE J
(DAVIS J and PAPIER AJ concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
26 APRIL 2000

2000 (3) SA 597 (C)

A surety remains liable to meet a tenant's obligations under a lease after liquidation of the tenant despite the provisions of section 37 of the Insolvency Act (no 24 of 1936).

THE FACTS

Boshoff signed a deed of suretyship in favour of South African Mutual Life Assurance Society. The suretyship was in respect of the obligations of Barbs (Pty) Ltd as lessee under a lease entered into between it and SA Mutual.

Clause 7 of the deed of suretyship provided that in the event of Barbs being provisionally liquidated, the suretyship would extend to cover all loss which might be sustained by SA Mutual by reason of the non-performance of the terms lease. Clause 8 provided that the surety's liability would include all claims for compensation or damages which SA Mutual might have as a result of the termination of the lease including termination pursuant to section 37(1) of the Insolvency Act (no 24 of 1936).

During the currency of the lease, Barbs was provisionally liquidated. The liquidator elected to cancel the lease.

SA Mutual then claimed from the sureties including Boshoff payment of R323 845,22 being unpaid rental and operating costs. Boshoff contended that in terms of section 37(1) of the Insolvency Act, the liquidator was statutorily obliged to pay rent from the date of provisional liquidation until the date of cancellation of the lease as a cost of sequestration and for that reason, the rent payable for that period could be recovered by SA Mutual from the liquidator. As the surety was not intended to be liable for rent which would be paid to SA Mutual he was not liable for that portion of the rental which the liquidator was obliged to pay in terms of section 37(3).

Section 37(3) provides that the rent due under lease, from the date of sequestration of the estate of the lessee to the determination of the cession thereof by the trustee, shall be included in the costs of sequestration.

THE DECISION

Section 37(3) does not create a new obligation. The lessee remains liable to the lessor for rent until termination thereof. The effect of section 37(3) is to confer on the lessor a high degree of preference, but this does not create a new obligation or change the nature of the original obligation.

The effect of the lessee's liquidation is that it will not pay the rent timeously. This is an event which gives rise to the lessor's right to obtain payment from the surety. SA Mutual was therefore entitled to recover payment from Boshoff. If Boshoff as surety were to make payment, he would then succeed to the lessor's position vis-a-vis the liquidator.

Clause 7 of the lease dealt with losses consequent upon termination of the lease, not losses consequent upon non-performance prior to termination. It therefore did not refer to the loss sustained by the landlord in this case.

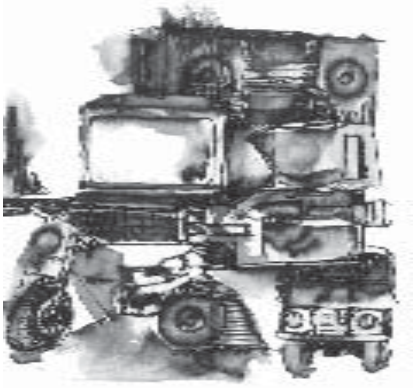
SA Mutual was entitled to payment from Boshoff.

BEKKER v OOS-VRYSTAAT KAAP KOÖPERASIE BPK

A JUDGMENT BY FARLAM AJA (VIVIER JA, NIENABER JA, HARMS JA and SCHUTZ JA concurring)
SUPREME COURT OF APPEAL
26 MAY 2000

[2000] 3 All SA 301 (A)

Credit Transactions



A provision that a statement sent to a person will be considered conclusive evidence of the facts unless objected to by the receiving party within a stipulated time is not contra bonos mores and is enforceable between the parties.

THE FACTS

GBA Van Ginkel (Edms) Bpk applied to Oos-Vrystaat Kaap Koöperasie Bpk (OVK) for a production credit to enable it to produce a crop of wheat on two farms which it owned. Bekker and the second appellant, the directors and shareholders of GBA, executed suretyship agreements in respect of the loan, and the application was approved. Further loans were granted until the amount owed reached some R443 000.

OVK's practice was to confer membership in itself on its debtors, but not in the case where its debtor was a company. GBA was therefore not given membership, but Bekker and the second appellant were treated as if they were partners in a partnership to which OVK had lent money. This meant that they were obliged to take out life insurance on their lives which was ceded to OVK as security. In the event of their deaths, the amount payable would be paid to OVK. It also meant that the terms and conditions of the loan remained those applicable to natural persons and not the more onerous terms and conditions which were applicable to companies.

OVK's founding statutes provided that if within three months of a statement having been sent to a member, the member had not objected to any debit or credit appearing on the statement, it would be considered for all purposes to be correct and would be conclusive evidence that the debits and credits were correct. Statements were sent to the debtor from time to time, each of them containing a statement that if written objection was not received within one month, the contents of the statements would be considered correct, whereafter the onus of proving otherwise would rest on the debtor.

GBA defaulted and OVK brought an action against Bekker and the second appellant to enforce their suretyship obligations. They defended the action inter alia on the grounds that the conclusive evidence provisions were not binding on GBA because it was not a member of OVK, and were in any event unenforceable because they were contra bonos mores.

THE DECISION

GBA's account was dealt with in all respects in the same way as any other member's account and there was a tacit agreement that this should happen and that the company would be bound by the statutes and regulations of OVK. The fact that no shares in OVK were issued to it made no difference. GBA had obtained advantageous terms, ie those applicable to a member of OVK, and it was to be taken to have accepted the concomitant obligations. This was the intention of both parties and that of the sureties, and on the strength of the 'fictitious bystander' test it would follow that the terms of the statutes and regulations of OVK were properly considered, implied terms of an agreement between GBA and OVK.

As far as the validity of the conclusive proof provision was concerned, this was not the same as the conclusive proof certificate whose validity was rejected in *Ex parte Minister of Justice: in re Nedbank Ltd v Abstein Distributors (Pty) Ltd* 1995 (3) SA 1 (A). The conclusive proof provision in this case anticipated the possibility of the creditor's statement being incorrect as it provided for the possibility of an objection by the debtor. It was akin to a contractual time bar as provided for in certain insurance contracts which provides for the determination of a particular position after the lapse of a certain period of time. As such it was unobjectionable and not contra bonos mores.

ABSA BANK BPK v ONS BELEGGINGS BK

JUDGMENT BY GROSSKOPF JA (HARMS JA, SCOTT JA, MPATI AJA and MTHIYANE AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2000

[2000] 3 All SA 199 (A)

Banking

An action for damages resulting from an incorrect payment of a cheque following an invalid indorsement requires proof of such damages. The amount of the cheque will be insufficient proof of such damages where there is evidence that the plaintiff did not suffer any loss.

THE FACTS

Saambou National Building Society Ltd drew a cheque for R420 000 in favour of Ons Beleggings BK on Volkskas Bpk, the predecessor of Absa Bank Bpk. Ferreira, as agent of Ons Beleggings, signed the reverse side of the cheque and added the words 'vir ONS/SJA' and deposited the cheque to the account of SJA Bemarking.

Ferreira was an authorised signatory of Ons Beleggings who had been permitted by that company to indorse its cheques and pay them into SJA's account. This was done in order to simplify progress payments made by Saambou in respect of a building project being conducted by Ons Beleggings.

Some months after the deposit of the cheque for R420 000 into SJA's account, SJA was liquidated. Ons Beleggings alleged that Absa had committed a breach of the banker-customer contract between them and had negligently paid the cheque to SJA which was not entitled to payment. It claimed damages in the sum of R420 000.

THE DECISION

The bank had been negligent in accepting the signature on the reverse of the cheque as that of the payee and crediting SJA's account. This was so because the signature purported to be given on behalf of 'ONS/SJA' which could not have been the payee of the cheque, even if Ferreira himself was an authorised signatory for Ons Beleggings.

However, Ons Beleggings had failed to show that it suffered any damages. Ons Beleggings had not shown that the cheque for R420 000 was misappropriated or indorsed without authority. It had not taken any steps to recover payment from a person alleged to have stolen or forged the indorsement, and the suggestion that its intention was that the cheque had been indorsed as part of the usual method of effecting payments to SJA had not been answered. It was only when the liquidation of SJA ensued that Ons Beleggings took any steps to bring a claim for damages.

The amount of the cheque was not necessarily the amount of the damages Ons Beleggings had suffered, and the doubts as to the extent of its damages meant that it had failed to prove its damages.

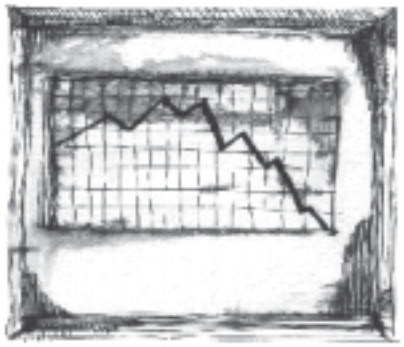
The action was dismissed.

