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A SURVEY OF THE CURRENT CASE LAW

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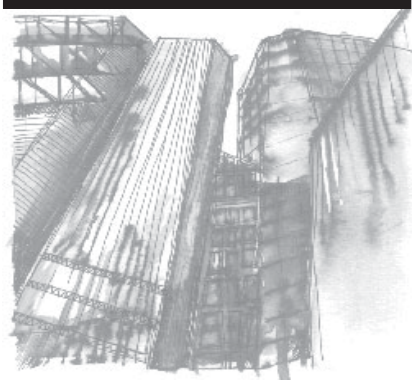
SUPREME COURT OF APPEAL
30 MAY 2006

2006 (6) SA 605 (A)

Property



A tenant which effects improvements to urban property is entitled to exercise a right of retention against a landlord's claim for ejection.

THE FACTS

Rand Airport Holdings (Pty) Ltd owned property occupied by the Business Aviation Corporation (Pty) Ltd originally under a lease agreement concluded with the previous owner.

Business Aviation alleged that when Rand Airport became the owner of the property, the parties concluded a verbal long-term lease. In support of the allegation, it indicated that it had effected extensive improvements to the property, that the sale agreement between Rand Airport, that the seller had not warranted that any improvements belonged to the seller, and that tenants would be compensated for any improvements in the event of Rand Airport selling the property.

Business Aviation paid rental to Rand Airport on an escalating basis. Rand Airport however, wished Business Aviation to vacate the property. It brought an action to eject Business Aviation.

One of the defences raised to the action was that because it had effected improvements to the property, amounting to several million rands, Business Aviation was entitled to assert a right of retention until such time as Rand Airport reimbursed it for the money so spent. Whether or not Business Aviation was entitled to assert such a right was determined on appeal.

THE DECISION

A lessee's right of retention in respect of improvements effected to the leased property was curtailed by legislation of the Estates of Holland in the seventeenth century. The import of the legislation was that lessees retained their right to compensation for improvements, but their claim was limited to improvements effected with their landlord's consent. At the end of the lease period, the lessee had to vacate the property before he could institute his claim for compensation.

This legislation became part of South African law. However, the question remained whether it applied to rural properties only or urban tenements as well. Originally, the legislation applied only to rural properties. Subsequent South African judgments appear to have taken the view that it applied equally to rural and urban properties. However, the grounds upon which these judgments took this view was based on incorrect reasoning and they could not be followed.

Rand Airport could therefore not depend on the legislation in answer to Business Aviation's assertion of its right of retention. Business Aviation was entitled to assert the right.

The appeal succeeded.

DREYER N.O. v AXZS INDUSTRIES

A JUDGMENT BY BRAND JA
(HARMS JA, MTHIYANE JA,
JAFTA JA and NKABINDE AJA
concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2005

2006 (5) SA 548 (A)

Contract

An action to enforce rights of ownership must show that a real agreement underlay the acquisition of the rights of ownership.

THE FACTS

Representatives of AXZS Industries attended an auction at which they purchased certain movables. The auction was held by the provisional liquidator of AF Dreyer and Co (Pty) Ltd and was preceded by an oral agreement between the parties to the effect that the successful bidder would purchase all of the goods at the auction excluding certain identified assets. Prior to the auction, the auctioneer read out the terms of sale, clause 1 of which contained the provision that the auctioneer's sole obligation was to solicit higher offers or bids in respect of all the assets 'as per annexure A hereto'. Clauses 20 and 21 listed items which were, respectively, excluded from and included in the sale.

Immediately after the auction, AXZS signed a written agreement of sale which provided that ownership in the assets would pass to the buyer on confirmation of the sale by the liquidators when the purchase price was paid in full and all other conditions met. AXZS paid the purchase price of R3,4m.

AXZS took possession of the items referred to in the agreement of sale, as well as others. The goods were left at the premises of the auction and thereafter, the shareholder in AF Dreyer refused to give AXZS delivery of the other goods, contending that they were not items to which the auction sale related as they were not listed in annexure A and not included in clause 21.

AXZS brought an action for delivery of the goods, basing its claim on its rights as owner. The possessor of the goods, trusts of which Dreyer was the trustee, refused to deliver

THE DECISION

The essential question was whether or not the equipment claimed by AXZS Industries formed part of the subject matter of the auction. This depended on whether or not the prior oral agreement contended for by AXZS had in fact been concluded and, if it had, whether it could be taken into account in view of the parol evidence rule.

The liquidators had confirmed the sale after the auction had taken place. They confirmed the written terms of the sale, and no more than that. They therefore did not confirm the terms of any oral agreement extending the sale to the items contended for by AXZS. The real agreement upon which AXZS relied to establish its ownership of the items therefore did not refer to the items in respect of which they claimed ownership. Notwithstanding the applicability or otherwise of the parol evidence rule, or any exception to it, therefore, the evidence did not support AXZS's claim to ownership.

Furthermore, the evidence indicated that Dreyer's representative never had any intention of selling the items in question. Not only did he have no authority to do so, he also had no intention of doing so. Therefore the real agreement required to support AXZS's claim to ownership did not materialise on this ground as well.

AXZS was not the owner of the goods and could not claim delivery of them. Its action failed.

DRIFTERS ADVENTURE TOURS CC v HIRCOCK

A JUDGMENT BY ZULMAN JA AND CONRADIE JA (FARLAM JA, MLAMBO JA AND MAYA AJA concurring)
SUPREME COURT OF APPEAL
29 SEPTEMBER 2006

2006 CLR 441 (A)

An indemnity clause, read in context, does not exclude liability for negligence in circumstances not contemplated by the parties to the indemnity.

THE FACTS

Drifters Adventure Tours CC conducted a tour which Hircock participated in. The tour involved her being a passenger on Drifters' bus. The terms and conditions of the tour, which Hircock signed, included an indemnity. Just above her signature, it was provided that she absolved Drifters and its staff of any liability whatsoever and realised that she undertook the venture entirely at her own risk. It also referred to an indemnity recorded on the reverse side, which provided that she accepted that Drifters did not accept responsibility in respect of any loss, injury, illness, damage, accident, fatality, delay or inconvenience experienced from time of departure to time of return. The indemnity was prefaced 'Due to the nature of hiking, camping, touring, driving and general third-world conditions on our tour/ventures, DRIFTERS, their employees, guides and affiliates, do not accept responsibility for any client or dependant thereof'.

While on the tour, the bus in which Hircock was travelling underwent an accident on a public road. This occurred due to the negligence of the driver, who had been employed by Drifters. Hircock suffered injuries and claimed compensation from Drifters.

Drifters contended that the indemnity signed by Hircock exempted it from responsibility for its employee's negligence. Hircock contended that the indemnity did not exclude liability if Drifters had been at fault.

THE DECISION

The indemnity was stated in wide terms but had to be read in the context of the contract as a whole, including the provisions on the reverse side of the document. Those stated above her signature were in wide terms, and sufficient to exclude liability for negligence, it was necessary to read them in the light of the provisions on the reverse side of the document as well. There, no mention is made of negligent driving by an employee of Drifters.

A person reading the indemnity would not understand it to cover the negligent driving of a Drifters employee while being conveyed on a public road. The driving referred to in it would be understood as driving on roads uniquely expected to be experienced while on a tour, as opposed to public roads which are just as likely to be used in other circumstances. The negligent driving which did occur on a public road was therefore not covered by the indemnity.

DALJOSAPHAT RESTORATIONS (PTY) LTD v KASTEELHOF CC

A JUDGMENT BY MEER J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
15 JUNE 2006

2006 (6) SA 91 (C)

The High Court does not have jurisdiction to hear an appeal against an award given in arbitration proceedings.

THE FACTS

Daljosaphat Restorations (Pty) Ltd performed extensive building work and renovations to Kasteelhof CC's hotel under a building agreement concluded between them. A dispute arose between the parties, and following negotiations, they concluded a settlement agreement. In terms of that agreement an arbitration of their dispute was to be held.

The arbitration took place, and the arbitrator decided the dispute in favour of Daljosaphat. Kasteelhof filed a notice of appeal against the award and the finding of the arbitrator.

Daljosaphat contended that no right of appeal had been agreed to in the settlement agreement and applied for an order that the arbitrator's award be made an order of court. Kasteelhof brought a counter-application in terms of which it sought an order that the arbitration agreement be declared void, and the proceedings before the arbitrator and the award be declared a nullity.

THE DECISION

The first issue for consideration was whether the filing of the notice of appeal was a bar to the granting of an order in terms of section 31 of the Arbitration Act (no 42 of 1965). If the court had jurisdiction to hear an appeal, this would be a bar since an appeal would be pending.

A High Court's jurisdiction is circumscribed by section 19 of the Supreme Court Act (no 59 of 1959). This Act gives the court jurisdiction to hear appeals from inferior courts within its area of jurisdiction but does not provide a basis for jurisdiction in an appeal from an arbitration award. The Arbitration Act does not confer jurisdiction in the case of an appeal. Accordingly the court does not have jurisdiction to hear an appeal in this case.

The fact that the settlement agreement might have included a provision that there was a right of appeal could not confer jurisdiction on the court. This provision was severable from the settlement agreement and its invalidity did not affect the rest of the agreement.

The arbitration award was therefore made an order of court. The counter-application was dismissed.

GARDNER v MARGO

JUDGMENT BY VAN HEERDEN JA (SCOTT JA, ZULMAN JA, MAYA AJA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2006

2006 (6) SA 33 (A)

A contract is to be interpreted according to its literal meaning even when it omits terms which a party contends should have been included in it. Secondary evidence of its meaning is also permissible when the contract so interpreted remains ambiguous.

THE FACTS

Gardner and Mr J.A. Joubert were founding members of OTR Mining Ltd, Gardner being the company's managing director and chairman, and Joubert being its mining director. The company was established in 1995 as a management and exploration company. It began exploiting alluvial gold deposits at the Klein Letaba mine in Limpopo.

In 1997, OTR was listed on the Johannesburg Stock Exchange . Joubert and Gardner were its two major shareholders, holding some 34 percent of the issued shares. They concluded a 'pool agreement', the purpose of which was to restrict the sale of their shares by prohibiting alienation to a non-pool member for five years from the date of listing on the stock exchange. After the listing, the company experienced severe financial difficulties.

In February 1998, Joubert signed a written contract of mandate. In it, Joubert instructed Gardner to act as his sole agent in the sale of 12 853 580 of his OTR shares, the amount payable to Joubert being an amount of forty cents per share. The shares were to be sold over a period of three months and OTR guaranteed Joubert a total consideration amount calculated on the total shares held by Joubert at a price of forty cents per share. Joubert would be entitled to payments at specified dates within the three month period. Following the sale of the shares, on 31 August 1998, Joubert would retire.

Gardner sold 9 200 000 of Joubert's shares, receiving a total consideration of R10 274 277. From these sales, he paid Joubert R3 680 000 less certain payments due by Joubert. The amount of R3 680 000 represented the price of forty cents per share referred to in the mandate. Joubert contended that he was entitled to the full R10 274 277, less expenses. He also contended that as regards the balance of the shares mandated for sale, if Gardner had not in fact sold them, he should have done so, and he was entitled to the proceeds of their sale at the market price for them during the period when they should have been sold.

Joubert ceded his claims to Margo. Margo contended that the mandate agreement should be rectified so as to provide that the 'minimum' amount payable to Joubert would be forty cents per share, alternatively that the mandate, properly interpreted, was to the effect that Joubert was guaranteed no less than forty cents per share for the shares Gardner was authorised to sell. Gardner contended that OTR had guaranteed payment in terms of the mandate and that this constituted a breach of the provisions of section 38 of the Companies Act (no 61 of 1973).

Gardner contended that the agreement between the parties was partly oral and partly in writing and that it was orally agreed that any amount received in excess of forty cents per share would be paid to OTR as compensation for Joubert's negligent conduct in erroneously determining the predicted yield of gold per ton of alluvial gold bearing ore, and employing the incorrect mining methods for the extraction of gold from such gold bearing ore.

THE DECISION

There was no express term in the mandate that Gardner was obliged to sell the shares at prevailing market prices, nor that he was to pay Joubert the full proceeds from the sale of the shares. It was silent on the fate of the proceeds of the sale over and

above forty cents per share. The literal meaning of the mandate as it stood was that Joubert would be paid forty cents per share.

Taking into account the nature and purpose of the mandate, it was clear that Joubert was severing his ties with OTR. He was entitled to payment in advance of his retirement and without regard to the actual date of sale of the shares. Taking into account the circumstances prevailing at the time the mandate was concluded, the fact that OTR was experiencing severe financial difficulties was indicative of the fact that Joubert probably wanted to bail out of the company as quickly as possible. Insofar as there was an ambiguity in the mandate terms, the subsequent conduct of Joubert in seeing the statements of account reflecting the price of forty cents per share indicated that the mandate in fact restricted his entitlement to forty cents per share.

As far as the claim for rectification was concerned, there was no evidence to support this.

As far as the oral terms were concerned, the evidence showed that in all probability, these were agreed to between the parties. Margo did not discharge the onus of disproving this.

Gardner was however, obliged to pay Margo in respect of the balance of the shares, which the evidence showed had been sold. The price payable to Margo for these shares was forty cents per share, in terms of the mandate.

The guarantee given by OTR in respect of the shares was not intended to provide financial assistance to anyone. The guarantee therefore did not fall foul of section 38 of the Companies Act.

[27] As regards the nature and purpose of the mandate, it is also clear from the terms of the written contract that Joubert was, with the agreement of Gardner and OTR, severing his ties with the latter. As was submitted by counsel for the appellants, the contract cannot be regarded as being simply a straightforward mandate to sell shares given by Joubert to Gardner. This is illustrated by the fact that the first payment of R750 000 to Joubert had to be made by 3 March 1998 (less than a week after the conclusion of the contract) and that this payment (as well as the second payment in the same amount, to be made by 31 March 1998) was not linked to, or dependent upon, the sale of any specific 'tranche' of shares by the dates specified. On the contrary, the mandate envisaged that the first 'tranche' of ±4 000 000 shares would be sold during a period of approximately one month from the date of signature thereof, without obliging Gardner to sell these shares on any single day during that month. The same applies to the sale of the other two 'tranches' of shares.

MASTERSPICE (PTY) LTD v BROSZEIT INVESTMENTS CC

A JUDGMENT BY FARLAM JA (HOWIE P, BRAND JA, JAFTA JA AND MAYA AJA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2006

2006 (6) SA 1 (A)

The description of a term of a contract as a 'warranty' does not necessarily mean that breach of the term entitles the other party to cancel the contract. Breach of a term resulting in a claim for reduction of the purchase price or payment of the value of what was not delivered ordinarily confines the innocent party to those remedies, rather than cancellation of the agreement.

THE FACTS

In August 2000, Broszeit Investments CC sold to Masterspice (Pty) Ltd a spice blending business as a going concern for R2 198 574 plus the value of stock. The agreement contained certain 'seller's warranties'. Two of them were provided for in clauses 9.3 and 9.10.1.

Clause 9.3 provided that Broszeit warranted that all assets sold were its property, would be fully paid for, and were not subject to any lien or right of retention. Clause 9.10.1 provided that Broszeit was not aware of any factors that could negatively impact on the smooth and profitable operation of the business after the date of possession.

Clause 13 provided for the right of either party to either enforce the agreement or cancel it and claim damages, in the event of the other party committing a breach of the agreement and failing to remedy the breach within 14 days of written notice of the breach. Cancellation was only possible if the breach was a material breach and was incapable of being remedied by the payment of money.

Shortly after the conclusion of the sale, Masterspice lost the custom of the largest customer of the business, Today Frozen Foods, which had accounted for approximately 46% of turnover. The total turnover of the business declined significantly, the majority of its clients being lost.

Masterspice alleged that Broszeit had breached clause 9.3 in that some of the recipes and product formulations sold were not Broszeit's property, and had breached clause 9.10.1 in that it had disseminated some of those formulations resulting in a negative impact on the smooth and profitable operation of the business.

Masterspice applied the provisions of the breach clause and claimed cancellation of the sale and repayment of the purchase price and return of the business. Broszeit refused to comply with the demand. Masterspice applied for the liquidation of Broszeit.

Broszeit denied that it had breached the agreement as alleged and contended that in any event, the alleged breach was not a material breach.