MTHINKHULU v RAMPERSAD

A JUDGMENT BY COMBRINK J
NATAL PROVINCIAL DIVISION
7 JUNE 2000

[2000] All SA 512 (N)

Insolvency



A friendly sequestration must be brought not only to assist a debtor but also to secure payment in some degree of the debt owed to the applicant, which must be shown to be a genuine debt. The court is also entitled to information which will satisfy it that the application is properly broughtin accordance with these principles.

THE FACTS

Mthinkhulu brought a friendly application for the sequestration of Rampersad's estate. He was a teacher at the same school as Rampersad and alleged that he had made a loan of R6 000 to the latter in respect of which Rampersad had signed an acknowledgement of debt. Mthinkhulu did not say what the purpose of the loan was, how it was paid and what the source of his funding was. He alleged that none of the repayments of R1 000 per month was made.

In support of the application, Mthimkhulu annexed a letter from Rampersad in which he stated that he could not repay the loan. A similar letter from Rampersad which had been sent to another person in an earlier sequestration application was also annexed.

BOE Bank Ltd intervened in the application and sought an order that the application be dismissed. It had obtained a judgment against Rampersad for payment of R106 352,40 arising from a loan which was secured by a mortgage bond over Rampersad's property and arranged for the sale in execution of the property to enforce its judgment. An earlier sale had been prevented by the earlier friendly sequestration application, the order for which had become discharged after that applicant's attorneys had withdrawn.

The court considered the proper procedures to be adopted in friendly sequestration applications.

THE DECISION

The facts of the case suggested that Mthimkhulu was a mere pawn in the application and had brought it in return for some payment. The similarity of the letters sent in both sequestration applications also suggested this.

A proper friendly sequestration application must be brought not only with the object of assisting the debtor but also to enable the applicant to share in the distribution to be made in the winding up of the debtor's estate. If it is brought merely to assist the debtor and exhibits no concern for the interests of other creditors, this is unacceptable. Also unacceptable is collusion between the applicant and the debtor.

In order to better ensure that this object is achieved, minimum requirements for a friendly sequestration application are:

(i) The applicant's locus standi must be proved. This means that there must be sufficient proof of the debt owing to the applicant.

(ii) Reasons why the applicant has no security for the debt must be given.

(iii) A full and complete list of the debtor's assets and their market value must be given.

(iv) A valuer of immovable property must state why he is qualified to make the valuation, what his experience is in valuing property in the area and comparable values. He must also state what he expect the property will fetch on a sale by public auction.

(v) In urgent applications brought in order to stay a sale in execution, full reasons must be given as to why the application has been brought at the last moment and what attempts have been made to sell the property by private treaty.

(vi) Notice of the application must be given to any bondholder.

(vii) Any application for the extension of a provisional order must set out full reasons for the extension.

The application was dismissed.

DE WET v LE RICHE

A JUDGMENT BY PATEL AJ
TRANSVAAL PROVINCIAL DIVISION
15 JUNE 2000

2000 (3) SA 1118 (T)

A nulla bona return of service which is defective in that it is signed by a person who did not serve the warrant of execution giving rise to the return will not entitle an applicant to an order sequestrating the respondent's estate.

THE FACTS

De Wet issued a warrant of execution against Le Riche and arranged for its service on Le Riche by the sheriff. The deputy sheriff served the warrant on Le Riche and gave a nulla bona return of service. The return of service was signed by the sheriff but indicated that the deputy sheriff had served the warrant.

De Wet then brought an application for the sequestration of Le Riche's estate based on the nulla bona return of service. No notice of the application was given.

Le Riche opposed the application on the grounds that the nulla bona return of service was defective in that it had not been signed by the person who served it. De Wet responded with evidence that Le Riche had committed an act of insolvency by having disposed of his property to his mother which had the effect of prejudicing his creditors in preferring one above another.

THE DECISION

Although it was the practice to allow a sequestration application without notice where a nulla bona return of service had been received, where the application is based on other grounds such as an act of insolvency, notice of the application should nevertheless be given. This is in keeping with the rule of fair play expressed in the audi alteram partem rule.

In the present case, the return of service was flawed because it contained statements of which the sheriff did not have personal knowledge. The nulla bona return of service was therefore defective and could not support an application for sequestration of Le Riche's estate.

The application was dismissed.

STRIDE v CASTELEIN

A JUDGMENT BY MARAIS J
WITWATERSRAND LOCAL DIVISION
15 AUGUST 2000

2000 (3) SA 662 (W)

Except in cases of extreme urgency, an application for sequestration ought to be given only after notice thereof to the respondent has been given. A nulla bona return of service received by the applicant is insufficient reason to dispense with such notice.

THE FACTS

Stride brought an application for the sequestration of Castelein's estate. The application was not served on Castelein. Stride depended on a nulla bona return of service which had been received in earlier proceedings.

The court questioned whether or not the nulla bona return was sufficient for the application and whether the failure to serve the application on Castelein was a reason to decline the application.

THE DECISION

A nulla bona return does not constitute proof of insolvency. It may indicate that the respondent has no assets which can be attached by an independent court official, but it does not provide complete compliance with the requirements of proof of insolvency in that it does not show, for example, that there is a benefit to creditors in the sequestration of the particular respondent.

Giving an order of sequestration without notice of the application to the respondent amounts to a violation of the audi alteram partem rule. Given the drastic consequences of sequestration, this rule ought not to be dispensed with, and notice of the application should be given even if the applicant holds a nulla bona return.

The application was postponed for proper service to be effected.

VAN ZYL N.O. v THE MASTER

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
2 MAY 2000

2000 (3) SA 602 (C)

A court will defer to the views of the Master in matters concerning the administration of insolvent companies, unless it is clear that the Master's decision in a particular matters was irregular or wrong. Where no new facts are placed before a court over and above those placed before the Master, the Master's decision will normally be confirmed.

THE FACTS

Van Zyl was appointed liquidator of ISU Education Group (Pty) Ltd. The company's greatest asset was claims against debtors amounting to some R3,5m and its operations extended to all of the main centres of South Africa as well as Windhoek. In order to ensure that the debts were properly collected, Van Zyl travelled to the various centres where he also arranged for the taking of stock.

The liquidator's account included a sum of R13 860,09 in respect of travel expenses incurred in the winding up of the company. This was reflected as a debit against the free residue of the company's estate. The Master queried the inclusion of this item and directed Van Zyl to remove it from the winding-up cost charges.

Van Zyl applied for an order that the charge be reinstated.

THE DECISION

A court has wide powers under section 407(4)(a) of the Companies Act (no 61 of 1973) to change a decision of the Master. However, the court in the present case was not required to exercise any of the wide powers given to it in the section as no new facts which were not placed before the Master were placed before the court.

As the Master is the official entrusted with the administration of insolvent companies, his rulings ordinarily deserve some deference. Where no new facts are placed before the court, the court should hesitate to substitute its own opinion for that of the Master, unless it is clear that any particular ruling by him is tainted by irregularity or error.

On the facts as presented, there was no basis upon which the Master's decision could be said to be wrong. The application was dismissed.

SCHMIDT v JACK BRILLARD PRINTING SERVICES CC

A JUDGMENT BY JOFFE J
(VAN OOSTEN J concurring)
TRANSVAAL PROVINCIAL DIVISION
3 MAY 2000

2000 (3) SA 824 (W)

Cheques

A signature on a cheque apparently given on behalf of the company which is the drawer of the cheque but which fails to qualify the signature as having been given on behalf of the company does not render the signatory personally liable on the cheque where it is clear that the signature was given on behalf of the company.

THE FACTS

Five cheques for R10 835,13 reflecting PLC Finance (Pty) Ltd as drawer and indicating the bank account number of that company with the drawee bank, were signed by Schmidt and the second appellant. They did not indicate that they signed on behalf of PLC. The drawee bank considered the cheques to have been drawn by PLC and not by Schmidt and the second appellant.

The cheques were dishonoured and a note made on them'Payment stopped/company in provisional liquidation'. Jack Brillard Printing Services CC brought an action against Schmidt and the second appellant for payment of the amounts of the cheques contending that they were personally liable as they had not qualified their signatures as given in a representative capacity, ie on behalf of PLC.

Schmidt and the second appellant appealed against the judgment given against them.

THE DECISION

The rule of law that a person is liable on a cheque unless he states that he puts his signature to it on behalf of another has become an accepted rule in South African law. However, the question was whether or not this rule should continue to be accepted, given that it was created two hundred years ago in a jurisdiction which itself no longer strictly applies the rule.

The rule does not take into account modern banking practices which have been changed by technology and computerisation. It is relevant that the account number and the company name of the intended drawer was reflected on the cheques, and the company name was imprinted on the cheques prior to their having been signed. It was clear that the signatories had not signed as drawers in their personal capacities but had intended to do so on behalf of PLC. Their signatures were intended to be those of the company when seen above the name of the company.

As any reasonable person would consider the signatures to have been given on behalf of PLC, they were properly regarded as those of PLC. The appeal was upheld.