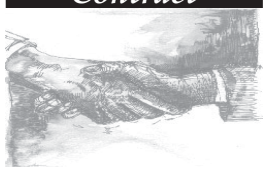
THE DECISION

Following the hearing of oral evidence in the matter, the court a quo held that a breach of the warranty in clause 9.3 had been established and that this was a material breach, but that it had not been shown that the breach was incapable of being remedied by the payment of money.

The fact that the obligation provided for in clause 9.3 was described as a 'warranty' did not indicate that the breach thereof entitled Masterspice to cancel the agreement. The question was in what sense did the parties use the term?

The parties had included provision for other obligations under 'seller's warranties' which were clearly terms whose breach could be remedied by monetary payment. It was clear that they had not attached any special significance to the description 'warranty' and had therefore not clearly intended that it referred to an obligation breach of which would give rise to the right to cancel the agreement.

The reality was that some of the formulations forming part of the business assets were not the property of Broszeit, but this default gave rise to a right to claim payment of the value of



what was not delivered and possibly a reduction in the purchase price. However, it did not give rise to a right to cancellation of the sale, merely because the business was no longer commercially viable in relation to the purchaser's initial outlay.

Masterspice failed to prove that it was entitled to cancel the agreement. Accordingly, it was not entitled to an order for the liquidation of Broszeit.

NATIONAL SORGHUM BREWERIES LTD v CORPCAPITAL BANK LTD

A JUDGMENT BY JAFTA JA (MPATI DP, NUGENT JA, COMBRINCK AJA and MAYA AJA concurring)
SUPREME COURT OF APPEAL
23 FEBRUARY 2006

2006 (6) SA 208 (A)

A non-variation clause does not prevent the parties thereto concluding a subsequent agreement relating to similar subject matter of the first agreement. Agreements concluded in terms of an existing master agreement containing such a clause do not purport to vary the terms of that agreement merely because they are concluded on terms not contained in the master agreement.

THE FACTS

Afinta Financial Services (Pty) Ltd ceded its rights in certain vehicle leasing agreements to Afinta Finance Ltd. The cession was incorrectly stated to be a cession in securitatem debiti, the parties having actually intended that it would be an out-and-out cession. Afinta Finance then ceded the lease agreements to Corpcapital Bank Ltd. This was correctly stated to be a cession in securitatem debiti, Corpcapital having agreed to lend money to Afinta Finance taking the cession as security.

Both cession agreements contained a non-variation clause, to the effect that no variation of the agreements would be valid unless concluded in writing, and signed.

Later, in substitution of the first cession agreement, Afinta Financial Services 'sold' eighteen lease agreements to Afinta Finance. Included in the eighty lease agreements were eleven lease agreements concluded with National Sorghum Breweries Ltd. The sale agreement also contained a non-variation clause.

Schedules of the ceded lease agreements were subsequently drawn up identifying those ceded to Corpcapital in terms of the second cession agreement. These were signed by Afinta Finance only.

Corpcapital alleged that Sorghum had breached the terms of its lease agreements. It brought an action to enforce its rights under them. Sorghum contended that no lease agreements not recorded in the 'sale' agreement, and no lease agreements identified in the subsequent schedule, were ceded, since the non-variation clause prevented the validity of any such cession.

THE DECISION

The later agreements did not purport to vary the terms of the existing sale agreement. They were no more than later

transactions in similar terms. They were therefore not affected by the non-variation clause and could form the basis of Corpcapital's action against Sorghum.

As far as the lease agreements governed by the second cession was concerned, there could be no objection to the cession of these to Corpcapital since the second cession was a master cession agreement and as such, contemplated future cessions. To effect such future cessions, the relevant lease agreements needed to be merely listed in a schedule compiled and signed by Afinta Finance. This is what it did, and no variation of the master cession agreement was contemplated or intended.

Corpcapital was entitled to enforce compliance with the cessions.

[15] The 'sale' agreement between Afinta Financial Services and Afinta Finance regulated the transfer of the rights in the lease agreements referred to in the annexure (annexure A). Their later agreements—concluded by their conduct in preparing the two further lists when seen in the context in which they did so—to transfer the rights in seven further leases did not purport to amend any of the terms of the former transaction. They were no more than later transactions in similar terms, which the sale agreement did not preclude them from concluding, and which required no formalities to be valid. The defendant's reliance on the non-variation clause in the 'sale' agreement was quite misconceived because no amendment to that agreement purported to be effected at all. It follows that the rights relating to all eighteen vehicles leased to the defendant were properly transferred to Afinta Finance.

[16] Similarly the master cession concluded between Afinta Finance and Corpcapital Bank on 26 February 1999 did not purport to preclude the parties from ceding rights in the future. Indeed, the master cession contemplated that future cessions would be effected, and its very purpose was to regulate the terms that would govern those cessions. What was required to effect such future cessions on the terms agreed to in the master cession was no more than that the relevant lease agreements should be listed in a schedule compiled and signed by Afinta Finance, which is what occurred in relation to the eighteen lease agreements that are now in issue. The parties did not thereby purport to vary or alter, or even add to, the master cession. On the contrary, they purported only to give the master cession its intended effect.

THATCHER v KATZ

A JUDGMENT BY GRIESEL J
(HLOPE JP and ALLIE J
concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
9 FEBRUARY 2006

2006 (6) SA 407 (C)

A party with a claim against another based on delict and on contract should proceed on contract.

THE FACTS

Katz and his son invested R800 000 in an investment syndicate known as the 'XYZ Syndicate', which was operated and formed by Thatcher. They did so after Thatcher had visited them at their home and explained the operation of the scheme. Thatcher stated that the funds he received would be used to finance a micro-lending scheme operated by a registered money-lending company which would make small loans to mineworkers employed by Anglo-American Mines in the Potchefstroom/ Klerksdorp area.

Katz and his son signed a lending agreement given to them by Thatcher. Clause 3 stated that the management of the syndicate made no warranties due to the high risk of the portfolio except to state that they themselves had considerable capital invested in the portfolio. The lender was informed that all prudent measures had been taken by the operators of the portfolio to reduce the risk to acceptable levels for all members of the syndicate. Clause 10 provided that all lending activities were completely legitimate.

A short while after Katz and his son had made their investment, the scheme collapsed. The estate of the party with whom Thatcher in fact made the investment, one Martinson, was sequestrated, and the two companies which she controlled were liquidated. It became apparent that no loans to mineworkers were ever made, Martinson's companies were not registered money-lending companies, and her business was in fact a pyramid scheme. Liquidators expected claims of R157m to be filed against Martinson's estate.

Katz then brought an action against Thatcher based on delictual and contractual causes of action. Katz alleged that Thatcher had made intentional, alternatively negligent, misrepresentations, and that he had breached his contractual obligation to reduce syndicate investors' risk.

THE DECISION

Delictual liability may exist when harm results from the making of a negligent misstatement. However, if a party whose claim is based also has a claim arising from a misstatement incorporated as a term of a contract, then there is no need for the delictual remedy. In the present case, the specific provisions of the parties' contract should take precedence over the more general duties owed in delict.

Clause 3 of the lending agreement contained a warranty which had been breached. No prudent measures were taken to reduce the risk to an acceptable level for members of the syndicate. The warranty contained in clause 10 had also been breached. It had become clear that the lending activities were not legitimate.

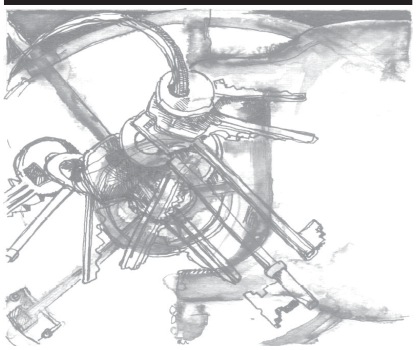
Katz was entitled to rely on these warranties. It was clear they had been breached. Katz and his son were therefore entitled to repayment of their investment.

PETERSON N.O. v CLAASSEN

A JUDGMENT BY BOZALEK J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
20 JUNE 2005

2006 (5) SA 191 (C)

Trusts



A trust formed for an illegal purpose but with an ostensibly legal purpose stated in the trust deed is not invalidly formed and it may conclude valid contracts binding between both parties thereto.

THE FACTS

Peterson and the other plaintiffs were liquidators in certain insolvent estates. They brought an action against Claassen in her personal capacity and in her capacity as trustee of seven trusts. The action was aimed at setting aside the transfer of certain immovable properties. Absa Bank Ltd was cited as the second defendant. It was the bondholder over the properties.