SUNDELSON v KNUTTEL

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION
10 MAY 2000

2000 (3) SA 513 (W)

An accommodation party may receive payment from the party accommodated in terms of an underlying contract between those two parties, where his intention was to act as an accommodation party as referred to in section 26(1) of the Bills of Exchange Act (no 34 of 1964). The accommodation party may be liable on a cheque to a party which has not given value therefor, but not where the accommodation party does not intend to accept such liability.

THE FACTS

In return for a fee, Knuttel drew a cheque in favour of M Turner or bearer and handed it to Turner. Turner indorsed the cheque and handed it to Sundelson. By agreement between them, Sundelson was to exchange the cheque with a third party for cash and pay this to Turner, failing which the cheque was to be returned to Turner.

The third party did not pay cash for the cheque. Sundelson then handed the cheque to his attorneys with instructions that they collect payment of it. The attorneys presented the cheque for payment but it was returned by the bank with the comment 'payment stopped'.

Sundelson brought an action against Knuttel for payment of the amount of the cheque.

THE DECISION

Knuttel was an accommodation party as defined in section 26(1) of the Bills of Exchange Act (no 34 of 1964), ie a person who had signed a bill as drawer, acceptor or indorser, without receiving value therefor, but for the purpose of lending his name to some other person. Knuttel's intention had been to sign the bill for this purpose and not for the purpose of receiving a fee for having done so in terms of the underlying contract between himself and Turner. Accordingly, he was an accommodation party as referred to in section 26(1).

In respect of the cheque, Sundelson was not a holder in due course because Turner had given no value to Knuttel, in the form of a quid pro quo, for the cheque. Furthermore, as an accommodated party, Turner had no right to sue on the cheque and could therefore cede no such right on Sundelson. As an immediate party to the cheque, Knuttel was entitled to raise the terms of the contract between himself and Turner as against Sundelson's claim. Sundelson had also given no value for the cheque, with the result that Sundelson could invoke section 26(2) of the Act to avoid liability toward him. The section provides that an accommodation party is liable on the bill to a holder for value.

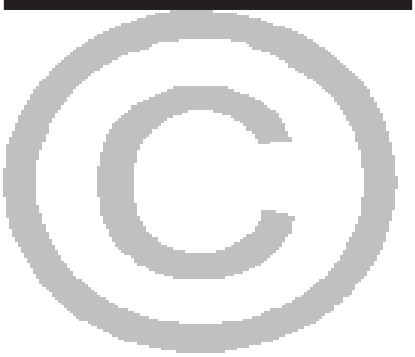
While it is possible for an accommodation party to be liable to a holder who has acquired a bill gratuitously, where the accommodation party and the holder have entered into a contract to that effect, in the present case Knuttel and Sundelson had entered into no such contract and Knuttel had not intended that he would be liable on the cheque to anyone who took it without giving value therefor.

MORRIS v BENSON AND HEDGES

A JUDGMENT BY HEHER J
WITWATERSRAND LOCAL DIVISION
16 MARCH 2000

2000 (3) SA 1092 (W)

Copyright



A claim for a reasonable royalty may be made in respect of a copyright infringement taking place prior to the date on which section 24(1A) of the Copyright Act (no 98 of 1978) came into operation.

THE FACTS

Morris brought an action against Benson and Hedges alleging it had infringed his copyright during the period 1988-1994. He did not claim damages but claimed a reasonable royalty which would have been payable to a licensee in respect of the broadcasting of a musical work.

Benson and Hedges excepted to the claim on the grounds that section 24(1A) of the Copyright Act (no 98 of 1978) in the form on which Morris based his claim for a reasonable royalty came into force on 1 January 1998. As Morris alleged an infringement of copyright prior to this, he was therefore not entitled to a reasonable royalty on the basis of this provision.

Section 24(1A) provides that in lieu of damages, a plaintiff may be awarded an amount calculated on the basis of a reasonable royalty which would have been payable by a licensee in respect of the work concerned.

THE DECISION

A reasonable royalty is not equivalent to the patrimonial loss which would be claimed as damages. It was not recognised as a distinct head of damages under the common law prior to the enactment of section 24(1A). Accordingly Morris' claim as framed could not be considered to be one which would have been recognised before the enactment of that section.

The amendment of the Copyright Act which was effected by the provisions of section 24(1A) was not intended to operate retrospectively. However, the rights provided for in it may supplement accrued rights. The right conferred in section 24(A1) related to an 'award', indicating that it was to be related to the date of judgment, not the date of infringement. This indicated that the intention was to make an exception to the rule against retrospectivity and entitle a claimant to a reasonable royalty calculated on the date of judgment.

The exception was dismissed.

THE RIZCUN TRADER (NO 4)
MV RIZCUN TRADER v MANLEY APPELDORE SHIPPING LTD

JUDGMENT BY VAN REENEN J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
12 APRIL 2000

2000 (3) SA 776 (C)

Shipping

Whether or not an order of arrest should be set aside ont he grounds of breach of the uberrimae fies rule depends on the extent of the breach, the reasons for non-disclosure, the extent to which the court might have been influenced by proper disclosure, the consequences of denying relief to the applicant on the ex parte order, and the interests of innocent third parties. A foreign party which impliedly submits to the jurisdiction of the court by bringing arrest proceedings in South African will not be considered to have submitted to the jurisdiction of the court for purposes of a claim for damages for wrongful arrest as this will not normally be considered to be related to matters relevant to security, for which the ship was initially arrested.

THE FACTS

Manley Appledore Shipping Ltd chartered the *Manley Appledore* to Ikhlas Offshore Shipping Co Ltd which sub-chartered the ship to Continental Grain Co Ltd. This ship proceeded to Kangla, India, to load bagged rice for discharge at two African ports. During off-loading at Guinea Bissau, cargo receivers alleged short loading of the cargo in Kangla, and arrested the cargo. They also brought a claim against Continental Grain in an amount of $37 984 for delays in the delivery of the cargo. Two cargo receivers claiming claimed shortages in quantities of the cargo to be delivered to them under bills of lading and arrested the ship.

Manley Appledore undertook to supply substitute rice to the two claimants and procured a letter of undertaking in the sum of $200 000 for legal fees incurred by the cargo receivers. The ship was released.

Manley Appledore then arrested the *Rizcun Trader* to obtain 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. Manley alleged that the *Rizcun Trader* was an associated ship of the *Manley Appledore*.

The claim intended to be brought against Ikhlas was said to be based on clause 8 of the New York Produce Exchange time charterparty, which was modified to provide that the charterers were to load, stow and trim, *discharge and if necessary, tally, lash, unlash, dunnage and secure* the cargo at their expense under the supervision *and responsibility* of the captain, who was to *authorise the charterer's agents* to sign bills of lading for cargo as presented, in conformity with the mate's or tally clerk's receipts. The emphasized words were the modifications added to the pro forma clause. They were not however, cited in the application for the arrest of the *Rizcun Trader*.

The *Rizcun Trader* applied for an order setting aside its arrest. It also applied for an order that Manley Appledore provide security for a damages claim for wrongful arrest.

THE DECISION

If the modifications to clause 8 of the NYPE form had been brought to the attention of the judge who granted the order for the arrest of the *Rizcun Trader*, it might have influenced the decision to arrest the ship. The effect of the modifications was to allocate responsibility for cargo claims to the shipowner, and the effect of this was to deny Manley Appledore a claim against Ikhlas arising from such claims. The uberrima fides rule, which was applicable in that the application for the arrest of the ship had been brought ex parte, had therefore been flagrantly violated in the arrest application.

Whether or not the order of arrest should be set aside depended upon the extent of the breach of the uberrima fides rule, the reasons for non-disclosure, the extent to which the court might have been influenced by proper disclosure, the consequences of denying relief to the applicant on the ex parte order, and the interests of innocent third parties. Taking all of these factors into account, the order of arrest should be set aside.

As far as the claim for security for its damages claim was concerned, this was based on section 5(4) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) which provides that any person who without reasonable and probable cause obtains the arrest of property shall

be liable for such loss or damage to any person suffering loss or damage as a result thereof. Its entitlement to security was based on section 5(2)(b) or (c) of the Act.

Rizcun Trader's claim was only enforceable by an action in personam as an arrest in terms of section 5(5) of the Act would not be possible. One of the requirements for such an action is that the parties were subject to the jurisdiction of the court. Both parties would be considered to have submitted themselves to the jurisdiction of the court in regard to issues relating to security, but their consent or submission to the court's jurisdiction was not also relevant to unrelated matters such as the claim for damages. There was no evidence that Manley Appledore had tacitly consented to the court's jurisdiction in this respect. Since the *Rizcun Trader* had not shown that the court had jurisdiction in regard to its claim for damages, its application for security had to fail.

Rizcun Trader had also failed to show that it had a prima facie case in respect of its damages claim, since it was not necessarily so that Manley Appledore obtained the arrest of the ship without reasonable or probable cause. It had also failed to show that it had a genuine and reasonable need for security but only that it would be convenient to it to have a source from which its damages claim could be met.