The claim alleged that Claassen Vervoer CC, a corporation whose business was run by Claassen's husband, had been placed in liquidation, and that a few months prior to that, Claassen and her husband had conspired to dissipate their assets. For this purpose, they had created seven new trusts and taken steps to obtain a divorce so as to separate their joint estate. Immediately after the creation of the trusts, they had sold two of the immovable properties to two of the newly-created trusts. Simultaneously with the transfer of each property, a mortgage bond was passed over the property by Absa, and loans were advanced to the trusts. A similar transaction took place in respect of another two properties.

Peterson alleged that the intended effect of the scheme was to divest the insolvent entities of their assets and place them beyond the reach of creditors. This constituted a fraud on creditors of the insolvent estates. He alleged that the trusts were created for an immoral or illegal purpose and the agreements upon which they were created were therefore contra bonos mores and null and void. The agreements for the acquisition of the immovable properties were void because they were concluded by void, and therefore non-existent trusts. The disposition of these assets pursuant to these agreement was therefore void and ownership never passed to the trusts. The bonds registered over the properties by the invalid trusts were therefore void and liable to be expunged from the title deeds.

Absa excepted to the claim on the grounds that no basis for the avoidance of a contractual nexus between the trusts and Absa had been pleaded.

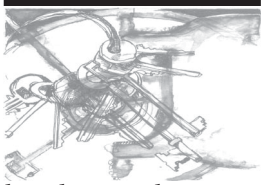
THE DECISION

A trust is normally created by agreement. However, the agreement is separate from the object of the trust so that while the object of the trust may be illegal, the agreement by which it is formed is not necessarily illegal merely because the object is illegal. Furthermore, the fact that the object of a trust is illegal does not render the trust itself void. Agreements concluded by such a trust may be void or voidable, in accordance with ordinary contractual principles. Accordingly, those principles determine whether or not the agreement is void.

In the present case, the object of the trusts, as stated in the trust deeds, was lawful. The trustee was registered as owner of the property, and therefore the bonds registered over the property upon her authority, were also valid and enforceable.

It therefore made no difference whether or not the purpose of creating the trusts and transferring the properties was part of a scheme to defraud creditors. The trusts were created by agreement and had a lawful object. The alleged illegal object could not be substituted for the lawful object. The alienation of the property was not in itself, invalid.

In the absence of any common law right to recovery of the



property consistent with the remedies provided for in the Insolvency Act (no 24 of 1936), and the trustee's inability to apply restitutio in integrum, the liquidators were not entitled to consider the bonds over the properties null and void.

The exception was upheld.

Whilst it is correct that one of the essentials for the creation of a valid trust is that the trust object must be lawful, it does not follow, however, in my view, that a trust is void if it is created with a fraudulent, illegal or immoral purpose. Counsel for the plaintiffs cited no authority for this far-reaching proposition, nor is support for this view to be found in Honoré . There is, in my view, a material difference between the object of a trust and the purpose thereof. The object is openly proclaimed and ascertainable and all parties who have dealings with that trust will be held to have knowledge of the trust's object. In the present case, the objects of the three new trusts which took transfer of the properties were entirely lawful, the primary object being in each case 'om bates en inkomste te bekom en aan te wend tot uiteindelike voordeel van die begunstigde'.

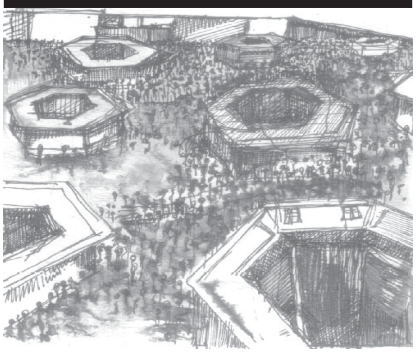
[17] By contrast, where a trust is formed for an illegal or unlawful purpose, this knowledge is jealously guarded by those who harbour such purpose. This is but one reason, although an important one, why the purpose of a trust, where it is an illegal or immoral purpose but is known only to the founder and to the trustees, cannot be equated, in all circumstances, with that trust's (lawful) object.

MINISTER OF WATER AFFAIRS AND FORESTRY v STILFONTEIN GOLD MINING CO LTD

A JUDGMENT BY HUSSAIN J
WITWATERSRAND LOCAL
DIVISION
15 MAY 2006

2006 (5) SA 333 (W)

Corporations



Directors of a company may not avoid their duties to their company by resigning en masse but will be held accountable to the company and shareholders notwithstanding their resignation. In order to resist an order declaring them to be in contempt of a court order given against their company, directors must show that they did not intentionally defy the order or did not act mala fide in doing so.

THE FACTS

In May 2005, the Minister of Water Affairs and Forestry obtained a court order that Stilfontein Gold Mining Co Ltd comply with the provisions of directives issued by the Director-General: Free State of the Ministry of Water Affairs and Forestry. These directives were aimed at compelling Stilfontein to continue with pumping and extraction of water from various mining shafts operated and controlled by it.

Stilfontein then brought an application for its winding-up, but the application was dismissed, Stilfontein itself having failed to appear at court on the date of the hearing of the application. The directors of Stilfontein then resigned after they had been advised that by continuing in their office as directors, they stood the risk of being party to reckless trading or would have to manage the company on the basis that it did not comply with court orders.

Stilfontein failed to comply with the court order. The Minister then applied for an order declaring Stilfontein and its directors to be in contempt of the court order and for appropriate punishment for such contempt.

THE DECISION

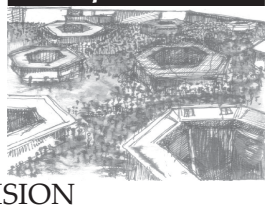
The directors of a company are its directing mind. The directors of Stilfontein were its directing mind. The resignation of them all simultaneously without notice was not an event investors and shareholders would have expected, and it was an event without precedent.

The directors of a company are under a duty to act bona fide in the interests of the company. The directors of Stilfontein had not acted bona fide in the interests of their company when they had resigned in the manner they had. All that they achieved by doing this was to incapacitate themselves from discharging their duties toward their company and its members. By accepting their appointment as directors, they accepted the duties and obligations that went with it. To allow the resignation of the entire board of directors as a means to avoid those duties and obligations would be to go against the standards of corporate governance essential for the well-being of a company and in the best interests of economic growth. The conduct of the directors flew in the face of the recommendations in the code of practices and conduct recommended by the King Report on Corporate Governance in South Africa.

Once it was established that Stilfontein and its directors, with knowledge of the court order, acted in conflict with its terms, the Minister was prima facie entitled to a committal order for contempt of court. In order to resist such an order, the respondents would have to show that they did not intentionally defy the order or did not act mala fide in doing so. In the absence of such evidence, the mala fide character of their conduct would be inferred. The respondents had failed to give such evidence.

Accordingly, Stilfontein and its directors were in contempt of the court order given against them and subject to punishment of a fine of R15 000 each.

TWK AGRICULTURE LTD v NCT FORESTRY CO-OPERATIVE LTD



A JUDGMENT BY THERON J
NATAL PROVINCIAL DIVISION
4 APRIL 2006

2006 (6) SA 20 (N)

A derivative action is an acceptable form of action in our law and may be brought in the case of a co-operative. If it is clear that a resolution to sue will not succeed, the members of the co-operative may bring the derivative action without first applying for leave to sue in this manner.

THE FACTS

TWK Agriculture Ltd brought two actions against the defendants based on allegations that they were in breach of their fiduciary duties toward CTC, a co-operative. The second to fourth defendants were directors of NCT Forestry Co-operative Ltd.

In the first action, TWK alleged that NCT had acquired shares in a company which began competing with CTC. In the second action, TWK alleged that NCT had acquired shares in another company which traded in competition with CTC, and had concluded a supply agreement with that company in competition with CTC. TWK alleged that the acquisition of shares in these companies, and the activities subsequently conducted through them, were opportunities that properly belonged to CTC, and should have been procured for the benefit of CTC.

The claims brought by TWK were brought on behalf of CTC. The relief sought was an order that the defendants account to CTC or pay damages to it.

NCT excepted to the claim on the grounds that TWK was not entitled to bring actions on behalf of CTC but that such actions should have been brought by CTC itself.