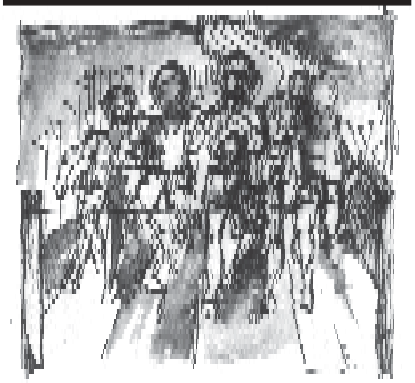
Has the Rizcun Trader succeeded in showing that its counterclaim against Manley Appledore Shipping will be enforceable in this Court? Jurisdiction is invariably present in those instances where the claims in convention and reconvention are enforced or intended to be enforce in the same forum (cf the Luis (supra); the Leresti (supra); not so in a case such as the present where the `counterclaim' is to be enforced in a forum where no other proceedings will be pending between the parties. As both the Rizcun Trader and Manley Appledore Shipping are peregrini of this Court and have no property within its area of jurisdiction, the only basis on which this Court would be able to entertain the damages claim would be the existence of consent of submission to its jurisdiction.

SAD HOLDINGS LTD v SOUTH AFRICAN RAISINS (PTY) LTD

A JUDGMENT BY NGOEPE JP
TRANSVAAL PROVINCIAL DIVISION
15 MARCH 2000

2000 (3) SA 766 (T)

Competition



The Competition Act (no 89 of 1998) does not apply to acts subject to or authorised by public regulation such as those to which the Marketing of Agricultural Products Act (no 47 of 1996) applies. Accordingly the Competition Tribunal has no jurisdiction to make orders in respect of the marketing of agricultural produce to which that Act applies.

THE FACTS

In 1998, SAD Holdings Ltd obtained an order in the Northern Cape Division of the High Court restraining South African Raisins (Pty) Ltd from receiving or keeping any of SAD's containers on its premises. The containers were used for the collection and delivery of raisins by producers of grapes in terms of an arrangement recorded in SAD's Articles of Association. The producers were shareholders of SAD and were not entitled to deliver their produce in the containers to anyone other than SAD.

SAD later obtained an order that South African Raisins was in contempt of the court order and a fine and sentence were imposed on it.

In November 1999, South African Raisins obtained an interim order by the Competition Tribunal established in terms of the Competition Act (no 89 of 1998) restraining SAD from taking punitive action against any of its shareholders. SAD appealed to the Competition Appeal Court. South African Raisins applied for and obtained an order that the interim order would not be suspended by the noting of the appeal. The Tribunal also ruled that the notice of appeal was invalid and of no effect.

SAD then applied in the Transvaal Provincial Division of the High Court for an order that pending the finalisation of their appeal, both orders by the Tribunal be suspended. It later applied for an amendment to this relief and sought an order that the entire proceedings before the Tribunal were null and void as the Tribunal did not have jurisdiction to adjudicate the dispute. The latter relief was sought on the grounds that the Competition Act did not apply to the matter as another Act did, the Marketing of Agricultural Products Act (no 47 of 1996).

THE DECISION

Section 3(1)(d) of the Competition Act provides that the Act does not apply to acts subject to or authorised by public regulation. The collection of dried grapes in the containers in question was done for the purpose of marketing them, which meant that the Marketing of Agricultural Products Act applied to this activity. Since it did, it was an act subject to public regulation as contemplated in the Competition Act, and the exception to the applicability of that Act as provided for in section 3(1)(d) was applicable.

As the activity which was the subject of dispute between the parties was an activity subject to public regulation and not subject to the Competition Act, the Tribunal did not have jurisdiction over the dispute.

As far as the High Court's jurisdiction was concerned, South African Raisins contended that this did not apply as section 65(3) of the Competition Act provides that the Competition Tribunal and the Competition Appeal Court share exclusive jurisdiction in matters relevant to the interpretation and application of that Act. This section however, could not apply at the present time as the Competition Appeal Court had not yet started functioning and judges had not yet been appointed to it.

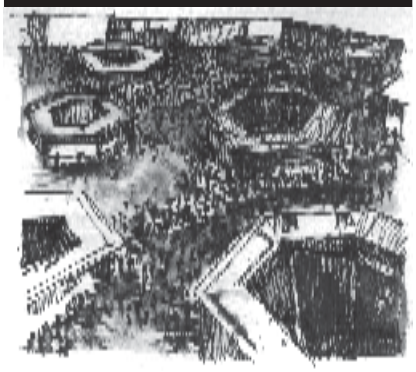
The orders of the Competition Tribunal were set aside.

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE v EAST COAST SHIPPING (PTY) LTD

A JUDGMENT BY McCALL J
DURBAN AND COAST LOCAL DIVISION
4 JULY 2000

2000 CLR 409 (D)

Companies



A court exercising its discretion on whether or not to order a plaintiff to furnish security for costs of the action it has brought may take into account the fairness of requiring the provision of such security. The merits of the dispute between the parties is not relevant in the decision whether or not to order the provision of such security.

THE FACTS

The Commissioner for the South African Revenue Service seized and held certain tyres in which East Coast Shipping (Pty) Ltd had an interest, in terms of section 3A(3) of the Import and Export Control Act (no 45 of 1963). It then retained them and seized further tyres in terms of section 88(1) of the Act.

The seizure of the tyres seriously affected East Coast's financial standing. Some of the tyres had been sold and the amount received in payment of them was being held in trust pending the outcome of the dispute between the parties.

East Coast instituted actions for the release of the tyres. The Commissioner defended the actions and brought an application for the provision of security for costs in the actions which East Coast had brought.

THE DECISION

The merits of the dispute between the parties were irrelevant in deciding whether security should be furnished. It was, in any event, impossible to determine from the pleadings in the action brought by East Coast what the prospects of success were or the merits of the respective claims and defences. The nature of the claim and the defence to it could however, be taken into account in the court's exercise of its discretion whether or not to order the provision of security.

The seizure of the tyres had seriously affected East Coast's ability to find security. It would therefore be unjust to allow the Commissioner to take advantage of the effects of his own action by requiring East Coast to put up security for that action. The Act conferred extensive powers on the Commissioner, and to extend them further by requiring that security be furnished in an action brought to challenge the exercise of those powers would be unconscionable.

It was also significant that the money being held in trust would be available to the Commissioner should he successfully defend the action brought against him. The Commissioner would also receive in forfeit the entire stock of tyres which had been seized. The Commissioner also had available to him a remedy in criminal proceedings which could have been brought against East Coast in terms of the Act.

The application for the provision of security was refused.

VEREINS- UND WESTBANK AG v VEREN INVESTMENTS

A JUDGMENT BY STEGMANN J (SCHABORT J and LABUSCHAGNE J concurring)
WITWATERSRAND LOCAL DIVISION
16 MAY 2000

2000 (4) SA 238 (W)

Banking

A buyer of goods who has authorised the issue of a banker's letter of credit to pay for them may only countermand the instruction to the bank issuing the letter of credit to pay where it had been established that the seller has committed a fraud. If documents that, on their face, conform with the requirements of the letter of credit have been presented on behalf of the seller, the seller must be paid in accordance with the terms of the letter of credit. The fact that the issuing bank has transferred funds payable to the beneficiary to an account designated for that beneficiary and marked 'interdicted' does not mean that the bank has made payment to the beneficiary.

THE FACTS

Veren Investments wished to import two Mercedes Benz motor cars into South Africa. It authorised a firm named Pinebro to attend to this and Pinebro arranged for their acquisition from Boli Speditions- und Vermittlungsgeschäfte GmbH, a German company. Pinebro applied for an irrevocable letter of credit for the purchase from Boli of the two motor cars, but after this application was declined, requested Irvine Trade Finance (Pty) Ltd to do so. It paid Irvine R1 283 174 for this purpose.

Irvine applied to Nedbank for the issue of a letter of credit for US$434 782,61. Irvine paid into a Nedbank account R1 119 356,60 and in February 1991, Nedbank issued the letter of credit, specifying Boli as the beneficiary and stating the payment date as 360 days after issue. The letter of credit cited Vereins- und Westbank, Hamburg, as the paying bank to which the funds would be made available. It was made subject to the Uniform Customs and Practice for Documentary Credits 1983 Revision ICC.

Vereins advised Boli of the letter of credit, discounted the amount and made an immediate payment to Boli. It took cession of Boli's rights in terms of the letter of credit. This was done in terms of a 'forfaiting transaction' between those two parties.

Bills of lading were issued in February 1991 and Boli forwarded these to Vereins. This, and the commercial invoices were forwarded to Nedbank. In November, Irvine informed Boli that the motor vehicles had not arrived in South Africa. Boli responded by furnishing a copy of an invoice addressed to it by an English company recording the sale of two Mercedes Benz motor cars, a bill of lading showing receipt of the vehicles at a container base in Essex and shipment on a vessel for delivery in Durban, a letter of credit issued by Vereins and confirmation of the issue of combined transport bills of lading. These documents related to the acquisition and shipment of four motor vehicles none of which were the two acquired by Pinebro from Boli.