THE DECISION

The justification for TWK bringing actions on behalf of another party, CTC, was that these constituted derivative actions as established in the case of *Foss v Harbottle* (1843) 2 Hare 461. South African judgments have adopted and accepted this form of action, and the procedure also takes a statutory form in section 266 of the Companies Act (no 61 of 1973). TWK was therefore entitled to proceed against the defendants based on the derivative action.

The question remained whether or not this form of action applies in the case of a co-operative, as opposed to a company.

The rule in *Foss v Harbottle* has been applied to entities other than companies. In South Africa, it has been applied to trade unions, and in Canada, it has been applied to co-operatives. Co-operatives have a separate corporate identity distinct from their members who control what the co-operative does. There was no reason why shareholder derivative actions should not be applicable to co-operatives.

As far as the proper procedure was concerned, it was not necessary for the plaintiff to first attempt to pass a resolution that the actions be brought when it was clear that such a resolution would certainly fail. The derivative action was therefore available to TWK without it having taken an initial step of applying for leave to sue on this basis.

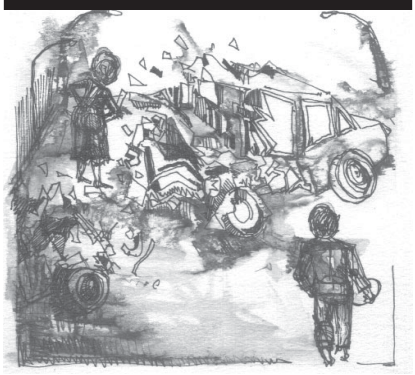
The exceptions were dismissed.

TRUCK AND GENERAL INSURANCE CO LTD v VERULAM FUEL DISTRIBUTORS CC

A JUDGMENT BY MPATI DP (FARLAM JA, MTHIYANE JA, JAFTA JA AND MAYA AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2006

2006 CLR 409 (A)

Insurance



An indemnity against liability incurred toward third parties should not be restricted merely because an obligation arising from an insured event, such as the obligation to attend to the clean-up of pollution, is created by statute. The wording of an indemnity may be wide enough to include any situation where the insured incurs cost or expense for which it is legally liable.

THE FACTS

Truck & General Insurance Co Ltd insured Verulam Distributors CC against liability incurred by Verulam toward third parties in respect of damage to property other than property belonging to Verulam or in the custody or control of Verulam, the damage having been caused by any accident caused by or through or in connection with any vehicle specified in a schedule. The indemnity covered 'all sums including claimant's costs and expenses which the insured shall become legally liable to pay'. The indemnity was provided for in a subsection B.

In terms of an endorsement the policy was extended to include additional costs reasonably incurred by Verulam of for which it was held responsible resulting from an accident to an insured vehicle and which results in leakage and/or spillage of the product being transported. Such additional costs included emergency services call out costs, cleaning the accident site of debris and product, and clearing up polluting or contaminating substances carried by the insured vehicle. Such additional costs were limited to the amount of R25 000 for any one incident.

In March 2000, in two separate incidents, diesel that was being conveyed in one of Verulam's tankers leaked, causing pollution and ecological damage. Following each incident, Verulam arranged for the clean-up of the spillage, and incurred costs of R1m in doing so. Verulam was obliged to attend to the clean-up in terms of the National Environmental Management Act (no 107 of 1998) and the National Water Act (no 36 of 1998). It claimed reimbursement from Truck & General under the indemnity given in the insurance policy.

Truck & General contended that the endorsement applied and that in consequence, its indemnity was limited to R25 000 for each incident. Verulam contended that subsection B applied. It claimed payment of the full costs incurred in cleaning up the spillage.

THE DECISION

The National Environmental Management Act imposed a legal obligation on Verulam to contain and minimise the effect of an incident of spillage. This was a legal liability covered by subsection B of the policy in circumstances where there was damage to property other than Verulam's.

There was no need to enquire whether the damage that did occur was ecological damage only or damage to property, because the policy itself did not distinguish between these two forms of damage.

Truck & General was therefore liable to indemnify Verulam as provided for in subsection B. Its liability was not limited under the provisions of the endorsement.

AUTOMOTIVE TOOLING SYSTEMS (PTY) LTD v WILKENS

A JUDGMENT BY CACHALIA AJA (FARLAM JA, NUGENT JA, LEWIS JA and MAYA JA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2006

2006 CLR 449 (A)

Competition

An employer does not have a proprietary interest in the specialised skills obtained by its employees in the course of their employment with it, merely because such skills are specialised.

THE FACTS

Wilkens and the second respondent were skilled toolmakers. They were employed as such by Automotive Tooling Systems (Pty) Ltd. Some years into their employment, at the instance of Automotive, they entered into independent contractor's agreements, and continued to do the same work for Automotive as they had done before.

The agreements contained restraint of trade and confidentiality clauses. They provided that they were not permitted to have a direct interest in any concern in competition with Automotive then or within a three-year period of termination of their contracts. They were also not permitted to disclose any information of any activities or processes of the company.

In May 2005, they resigned from Automotive and took up employment immediately with AMS Manufacturing (Pty) Ltd.

AMS had purchased marking machines from Automotive and Wilkens and the second respondent had done much of the work in the manufacture of these machines. Automotive contended that the technological know-how used in their manufacture was learnt by Wilkens and the second respondent during their employment with it and that it had a proprietary interest in preventing its use for the benefit of AMS.

Automotive brought interdict proceedings to prevent Wilkens and the second respondent from taking up employment with AMS.

THE DECISION

An agreement in restraint of trade will be considered unenforceable if it does not protect some legally recognisable interest of the employer but merely seeks to restrict competition. In the present case, the interest in question was the skill, expertise and know-how acquired by Wilkens and the respondent during their employment with Automotive. The question was whether this interest accrued to Automotive or to them.

The mere allegation that the processes learnt by Wilkens and the second respondent were confidential did not make them confidential. There was no indication of what was unique about these processes and no indication of the use of any special formulae or methods of manufacturing in the production of the marking machines. The design of the machines had not been undertaken by Wilkens and the second respondent but by someone else. They had merely implemented the design by manufacturing the machines in accordance with it. Accordingly, they had acquired no special knowledge in doing so and had done no more than any other toolmaker would have done.

It also appeared that the design and manufacture of such machines was not unique to Automotive. Other companies were engaged in similar work. Furthermore, Automotive had allowed all employees access to the manufacturing process, thus indicating that it had not regarded it as confidential.

Automotive was seeking to protect no more than the know-how relating to the manufacture of the machines. Even though the skills acquired by Wilkens and the second respondent were specialist skills, they were not a proprietary interest vesting in Automotive but the skill and knowledge acquired by its employees which they were entitled to exploit.

The interdict was refused.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v KOMATSU SOUTHERN AFRICA (PTY) LTD

Competition

A JUDGMENT BY THERON AJA (HARMS JA, BRAND JA, CLOETE JA AND CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2006

2006 CLR 461 (A)

In determining the customs classification of goods, the decisive criterion is the objective charcteristics and properties of the goods as determined at the time of their presentation for customs clearance.

THE FACTS

Komatsu Southern Africa (Pty) Ltd imported a Komatsu wheel loader into South Africa. The wheel loader consisted of a self-propelling tractor base with two lifting arms, in the centre of which was a bell crank. Both had provision for the addition of various implements, such as buckets, shovels, forks, rakes and spoons, which could then be used with the machine. It applied to the Commissioner of the South African Revenue Service for a classification of the machine for customs duty purposes.

The Commissioner classified it as a front-end shovel loader under tariff sub-heading 8429.51. Komatsu contended that because, as imported, it had no additions for which it made provision, the proper classification for it was under the heading 'other machinery, self-propelled' which attracted no customs duty. The Commissioner contended that in spite of its incomplete nature, it was still classifiable as a front-end shovel loader.

THE DECISION

The decisive criterion for the customs classification of goods is the objective characteristics and properties of the goods as determined at the time of their presentation for customs clearance. The intention of the designer of the goods, or what they are used for after importation, are normally irrelevant except insofar as they might indicate the characteristics and properties of the goods.

Upon importation, the wheel loader was an incomplete machine. It became complete only after addition of the implement it was to use, such as the shovel or bucket. Its essential character after completion was therefore what had to be determined, even though it was not, at the stage of importation, in fact complete.

The wheel loader was designed to push, break out and lift material, using whatever implement was added to it. It therefore had all the characteristics of a front-end shovel loader and should have been classified as such.

COMMISSIONER, SOUTH AFRICAN REVENUE SERVICE v MOTION VEHICLE WHOLESALERS (PTY) LTD

Competition

JUDGMENT BY THERON AJA (HARMS JA, BRAND JA, CLOETE JA AND CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2006

2006 CLR 468 (A)

In determining which category imported goods fall into, a court may take into account surrounding circumstances when it is faced with an alleged simulation whereby goods have been modified in order to ensure their classification within a particular category.

THE FACTS

Motion Vehicle Wholesalers (Pty) Ltd imported vehicles manufactured in Japan as eight-seater vehicles. The seats were positioned in three rows, the rear-most being attached to the base of the vehicle. As constructed, they fell within tariff heading 87.03 and their importation attracted customs duty as determined by the Commissioner, South African Revenue Service.

Before importation, the vehicles were modified in Australia by the addition of two extra seats behind the third row of seats. They were imported as modified, and then classified as items falling within tariff heading 87.02, thus attracting a lower customs duty rate upon their importation. This heading covers vehicles for the transport of ten or more persons. The two additional seats were then removed and the vehicles were sold as suitable for the transport of eight persons.

The Commissioner revoked the determination of this classification and classified the vehicles as falling within tariff heading 87.03.

Motion Vehicle objected to the reclassification of the vehicles and appealed against it.

THE DECISION

The question was whether the vehicles were designed for the transport of ten persons or whether they were disguised as such as part of a scheme to limit liability for customs duty.

The intention of the manufacturer and designer of an item is normally irrelevant to its classification. However, a court is entitled to take into account the surrounding circumstances, when it is faced with an alleged simulation. The design purpose of the vehicles in question must be taken into account in determining which category the vehicles fall into.

It was clear from the evidence of how the additional seats were installed in the vehicles that they were placed there temporarily and in an attempt to disguise the true purpose of the vehicles as constructed. The intention was to circumvent the Act and the modification of the vehicles was a sham.

Motion Vehicle's objection could therefore not be sustained.

THE NEW MARKET
TAXFIELD SHIPPING LTD v CARGO CURRENTLY LADEN ON BOARD THE MV NEW MARKET

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
13 APRIL 2006

2006 (5) SA 114 (C)

Shipping

The failure of a bill of lading to identify the charterparty under which a ship carries cargo does not mean that the terms of the charterparty are no longer applicable to the carriage contract as the relevant charterparty may be identified as that to which the bill of lading makes reference.

THE FACTS

Taxfield Shipping Ltd, the owner of the New Market, concluded a voyage charterparty with Asiana Marine Ltd, in terms of which the ship was chartered for a voyage from China to Port Harcourt in Nigeria. The ship was loaded with cargo in China and a bill of lading was issued. The charterparty contained a lien clause to the effect that Taxfield would have a lien on the cargo and on all subfreights payable in respect of the cargo, and for all other amounts due under the charterparty.

Clause 1 of the conditions of carriage recorded on the reverse of the bill of lading provided that 'all terms and conditions, liberties and exceptions of the charterparty, dated as overleaf' were incorporated therein. No charterparty was in fact attached to the bill of lading, or was to be found overleaf. On the face of the bill of lading, a printed clause stating 'Charterparty dated ...' remained incomplete.

The ship proceeded to Port Harcourt but the cargo could not be discharged because an import permit issued by the Federal Ministry of Nigeria had been cancelled prior to its arrival. The ship was then ordered to the next convenient port to offload its cargo. Following unsuccessful attempts to obtain agreement from the buyer and seller of the cargo, Taxfield obtained an order from a Hong Kong court authorising it to sell the cargo, the proceeds to be held in trust pending the outcome of arbitration proceedings.

When the ship arrived in Cape Town, the buyer and seller of the cargo arrested the cargo. Taxfield then applied for an order setting aside the writ under which the cargo was arrested.

THE DECISION

The main ground for Taxifield's application was that it held a lien over the cargo in terms of the charterparty. It contended that this clause was incorporated in the contract of carriage evidenced by the bill of lading. The respondents however, contended that in view of the omissions in the bill of lading, Taxfield held no such lien.

The respondents' contentions could not be upheld. The effect of them was that clause 1 would be regarded as pro non scripto because of the failure to complete the clause identifying the charterparty in question. A far more reasonable and businesslike interpretation was to have regard to the surrounding circumstances in order to identify the charterparty in question. The omission should not be taken to demonstrate an intention not to incorporate the charterparty. The general reference to the charterparty was to be construed as relating to the head charter since this was the only charter to which Taxfield was a party.

The bill of lading was issued on behalf of the master of the ship, who represented Taxfield. Notwithstanding the fact that the date of the charterparty was not recorded therein, the effect of clause 1 on the reverse side was to incorporate the terms and conditions of the head charterparty.

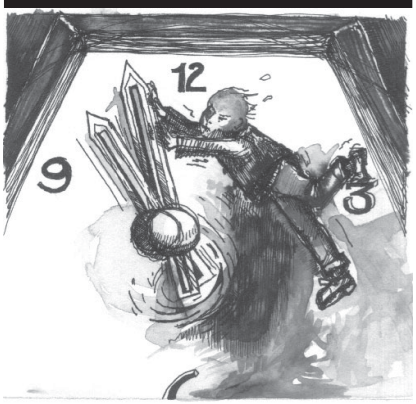
Taxfield therefore had a contractual lien over the cargo. It was entitled to an order setting aside the arrest.

MINISTER OF FINANCE v GORE N.O.

A JUDGMENT BY CAMERON JA and BRAND JA (MTHIYANE JA, MLAMBO JA and MALAN AJA concurring)
SUPREME COURT OF APPEAL
8 SEPTEMBER 2006

2007 (1) SA 111 (A)

Prescription



A creditor gains knowledge of the facts giving rise to a claim when he obtains the evidence upon which his claim can be made, and not when he merely has a suspicion that he has a claim. An employer is vicariously liable for the dishonest acts of its employees if there is a sufficiently close link between the self-directed conduct and the employer's business. In proving that loss resulted from some act, a plaintiff must prove that but for the act, it would not have suffered loss. An unsuccessful tenderer may prove delictual liability on the part of a government body if it is clear that in the act complained of, the actions were wrongful.

THE FACTS

On 11 April 1994, 3D-ID Systems (Pty) Ltd submitted a tender to the Cape Provincial Administration in response to a call for tenders by the national government for a pension payment system that would be secure while ensuring payouts to those entitled thereto under the administration of the Department of Welfare and Population Development. 3D-ID had intimate knowledge of the requirements for the pension payment system which to that point, had been plagued by fraud. The company had secured the rights to fingerprint verification and identification technology from a Californian company which was capable of rapidly compiling and accurately searching a huge database of fingerprints stored on a personal computer.

A total of thirteen entities submitted tenders. One was submitted by Nisec CC, a corporation based in Port Elizabeth whose sole member was without previous experience in information technology. A certain Mr Louw, an official of the Cape provincial administration, and a member of the tender evaluation committee, recommended that the Nisec tender be accepted. On 16 June 1994, the State Tender Board awarded the tender to Nisec.

In due course, Nisec was unable to perform properly under the contract and was unequal to the task of ensuring secure and non-fraudulent pension payouts for those entitled to them. In December 1996, the Western Cape tender board cancelled Nisec's contract. It was subsequently determined by a full bench of the Cape High Court, in February 1997, that there was insufficient evidence to show that improper means had been used to secure the tender. However, one of 3D-ID's directors, a certain Mr Rabie, persisted in a challenge to the award of the tender. Although unsuccessful in review, interdict and Anton Piller applications, Rabie made representations to the Office for Serious Economic Offences. The resulting investigation in due course found evidence that prior to the submission of tenders, Louw and an accomplice in the Cape provincial administration had secured employment contracts with Nisec and certain payouts which were made into their wives' bank accounts. It also found that the Nisec tender had been prepared on a Cape provincial administration computer under Louw's control.

In January 1999, 3D-ID issued summons against the Minister of Finance and three other government entities concerned in the tender process, claiming damages. The company's liquidator, Gore, continued the action. The Minister and the other defendants defended the action on four grounds.