Irvine informed Nedbank of its failure to receive the two motor cars. After consultation with the Reserve Bank, Nedbank paid the amount of the letter of credit into a blocked account in the name of Vereins. The Reserve Bank later authorised the release of the funds. Veren Investments then obtained an interim interdict restraining Nedbank from dealing with the proceeds of the letter of credit pending the institution of an action for a declaration confirming Veren's entitlement to the money. Veren then brought that action. The interim interdict was later substituted with an order preventing Nedbank from discharging its obligations in terms of the letter of credit.

Vereins applied for an order declaring that Nedbank had discharged its obligations under the letter of credit when it made payment into the blocked account, and compelling Nedbank to pay it the money standing to the credit of an account in its name, pre-fixed with the word 'Interdicted', to which Nedbank had transferred the money. Veren opposed this application.

THE DECISION

A buyer of goods who has authorised the issue of a banker's letter of credit to pay for them cannot countermand this instruction to the bank issuing the letter of credit on account of a dispute with the seller over the

quality or quantity of the goods. If documents that, on their face, conform with the requirements of the letter of credit have been presented on behalf of the seller, the seller must be paid in accordance with the terms of the letter of credit. However, where it has been established that the seller has committed a fraud, the bank's customer may countermand his instruction to the bank. The bank must then decide whether the fraud is sufficiently well established to justify a dishonouring of the undertaking to pay made in the letter of credit.

Vereins contended that Nedbank had made the payment to it when it paid the amount of the letter of credit into the blocked account opened in its name. However, the fact that the Reserve Bank had authorised the release of the blocked funds did not make them unconditionally payable. Whether or not they had to be paid to Vereins still depended on its entitlement to them. That entitlement depended on a determination of matters relating to the transactions underlying the letter of credit, including the authenticity of bills of lading relating to the shipment of two Mercedes Benz motor cars from Hamburg for discharge at Durban, confirmation of their shipment, a determination that no fraudulent misrepresentation had taken place in the presentation of the bill of lading to Vereins, that the failure to receive the motor cars was not a result of Irvine's failure to produce the relevant bill of lading, confirmation of the validity of the forfaiting transaction and a determination of whether or not payment by Nedbank into the blocked account amounted to a discharge of its obligations in terms of the letter of credit.

Having regard to the disputes of fact, the court was not able to make any findings necessary to justify the declaratory order sought by Vereins. These disputes of fact would be the subject of determination by the trial court in the action which had been brought by Veren. Until it was determined that Nedbank did have an obligation to make payment in terms of the letter of credit it would be premature to order that it discharged that obligation when it credited the blocked account with that amount.

As far as the order for payment was concerned, the interdict preventing Nedbank from making payment could be construed as conditional upon it being shown that Nedbank had been obliged to make payment, not as conditional upon it being shown that by effecting the book entries by which the money payable under the letter of credit had been transferred from the blocked account to Vereins, Nedbank had effectively made payment to Vereins. The condition however, had not been shown to have been fulfilled as it had not yet been shown that it had discharged its obligations under the letter of credit, this being a matter for determination by the trial court.

The orders sought by Vereins were refused.

BACHNLAL v THE NORTH CENTRAL LOCAL COUNCIL AND THE SOUTH CENTRAL LOCAL COUNCIL FOR THE DURBAN METROPOLITAN AREA

A JUDGMENT BY PILLAY J
DURBAN AND COAST LOCAL DIVISION
30 JUNE 2000

2000 CLR 421 (D)

Contract

A party to an agreement which provides for notice of default prior to cancellation may not summarily cancel the agreement where the default may be remedied within the time period provided for in the notice period. The party cancelling may depend on default which occurs at some time prior to a date by which such default would no longer be considered a breach of the agreement.

THE FACTS

The North and South Central Local Council for the Durban Metropolitan Area sold certain property to Bachnlal subject to a term (recorded in clause 27) that Bachnlal was prohibited from letting the property for a period of five years from the date of the agreement, or until the whole of the balance of the purchase price and interest had been paid. Clause 39 of the agreement provided that the council had the right to cancel the agreement upon a breach of any of its terms. It was provided that such breach would be considered to be a material breach of such term.

The council alleged that Bachnlal had breached the agreement by letting the property to Mohanlal, the second respondent, within the five-year period referred to in clause 27, and in a letter addressed to him, it cancelled the agreement. Bachnlal had in fact entered into a lease with Mohanlal within five years of the agreement having been entered into. The letter of cancellation was however, sent to Bachnlal after the expiry of the five-year period.

Bachnlal contended that the council was not entitled to cancel the agreement because (i) the letter notifying the cancellation did not expressly state that he was in default of the terms of the agreement, (ii) when he received the letter, which was more than five years after conclusion of the agreement, he was not in breach of the agreement, and (iii) cancellation was not preceded by a notice requiring that his default be remedied within a period of seven days, as provided for in clause 39.

Bachnlal sought an order that the purported cancellation by the council was invalid.

Shortly before the council's letter of cancellation, Bachnlal gave notice to Mohanlal to vacate the property. Mohanlal refused to do so. Bachnlal sought an order against him that their lease was lawfully cancelled and requiring that he vacate the property.

THE DECISION

The council would have been entitled to cancel the agreement if breach had occurred within the initial five-year period and cancellation took place within that period as well. There was no reason to distinguish this situation from that pertaining where the breach occurred after the five-year period and cancellation took place after the expiry of that period. The right to cancel after the expiry of this period was also necessary to prevent the dishonest attempts to circumvent the object of agreements such as these, ie the provision of low-cost housing to those in need of it.

As far as the summary nature of the cancellation was concerned, the fact that the breach was capable of remedy was significant. That it was so meant that the seven-day notice period should be applied to the procedures for cancellation and Bachnlal was entitled to have such notice prior to cancellation.

As far as the lease agreement was concerned, it was not affected by any illegality in respect of Bachnlal's title to the property. There was no evidence that termination of that agreement had not been lawfully effected and it had to be considered a valid termination.

The orders sought by Bachnlal were granted.

DEMMERS v BOLAND BANK BPK

A JUDGMENT BY LEVINSOHN J (McLAREN J and PC COMBRINCK J concurring)
NATAL PROVINCIAL DIVISION
17 MARCH 2000

2000 CLR 481 (N)

A settlement agreement entered into in the knowledge that one of the parties has allegedly defrauded the other party and which is intended to settle all disputes between the parties effectively compromises the claim which the defrauded party might have had against the other.

THE FACTS

Demmers entered into an agreement with NBS Boland Bank Ltd (the 'bank') and three other parties in terms of which he conferred on the bank an option to purchase from him 76% of the shares in Holdem (Pty) Ltd . It was provided that if the bank accepted the offer to purchase these shares, an option was conferred on it to also purchase the remaining 24%. On the day before the expiry of the second option was to expire, the parties entered into a second agreement.

In terms of the second agreement recorded that the various rights, claims and obligations of the parties between themselves were settled and they waived any claims against the other. All existing agreements were cancelled. Demmers irrevocably acknowledged that he had no further claims against the bank, whether in contract or delict, and he and the bank waived any claim alleged to subsist against the other.

The bank acquired 100% of the shareholding in Holdem.

Demmers then alleged that in its capacity as banker to the group of companies of which Holdem was a part, the bank had acquired knowledge of Holdem's affairs, on the basis of which it represented to him that the group of companies was hopelessly insolvent and faced winding up. As a result of those representations, Demmers had been induced to enter into the two agreements and in the circumstances, he was entitled to rescind the agreements and recover damages. Demmers brought an action against the bank claiming such relief.

The bank excepted to the claim on the grounds that as the second agreement was a compromise or settlement including the waiver or rights and the cancellation of existing agreements, and that at the time of entering into it Demmers was aware of the facts which he alleged the bank had failed to disclose to him when entering into the first agreement, Demmers had alleged that the second agreement had been induced by a misrepresentation which was not causally linked to the conclusion of the second agreement.

THE DECISION

The second agreement was clearly intended to settle a dispute which had arisen out of the first agreement. The terms of the settlement were stated widely and could be understood to include a settlement of a claim based on fraudulent misrepresentation. Demmers had been aware of the facts upon which such a claim could be based when he entered into the second agreement and could therefore be considered to have settled and compromised his claim in respect thereof when he entered into the second agreement.

Were it to be thought that the second agreement was entered into at a time when Demmers was unaware of the full extent of the alleged fraud being perpetrated on him, and had been induced to enter into the agreement because of his ignorance, this would be inconsistent with the allegation that Demmers entered into the agreement because of the option conferred on the bank in the first agreement.

The exception was upheld.

CONTINENTAL GRAIN SA (PTY) LTD v BRAEBURN MILLING

A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
31 AUGUST 2000

2000 CLR 517 (D)

The terms of a contract may be inferred by a course of dealing conducted by the parties in similar contracts entered into prior to the contract in question.

THE FACTS

In June 1997, Continental Grain SA (Pty) Ltd agreed to sell Braeburn Milling 2000 metric tons of wheat at a basic price of R945 per mt, delivery to be effected from September to December of that year. It was not agreed that he price would escalate for each month of delivery, but this did in fact take place and Braeburn accepted the obligation of paying the escalated prices. In September 1997, the parties concluded a further sale agreement, in terms of which Continental would deliver a further 2000mt of wheat to Braeburn between January and April 1998. The base price was agreed at R968 per mt but no escalation was agreed.

The contracts were concluded orally and immediately they were concluded, Continental placed orders with its holding company for delivery of the wheat.

In December 1997, Continental sent a fax to Braeburn requesting that it sign an unsigned contract in respect of the second sale, quoting prices varying upwards from R968 per mt for each month of delivery. Braeburn queried the stated price but after discussions between the parties, the price was set at R965 per mt escalating at R35 per month, and the quantity was reduced to 1500mt.

Braeburn took delivery of some of the wheat, but queried the calculation of the escalations. By the end of April, it had not taken delivery of a quantity of the wheat and refused to do so. Continental took the view that Braeburn had repudiated the contract and brought an action for payment of damages in the sum of R711 295. Braeburn contended that no contract as alleged by Continental had been concluded and that it had accordingly not been obliged to take delivery of the wheat.

THE DECISION

Although no escalation was agreed in the contract concluded in September 1997, Braeburn knew from past experience that escalation would take place. The escalation was a result of known factors such as storage charges and interest. It could therefore be inferred that both parties agreed on an escalation factor. That the parties had agreed to an escalation could also be inferred by the course of dealings they had entered into during the development of their business relationship.

As all the terms of the contract were sufficiently certain, the parties had concluded a contract. It followed that Braeburn's refusal to take delivery of the balance of the wheat was a repudiation of the contract.

The action succeeded.

MIA v DJL PROPERTIES (WALTLOO) (PTY) LTD

Contract

A JUDGMENT BY DE VILLIERS J
TRANSVAAL PROVINCIAL DIVISION
7 AUGUST 2000

2000 (4) SA 220 (T)

Parties may record the circumstances in which a suspensive condition of their agreement will be deemed to be fictionally fulfilled. The suspensive condition will however, remain a condition for the benefit of the party for whose benefit it was originally included. A deliberate failure to fulfil the condition will not amount to a breach of contract but will allow the application of the doctrine of fictional fulfilment, and a failure to honour ensuing obligations will give rise to enforcement of the other party's rights.

THE FACTS

Mia purchased fixed property from DJL Properties (Waltloo) (Pty) Ltd for R1 850 000. In terms of clause 3.2.2 the sale was subject to Mia obtaining a bank or building society bond in an amount of R1 400 00 within 20 days of acceptance of his offer. The clause provided that the condition would be deemed to have been fulfilled as soon as Mia or the estate agent received confirmation that the bond had been approved by the mortgagee concerned.

DJL alleged that Mia had failed to apply for a bond of R1 400 000 but had applied for a bond of R1 850 000, and had also failed to co-operate with the banks to which application had been made to finalise the bond application. It contended that the suspensive condition should be considered to have been fictionally fulfilled. Mia failed to furnish the guarantees for payment of the purchase price and DJL called upon him to remedy this breach of contract. Mia failed to do so and DJL cancelled the agreement and claimed damages.

DJL's claim proceeded to arbitration and damages of R300 000 were awarded to DJL. Mia brought review proceedings.

THE DECISION

The provision for the deemed fulfilment of the suspensive condition referred to in clause 3.2.2 showed an intention to apply the doctrine of fictional fulfilment should Mia deliberately fail to apply for a bond within the time stipulated. This was therefore not a provision which set out circumstances of a breach of contract, but one which affirmed that fictional fulfilment would apply in the circumstances provided for. It followed that DJL was not entitled to cancel the agreement merely because Mia failed to apply for the bond within the stipulated time.

The suspensive condition operated for the benefit of Mia and not DJL. Mia would have been entitled to furnish guarantees without obtaining the bond at all. For this reason as well, Mia could not become obliged toward DJL merely for having failed to procure the bond within the time stipulated.

Mia had however waived the protection of clause 3.2.2 by having applied for a bond of R1 850 000. That meant that the suspensive condition no longer operated and the agreement became unconditional. Mia had thereafter failed to deliver the guarantees as required in the agreement and thereby breached his obligations in terms of the agreement. DJL had accordingly been entitled to cancel the agreement.

The application to review the arbitration proceedings was dismissed.

K&S DRY CLEANING EQUIPMENT v SOUTH AFRICAN EAGLE INSURANCE CO LTD

A JUDGMENT BY LABE J
(PRELLER AJ and CASSIM AJ concurring)
WITWATERSRAND LOCAL DIVISION
17 FEBRUARY 2000

2000 CLR 494 (W)

Insurance

An insured which holds rights to property but does not own the property is required to establish the basis of its rights to such property in order to show it has locus standi to sue an insurer in respect of damage caused to the property. A time-bar clause in an insurance policy cannot be read subject to an implied term that the provision will not apply in certain circumstances if the insured fails to attempt to obtain an extension of time in order to comply with the time limit.

THE FACTS

K& S Dry Cleaning Equipment insured a building against damage with South African Eagle Insurance Co Ltd. The second appellant, Osizweni Dry Cleaners, which rented the building from K&S, insured equipment in the building with the second respondent, South African Special Risks Insurance Association, against certain perils which were excluded in the SA Eagle policy, viz loss or damage caused in the furtherance of political aims or by public disorder, but excluding loss brought about by theft.

The SA Eagle insurance policy provided that the property insured was 'all premises as stated in each owned or occupied or used by the insured for the purposes of the business'. The property to which K&S held rights was owned by the local authority, Thokoza Town Council, and was an affected site in terms of the Conversion of Certain Rights to Leasehold Act (no 81 of 1988). A certain Nhlapo was the lessee of the land and he held the land as nominee for K&S which erected the building on the land. K&S contended that because the parties knew that K&S could not acquire ownership of land in Thokoza, they must have intended that its lesser rights in respect of the property would entitle it to cover for the perils referred to in the policy.

In terms of clause 6(b) of the policy with SA Eagle, no claim would be payable after the expiry of 24 months from the happening of any event unless the claim was the subject matter of a pending legal action.

In August 1993, the building was damaged in circumstances of political instability and rioting in the area where the building was situated. The evidence showed that it had been done by a certain party whose motivation was theft of the equipment.

On 25 October 1996, K&S and Osizweni instituted action against SA Eagle for payment in terms of the insurance policy. SA Eagle repudiated the policy on the grounds that it had become time-barred in terms of clause 6(b). They also brought an action against SASRIA on the grounds that the damage caused to the building was brought about by public disorder.

THE DECISION

K&S did not hold rights of ownership in respect of the land. It had not shown that it had any other rights in the land and accordingly lacked the locus standi to bring an action against SA Eagle.

As far as the defence based on clause 6(b) was concerned, K&S sought to meet this with the plea that the policy was to be interpreted subject to a tacit term that if the circumstances were such that it could not comply with the time bar, it would be excused from doing so. However, there was no basis for importing such a tacit term. K&S could have asked for an extension of the time limit provided for in the clause. This meant that the tacit term was not required to give business efficacy to the insurance contract. The evidence did not show that it was impossible or dangerous for them to have ascertained the extent of the damage to its property. This was therefore not a reason to excuse them from compliance with the clause.

As far as the claim against SASRIA was concerned, the exclusion applied. The evidence had shown that the property was damaged in the course of theft from the premises. Furthermore, the loss arising from the theft was an interruption of the causes provided for in the policy for which cover would be provided.

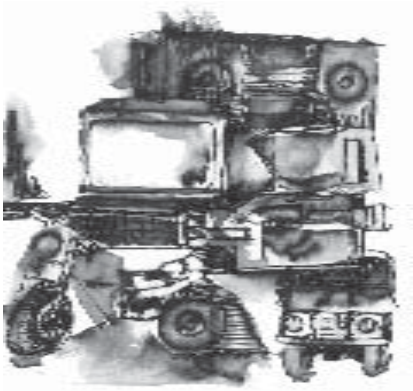
The action was dismissed.

MARQUES v UNIBANK LTD

A JUDGMENT BY CLOETE J
WITWATERSRAND LOCAL DIVISION
29 OCTOBER 2000

2000 CLR 451 (W)

Credit Transactions



A credit receiver is obliged to ensure that he receives notices sent to his domicilium address. A letter which is sent to a credit receiver in terms of section 11 of the Credit Agreements Act (no 75 of 1980) need not be received by the credit receiver in order for there to be proper compliance with the notification provisions of the section. Accordingly, a registered letter which is returned to the credit grantor by the post office 'unclaimed' does comply with the provisions of this section.