THE DECISION

Prescription

The Minister contended that the claim was time barred because of the three-year limitation period provided for in the Prescription Act (no 68 of 1969). The question however, was whether or not section 12(3) of the Act was applicable. It provides that a debt will not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. In the present case: in January 1996, did Rabie have knowledge of the facts from which the claim arose?

When the tender was awarded to Nisec, and Rabie knew that it had not been awarded to 3D-ID,

he did state that fraud must have taken place. However, this was a belief resting on speculative inference, and he had no knowledge that fraud had in fact taken place. Not only was there no proof of fraud at that stage, but subsequently, the provincial administration refuted allegations of fraud and Rabie had been forced to withdraw his allegations in the abortive legal proceedings he had brought. Those proceedings too, had ended in failure. Rabie's beliefs were not justified by the evidence required to support them. Rabie acquired the minimum knowledge needed to institute action only at the end of 1996 when the Office for Serious Economic Offences issued its report and presented the evidence it had found.

The action was therefore not time-barred.

Vicarious liability for the fraud of the administration officials

The Minister contended that the actions of Louw and Scholtz were outside the scope and course of their employment and that the government was therefore not responsible for their actions.

While a fraudulent act by an employee is the antithesis of an act in the course and scope of the employee's employment, there is no general rule that an employer cannot be responsible for an employee's intentional wrongful conduct causing the employer loss. Even though a deliberately dishonest act that, subjectively seen, was committed solely for the employee's own interests and purposes may fall outside the ambit of conduct that renders the employer liable, it is established that liability may nevertheless follow if, objectively seen, there is a sufficiently close link between the self-directed conduct and the employer's business.

In the present case, a full court had rejected the proposition that the two officials had fraudulently won the tender for Nisec. This showed how close their actions were to what they were bound to do as employees. This closeness of purpose, planning and effect, indicated that the policy reasons for requiring the employer to bear the burden of its employees' wrongdoing applied, and no countervailing considerations apply.

The defendants were vicariously liable for the actions of the administration officials.

Causation: 3D-ID had not proved it would have won the tender

The test was whether *but for* the actions of the officials, 3D-ID would have won the tender. One had to determine whether the tender would have been won if, hypothetically, the officials had acted lawfully.

The Minister's defence rested on the allegation that 3D-ID's tender did not in any event comply with the tender requirements, that another tenderer did so comply, and that even if 3D-ID's tender had been properly compliant, the State Tender Board would not have awarded any tender at all.

Analysis of the evidence showed that but for the wrongful conduct of Louw and Scholtz, it was more likely than not that 3D-ID, as the only qualifying tenderer, would have received the award, even though its price was substantially higher than all the other tenders. This meant that, in our view, the element of causation had been established.

Wrongfulness: there is no delictual liability for an unsuccessful tender against a government department for losses suffered in a tender process

As a general rule, the Minister's proposition could not be accepted. The state of mind of

officials who award a tender is relevant to the question of wrongfulness. Although when the claim is for pure economic loss, considerations of public policy determine whether or not delictual liability should be imposed, the fact that the loss arose because of dishonest conduct on the part of a government employee is relevant in determining whether or not such liability should be so imposed.

In general, the fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages, even where a public tender is being awarded. In the present case, there were no conceivable considerations of public or legal policy that dictated that Louw and Scholtz and, vicariously, their employer, should enjoy immunity against liability for their fraudulent conduct. The fact that the fraud was committed in the course of a public tender process could not provide any protection to the wrongdoers.

All four defences were rejected. The Minister was liable to the plaintiffs.

Rabie acquired the minimum knowledge needed to institute action only at the end of 1998, when OSEO finally released the evidence that showed that the Nisec tender had been prepared on a CPA computer. This was 'the smoking gun' that senior counsel in February 1997 advised him to obtain before he contemplated further litigation based on fraud. With this in hand, the plaintiff promptly issued summons. It was not time-barred when it did.

Even though a deliberately dishonest act that, subjectively seen, was committed solely for the employee's own interests and purposes may fall outside the ambit of conduct that renders the employer liable, it is in our law established that liability may nevertheless follow if, objectively seen, there is a 'sufficiently close link' between the self-directed conduct and the employer's business.

KANTEY & TEMPLER (PTY) LTD v VAN ZYL N.O.

A JUDGMENT BY FOURIE J
(TRAVERSO DJP AND DESAI J
concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
31 AUGUST 2006

2007 (1) SA 610 (C)

Contract

A firm of consulting engineers may be liable in delict to its client when it assures the client that the party with whom it contracts has been formed and is able to fund the project which it is instructed to proceed with, in circumstances where the firm knows that that party has not been formed with the result that it will not pay the client, and its client depends on the firm for assurance of such facts.

THE FACTS

In October 1998, Gransteel (Pty) Ltd accepted a proposal for the construction of a fruit terminal in the harbour area of Port Elizabeth, involving the erection of a building of 10 000 square metres at an estimated project cost of R23m. Gransteel understood this proposal to have been made by a refrigeration consultant on behalf of a consortium of which Spoornet was a member. Kantey & Templer (Pty) Ltd, a firm of consulting engineers, accepted the appointment to act as engineers in the construction of the fruit terminal, its responsibilities to include the arrangement of contracts between developer and contractors and the co-ordination of contractors and consultants.

Kantey & Templer and the refrigeration consultant had been doing business with Gransteel over a period of thirty years and in that time Gransteel had come to greatly respect both firms. They instructed Gransteel to proceed with the construction of the terminal at a time when the company which instructed them had not yet formed the consortium which was to fund the project.

Gransteel was informed that the construction of the fruit terminal was a matter of urgency. In consequence, it accelerated its preparation of a budget quotation and provided a proposed programme for the steelwork construction commencing on 7 December 1998 and ending 22 February 1999.

Gransteel ordered the steel for the construction of the terminal and commenced work shortly after 17 November 1998. In December, the refrigeration consultant told Gransteel to stop work as an unspecified problem had arisen. A week later, he told Gransteel to continue. However, at the end of January 1999, the building contractor informed Gransteel that all work on the site was to be suspended with immediate effect. Gransteel was not paid for the work it had performed, and this was instrumental in its subsequent liquidation in 2001.

Gransteel's liquidator, Van Zyl, brought an action for damages against Kantey & Templer, claiming that it was liable for the loss suffered as a result of wrongful and negligent misstatement in that it had stated it was acting for the developer of the project, that the consortium had been established, and the necessary financial arrangements were in place to enable the project to proceed.

THE DECISION

Due to the history of the relationship between Gransteel and Kantey & Templer, Gransteel had absolute faith in that firm and that of the refrigeration consultant. Their duties had included the conclusion of contracts between developer and contractor and in previous cases, the ultimate clients had always met their financial obligations to Gransteel. By instructing Gransteel to proceed with the construction of the fruit terminal they therefore represented that the necessary financial arrangements were in place to enable the project to proceed. Gransteel had no reason to doubt that this meant they would be paid their contractual remuneration.

The probabilities were that if Gransteel had known that the consortium had not been formed, it would not have proceeded with the construction of the fruit terminal. The fact that the consortium had not been formed,

was withheld from them, with the consequence that they did proceed with the construction of the fruit terminal.

A legal duty on Kantey & Templer also arose from the fact that it represented itself as an agent without having the authority to do so. This resulted in liability to pay damages consequential upon a breach of implied warranty of authority.

The duty resting on the firm had also been negligently breached. A reasonable person in its position would have realised that Gransteel would have depended on it to inform it of any material matters regarding the formation of the consortium or its ability to afford the project. It would have been realised that this was a big contract for Gransteel to be commenced with urgency.

The firm was also the cause of the loss and was accordingly liable to Gransteel in damages. The action succeeded.

BEKKER v SCHMIDT BOU-ONTWIKKELINGS CC

A JUDGMENT BY YEKISO J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
1 SEPTEMBER 2006

2007 (1) SA 600 (C)

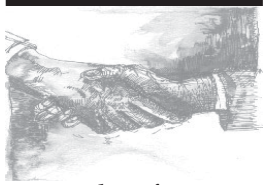
Strict adherence to the formalities required for cancellation of a contract in the event of breach are required in order to effect a valid cancellation of the contract. A builder's failure to enrol with the National Home Builders Council should not detrimentally affect a party which has contracted with such a builder to construct a house.