THE FACTS

Unibank Ltd sold a motor vehicle to Marques in terms of a written contract which was governed by the Credit Agreements Act (no 75 of 1980). In terms of clause 10(a), upon default by Marques, Unibank would be entitled to claim immediate payment of all amounts payable in terms of the contract, or cancel the contract and repossess the vehicle and claim the difference between the balance outstanding and the value of the vehicle.

Marques did default and Unibank sent a letter to him by registered post notifying him of arrears outstanding and indicating that if the arrears were not paid within thirty days of the posting/receipt of the letter, it would cancel the contract and claim possession of the vehicle. The letter was returned to Unibank by the post office and marked 'unclaimed'.

Unibank then brought an action against Marques for confirmation of its cancellation of the contract, return of the vehicle to itself, payment of the sum due in terms of clause 10(a) of the contract and forfeiture of all instalments paid. Marques was unable to return the vehicle to Unibank. Unibank obtained judgment in its favour for payment of the balance outstanding in terms of the contract.

On appeal, Marques challenged Unibank's right to claim payment of the balance outstanding on the grounds that the letter sent to him failed to comply with section 11 of the Act. The section provides that no credit grantor shall be entitled to claim the return of goods subject to a credit agreement unless the credit grantor has, by registered letter, notified the credit receiver of his failure to comply with his obligations in terms of the credit agreement and has required him to comply within thirty days of the posting of the letter.

THE DECISION

Unibank was obliged to comply with the provisions of section 11 in order to impose on Marques the obligations under the contract. Its claim for return of the vehicle was necessary in order to enable it to quantify its damages and entitle it to claim liquidated damages as provided for in clause 10(a). The question was whether or not the letter sent to Marques complied with section 11 of the Act.

The letter contemplated two alternatives: that the thirty-day period would run from the date of posting or from the date of receipt. The latter did not take place. Accordingly, the former applied, and the thirty-day period began on the date of posting of the letter. The fact that the letter did not actually come to the notice of Marques did not mean that section 11 had not been complied with. This is because the section provides that the letter must be sent by registered post. The credit receiver has a duty to ensure that communications sent to him at his domicilium come to his attention.

Section 11 of the Act obliges the credit grantor to 'notify' the credit receiver of his default, not 'inform' him of it. This distinction shows that the intention of section 11 is to require compliance with its formalities, rather than ensure that the credit receiver receives actual notice of his default.

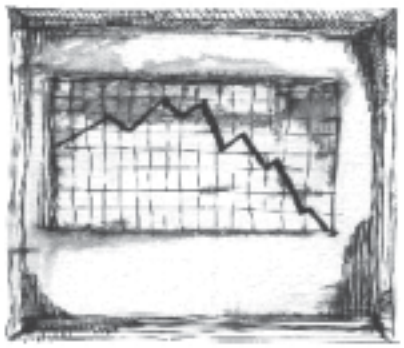
The letter sent by Unibank therefore did comply with section 11 of the Act. The appeal was dismissed.

CHOICE HOLDINGS LTD v YABENG INVESTMENT HOLDING CO LTD

A JUDGMENT BY WUNSH J
WITWATERSRAND LOCAL DIVISION
6 APRIL 2000

2000 CLR 442 (W)

Insolvency



A company against which an order has been made for its winding up is not entitled to an order suspending the winding up proceedings pending an appeal against that order where the basis of the appeal concerns the process of liquidation which followed the grant of the order.

THE FACTS

On 16 July 1999, an order winding up Choice Holdings Ltd was made. The basis of the application for its winding up was that the company was unable to pay its debts. Leave to appeal the order was granted.

The liquidators took control of the company and instituted an inquiry in terms of section 417 of the Companies Act (no 61 of 1973). At the inquiry, the interrogees contended that the inquiry was incompetent as the winding up of the company had been suspended by the appeal proceedings which were then pending.

The company brought an application for an order suspending the winding up proceedings pending the determination of the appeal. The application was based on Rule 49(11) which provides that where an appeal against an order of court has been noted, the operation and execution of the order shall be suspended pending the decision of the appeal, unless the court which gave the order otherwise directs.

THE DECISION

Section 150(3) of the Insolvency Act (no 24 of 1936) provides that when an appeal has been noted against a final order of sequestration, the provisions of the Act shall nevertheless apply as if no appeal has been noted, provided that no property belonging to the sequestrated estate shall be realised without the written consent of the insolvent person. Section 339 of the Companies Act (no 61 of 1973) provides that in the winding up of a company unable to pay its debts, the provisions of the law relating to insolvency shall insofar as they are applicable be applied in respect of any matter not specifically provided for by that Act.

The opening words 'in the winding up of a company' in section 339 do not apply to the legal proceedings giving rise to the grant or refusal of the winding up order, with the consequence that section 150(3) is not applicable to such proceedings. However, the question was whether or not what was being dealt with was a step in the legal proceedings which led to the grant of the order, or with the process of liquidation which had already begun.

In this case, a final winding up order was granted. This commenced the process of liquidation and the events that followed were events which took place in the process of liquidation. It followed that section 150(3) was applicable to the events in question and its provisions were applicable in the present case.

The application was dismissed.

MULLER v DE WET N.O.

JUDGMENT BY FLEMMING DJP (HUSAIN J and PRELLER AJ concurring)
WITWATERSRAND LOCAL DIVISION
14 JUNE 2000

2000 CLR 468 (W)

The sale of property from an insolvent estate by public auction or public tender must be advertised. The provisions of section 82(1) of the Insolvency Act (no 24 of 1936) are peremptory and not merely directory, and failure to comply therewith results in invalidity of a sale.

THE FACTS

The creditors in the insolvent estate of Muller passed a resolution empowering De Wet and co-trustees in the insolvent estate to sell all assets, whether fixed property or moveable goods of whatever nature, by public auction or tender or private treaty under normal terms applicable to the practice of sale. A second resolution empowered the trustees to sell by public auction, public tender or private treaty, (i) Portion 60 (a portion of Portion 43) of the farm Klippooortjie 110, and (ii) the Remainder of Portion 43 of the farm Klippoortjie 110. The sale of these properties was subject to the condition that if the offer for them was insufficient to meet the claims of secured creditors, the offer would not be accepted without the written consent of the creditors.

The estate owned Portion 60 of Klippoortjie, which had not been cut off from Portion 43. The advertisement of the auction which was held for the sale of the properties however, described the property as Portion 60, a portion of Portion 43 of the farm Klippoortjie 110. The second property was described in the advertisement as 'the remaining extent of portion 33'.

The properties were sold by public auction and the sale was confirmed by the trustees. Muller brought an application to declare the sale invalid, basing the application on the inadequacy of the resolutions and the failure of the advertisements to properly describe the estate property.

THE DECISION

Section 82(1) of the Insolvency Act (no 24 of 1936) provides that (a) the trustee of an insolvent estate shall sell all the property in the estate as soon as he is authorised to do so, and (b) a sale by public auction or public tender shall be after notice in the *Gazette* and after such other notice as the Master may direct, and in the absence of directions from creditors, upon such conditions as the Master may direct.

The section implies that, whichever basis for the sale is followed, every sale by auction must be advertised. The reference to the *Gazette* is intended to be a reference to both procedures, whether the trustee sells the property with or without directions from creditors. The purpose of the provision is to ensure that a minimum amount of marketing is adhered to.

The property referred to in the resolutions and as advertised was not the property of the insolvent estate as its description therein varied from its actual description. This could not be considered to be a mere misdescription of the same property, but a reference to something other than the property actually in the estate. The properties owned by the estate were never advertised in the *Gazette* and there was a failure to comply with section 82(1). In consequence, the sale was prejudicial to the estate, as potential purchasers would have been misled by the information given in the advertisement.

Section 82(8) did not remedy the defect. The section provides a protective shield for a purchaser but does not protect the trustee.

The provisions of section 82(1) were not directory only. They require that the property of an insolvent estate be advertised according to its proper description and under the supervision of the Master. Failure to comply therewith constitutes a deviation which results in invalidity of any sale.

The application was granted.

EX PARTE ANTHONY

A JUDGMENT BY BLIGNAULT J (DAVIS J and IMMERMAN AJ concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
29 MAY 2000

2000 (4) SA 116 (C)

In order to prove that sequestration will be to the advantage of creditors, an applicant must give a realistic indication of what the expected price of its property will be upon its sale by the trustee in insolvency.

THE FACTS

Anthony and seven others applied for the sequestration of their estates. In support of their applications, they submitted reports by a valuer who placed a value on fixed property held by the applicants. In substantiating the value, the valuer indicated the various factors which would determine the expected price at which the property would be sold. He stated that he had followed the same procedures for valuing property as would be followed by a mortgage lender and in the light thereof, had conservatively valued the property at 80% of the value he estimated the value to be.

The valuer also stated that the actual price received for a property sold from an insolvent estate could vary considerably, even amounting to a nominal sum. This indicated that the fixing of a price was unscientific but that a sale from an insolvent estate would normally result in a higher price than one from ordinary execution proceedings.

A separate affidavit by Anthony's attorney affirmed that banks and financial institutions were normally willing to lend 80% of the market value of fixed property.

The court questioned whether or not the applicants had adequately shown that there was an advantage to creditors in the sequestration of their estates.

THE DECISION

What had to be determined was the value of the property if it was sold by the trustee of the insolvent person. There was no indication of what this amount would probably be.

The valuer had attempted to determine the market value of the properties. However, in a sale by a trustee in insolvency, a willing buyer and a willing seller were not present. A lower price could therefore be expected, and this was borne out by the Master's report which had stated that lower than market prices were often achieved in sales from insolvent estates.

It was probably true that a higher price would be fetched in a sale from an insolvent estate, as compared with a sale following ordinary execution proceedings, and that financial institutions would lend 80% of the market value. However, this was insufficient to indicate was the probable sale price would be on the basis of the market value of the property. Without evidence of the expected proceeds of the sale of their property, none of the applicants had shown that sequestration would be to the advantage of creditors.

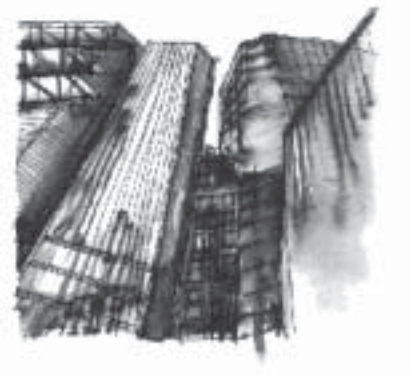
The applications were dismissed.

TIMMERMAN v LE ROUX

A JUDGMENT BY LABE J and VAN OOSTEN AJ
WITWATERSRAND LOCAL DIVISION
1 JUNE 1998

2000 (4) SA 59 (W)

Property



A landlord is not entitled to an order for the attachment of goods at the leased premises without grounds for believing that the tenant is about to remove the goods in order to avoid paying rent. A tenant's indication that rent is to be paid from a deposit paid in terms of the lease does not give a basis for such a belief.

THE FACTS

In May 1997, Timmerman brought an action against Le Roux for payment of arrear rental of R476,36 for the period 1-8 May, and damages of R59,67 per day. The summons included a notice in terms of section 31 of the Magistrates' Courts Act (no 32 of 1944) prohibiting Le Roux from removing goods from the premises.

On 12 May, Timmerman applied ex parte for an order that the sheriff be authorised to attach movable property at the leased premises to cover the amounts claimed in the summons. She did so in terms of section 32 of the Act. She alleged that she believed that Le Roux was preparing to remove goods from the premises in order to avoid paying the rental. A rule to this effect was then granted.

Le Roux opposed the grant of the order, alleging that she had paid the rental claimed and stating that she had earlier indicated to Timmerman that this rental was to be obtained from the deposit which had been paid in terms of the lease.

The rule was discharged. Timmerman appealed.

THE DECISION

Timmerman had alleged that she believed Le Roux was about to remove movable property from the premises in order to avoid payment of rent. However, the letter indicating that the rent was to be obtained from the deposit gave no grounds for this belief. The fact that Timmerman thought Le Roux was about to vacate the premises in order to avoid paying rent was not a relevant factor. Grounds for the attachment of the goods had accordingly not been furnished in terms of section 32 of the Act.

Section 32 authorises the attachment of goods in the circumstances therein set out. However it does not authorise the removal of the goods without proper compliance with the Rules. The order given for the removal of the goods was therefore not properly given.

The appeal was dismissed.

PLEASURE FOODS (PTY) LTD v TMI FOODS CC

A JUDGMENT BY VAN DIJKHORST J
TRANSVAAL PROVINCIAL DIVIISON
19 MAY 2000

2000 (4) SA 181 (T)

Trade Mark

A purely descriptive term such as 'mega' when used in relation to goods is not capable of registration as a trade mark.

THE FACTS

Pleasure Foods (Pty) Ltd held a registered trade mark in the name 'megaburger' in classes 29, 30 and 42, relating to food products and retail food outlets. Through its fast-food restaurants, it sold large hamburgers which were named 'mega burger' on its menu. The mark was not however, used in advertising. The mark had been registered in 1990.

TMI Foods CC conducted a fast-food business in one of the town's in which Pleasure Foods also conducted its business. It did so under the name 'Mega Burger Fast Foods' and had done so since 1991. It contended that it was entitled to use this name as the term 'mega' was merely descriptive of its product and had been used without knowledge of the trade mark held by Pleasure Foods.

Pleasure Foods applied for an interdict restraining TMI from infringing its trade mark rights. TMI counter-applied for the removal of the mark from the register.

THE DECISION

Section 10(2)(a) of the Trade Marks Act (no 194 of 1993) provides that a registered mark shall be liable to be removed from the register if it is not capable of distinguishing, and sub-section (b) provides similarly in the case of a mark which consists exclusively of a sign or an indication which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or other characteristic of the goods or services, or the mode or time of production of the goods or of rendering of the services.

The term 'mega' was used in a descriptive sense to indicate the nature of the product sold by TMI. The dictionary showed that the term could be used in a variety of senses, each connoting the idea of a large item, this being its etymological origin. The evidence was that the term was a generic one which had been applied in English to a great range of topics and items. It followed that in the case of the retail food industry, the term was similarly used and that a megaburger was merely an indication of a large hamburger.

The term 'megaburger' was therefore not distinctive as to origin of the product but was merely descriptive of the size of the hamburger. It was liable to be removed from the register of trade marks in terms of section 10(2) of the Act.

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

THE AKKERMAN FULLWOOD SHIPPING SA v MAGNA HELLAS SHIPPING SA

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
12 APRIL 2000

2000 (4) SA 584 (C)

Shipping

In determining whether a party has made out a prima facie case on the grounds that it is entitled to repayment of what it has paid under an avoided contract, a court will take into account the benefits received by the claimant under the avoided contract. An order that a party provide security for costs is final and definitive and accordingly cannot be varied or set aside, though it may be appealed against.

THE FACTS

Magna Hellas Shipping SA arrested the *Akkerman* commencing an action in rem for payment of US$493 126. Magna Hellas alleged that the *Akkerman* was an associated ship of the *Nikita Mitchenko* on which it had effected repairs at Odessa in 1996. The repairs had been carried out in terms of a written contract concluded in Odessa between Magna Hellas and the owner of the *Nikita Mitchenko*, the Black Sea Shipping Co (Blasco).

Fullwood Shipping SA, the owner of the Akkerman, defended the claim with the allegation that according to Ukrainian law, the repair contract was invalid and unenforceable against it. Fullwood's alternative defence was that Magna Hellas had failed to complete the repair work within the stipulated time for completion and was accordingly liable for the payment of US$5 000 per day in respect of the delay, subject to a maximum of US$79 312. Fullwood counterclaimed for repayment of US$300 000 it had paid in terms of the contract, alternatively US$79 312. The contract price for the repair work had been US$793 126.

Fullwood successfully obtained an order directing Magna Hellas to provide security in the sum of US$353 646,67 and £42 105 in respect of the costs of defending the action. Magna Hellas failed to provide the security and Fullwood accordingly applied for the dismissal of the action and for the setting aside of the arrest of the Akkerman. Magna Hellas applied for an order reviewing and setting aside the Registrar's determination of the amount of security and for an order staying the order directing it to provide security.

Fullwood also applied for security for its alternative counterclaims in their capital amounts with interest. This application was brought under section 5(2)(a)-(c) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983).

THE DECISION

As the order directing the provision of security was not merely interlocutory, nor a mere ruling, it was final and definitive in effect in regard to security and could not be varied or set aside, although it could be appealed against. The application for an order staying the order directing the provision of security was therefore dismissed.

As far as the application for the provision of security for Fullwood's claims was concerned, assuming that the repair contract was void and unenforceable in the Ukraine, the question was whether or not this meant that the US$300 000 which had been paid to Blasco had to be repaid to Fullwood, either fully or in part. Applying the presumption that in the absence of evidence to the contrary, the law of a foreign country is the same as our own, restitutio in integrum would have to be applied. This would mean that each party would have to tender what it had received under the contract and if unable to do so, make up any deficiency by a monetary adjustment. On this basis, it appeared unlikely that Fullwood would recover the full amount of US$300 000. From this amount there would have to be deducted the value of the benefits it had received. Given the fact that the contract price had been US$793 126, it appeared that Fullwood had received the full benefit of US$300 000. It therefore appeared not to have made out a prima facie case in respect of its application for security.

As far as its alternative claim based on the penalty of US$5 000 per day was concerned, it

appeared that Blasco was entitled to payment of this amount as the evidence showed that redelivery of the *Nikita Mitchenko* had taken place late. The maximum of US$79 312 applied, and a prima facie case for payment of this amount had been made out. Fullwood's need for security was also genuine and reasonable, given the fact that Magna Hellas was a peregrinus and without assets in South Africa. Fullwood was entitled to security in the sum of US$79 312.