THE FACTS

Bekker purchased certain fixed property from Schmidt Bou-Ontwikkelings CC under a sale agreement concluded in July 2003. The sale agreement provided for certain remedies in the event of breach by the purchaser. Clause 10 provided that should the purchaser fail to make any payments provided for therein, or otherwise commit a breach of any of the conditions, and remain in default for seven days after despatch of a written notice by registered post requiring the purchaser to remedy the breach, the seller would be entitled to claim immediate payment of the balance of the purchase price or cancel the deed of sale and retain all amounts paid by the purchaser and claim arrear instalments. Alternatively, the seller would be entitled to cancel the sale and recover any damages.

Bekker brought an application for an order declaring that the deed of sale was valid and binding between the parties. Schmidt Bou-Ontwikkelings CC opposed the application on the grounds that it had cancelled the sale in that it had sent a letter by fax to Bekker demanding that she perform in terms of her obligations arising from the deed of sale. Schmidt sent a further faxed letter to Bekker's attorneys a month later calling upon her to provide guarantees by no later than 17 October 2003, the day after the letter was sent. A further letter sent by registered post the following month gave notice of Schmidt's intention to cancel the sale in terms of clause 12(4), a clause which did not appear in the sale agreement.

Schmidt also opposed the application on the grounds that



its construction of a house on the property in terms of the sale was illegal as there had been a failure to comply with section 10 of the Housing Consumers Protection Measures Act (no 95 of 1998). Schmidt alleged that because it had not enrolled with the National Home Builders Council. In terms of section 10, no person shall carry on the business of a home builder unless that person is a registered home builder.

THE DECISION

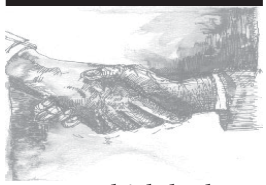
The breach clause requires that the purchaser be put in mora in the event of breach. This required compliance with the breach clause and the provisions relating to notices.

In none of the correspondence addressed to Bekker was the nature of the breach complained of stipulated in specific terms. The seven day period provided for was not complied with. Payment was not demanded other than a demand for guarantees. In no case was the relevant notice addressed to Bekker at her domicilium address. There was therefore no basis for inferring that the sale agreement was validly cancelled.

As far as Schmidt's dependence on failure to comply with the Housing Consumers Protection Measures Act was concerned, the essential question was whether it was absolutely or relatively impossible for Schmidt to perform in terms of the contract. When Schmidt first realised it should have been enrolled as required by the Act, it could have simply done what was required, ie enrolled, thus rendering it possible for itself to perform in terms of the contract. Furthermore, Schmidt could have arranged the construction of the house by an associate close corporation Schmidt Boukontracteure CC, which was enrolled with the Council. In any event, registration with the Council is an internal matter for a construction company and failure to do so should not detrimentally affect those who employ a builder to construct a house.

The application was granted.

FELDMAN v MIGDIN N.O.



A JUDGMENT BY STREICHER JA (SCOTT JA, NAVSA JA, MTHIYANE JA and VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
26 MAY 2006

2006 (6) SA 12 (A)

Money received by an executor of a deceased estate in payment of money owed to the deceased's close corporation is not money received for the estate. 'Money' as referred to in section 46 of the Administration of Estates Act (no 66 of 1965) does not include cheques payable to a deceased estate.

THE FACTS

In his will, Migdin appointed Feldman as his executor, and also bequeathed a sum of money to him. After Migdin's death, Feldman was duly appointed as executor but was later removed as executor by the Master for having failed to perform his duties properly.

Feldman handed to the new executor, the respondent, all documents and records pertaining to the estate. This included a number of cheques which had not been presented for payment. It also contained evidence of the sale of a certain fixed property by a close corporation in which Migdin had had a one hundred percent interest, for a purchase price of R150 000.

The new executor demanded payment of the R150 000. Feldman tendered a cheque payable to the close corporation in this sum. The new executor obtained new cheques from the drawers of the undeposited cheques, which had become stale, and deposited these to the estate bank account.

Migdin then brought an action against Feldman in terms of section 46 of the Administration of Estates Act (no 66 of 1965) claiming twice the sum of the amount due from the sale of the property and the undeposited cheques.

Section 46 provides that an executor who fails to pay over money to the Master or deposit it into a banking account under section 28 of the Act, shall pay into the estate an amount equal to double the amount which he has so failed to pay over.

Section 28 provides that an executor shall open a cheque account in the name of the estate and deposit therein money received for the estate.

THE DECISION

The amount of R150 000 was received for the close corporation, the seller of the property, not for the estate. The fact that Feldman in his capacity as executor acted on behalf of the close corporation in selling the property did not transform the sale into a sale on behalf of the estate. There was therefore no reason to believe that the amount paid to the respondent, the new executor, was paid to him in his capacity other than as representative of the close corporation.

Section 46 therefore did not apply to the receipt of this money. The section did not oblige the executor to deposit the proceeds of the sale into the estate banking account as it was not money received 'for the estate'.

As far as the undeposited cheques were concerned, the question was whether or not 'money' as referred to in section 46 included cheques. A cheque is not money. The word 'money' may however, be used in a wide sense to include cheques. There was no basis however, for concluding that the word was meant in this wider sense. On the other hand, there were indications to the contrary. The word was properly interpreted as not referring to cheques.

The action was dismissed.

VAN AARDT v VAN AARDT

A JUDGMENT BY JONES J
(PICKERING J and MALOPA AJ concurring)
EASTERN CAPE PROVINCIAL DIVISION
10 AUGUST 2006

2007 (1) SA 53 (E)

An agreement to sell property to a party or his successors, the property to be transferred and paid for upon death of the seller, is a pactum successorium and therefore unenforceable.

THE FACTS

Van Aardt and his brother conducting farming operations in partnership. During the subsistence of the partnership, the concluded a written agreement in terms of which Van Aardt sold his farms to his brother or his descendants, transfer to be effected and the purchase price to be paid upon his death.

After dissolution of the partnership, Van Aardt sold the farms to a third party. His brother, the respondent, applied for an interdict restraining the sale and transfer of the farms. The interdict was granted. Van Aardt appealed.

Van Aardt contended that the agreement was a pactum succesorium, an agreement to dispose of assets after death, and was therefore unenforceable.

THE DECISION

The identifying characteristics of a pactum successorium are that it purports to effect a post mortem disposition of an asset by devolving the right to the asset upon another person, and binds the contracting party irrevocably. The test for determining whether or not these identifying characteristics are present is whether the agreement constitutes a restriction on testamentary freedom. This involves a determination of whether the right to acquire the asset becomes vested in that other person prior to the death of the contracting party.

The agreement of sale provided that the purchaser would be Van Aardt's brother or his descendants. It was therefore conditional on the future uncertain event of his brother surviving him or there being survivors to him. Consequently, it could not be said that his brother's rights vested immediately upon conclusion of the agreement. The agreement also identified the purchaser by reference to parties who would only be identifiable upon Van Aardt's death. It therefore envisaged the vesting of rights only upon the death of Van Aardt.

The agreement also clearly envisaged the disposition of rights after Van Aardt's death. It was therefore a prohibited pactum successorium.

The appeal was allowed.

ENGELBRECHT N.O. v SENWES LTD

A JUDGMENT BY BY MALAN AJA (MPATI DP, STREICHER JA, CLOETE JA AND MLAMBO JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2006

2006 CLR 521 (A)

The intention of contracting parties is to be determined from the language of their agreement in its contextual setting and in the light of admissible evidence. The background facts constitute admissible evidence but the surrounding circumstances and pre-contractual negotiations are admissible only if there remains ambiguity or uncertainty.

THE FACTS

Senwes Ltd instituted action against Mr PV De Wet for payment of R397 152,78 in respect of goods sold and delivered. The action was settled and an agreement of settlement was entered into and recorded in writing. At the time, Senwes held security for the claim in the form of a mortgage bond over De Wet's property and had taken cession of a life policy on De Wet's life.

The terms of the settlement agreement were that De Wet undertook to pay a total of R201 000 during 2001, following which the mortgage bond would be cancelled. De Wet undertook to maintain the life policy, the expected payout of which was R197 000. Should De Wet default, Senwes would be entitle to proceed to judgment against him. Simultaneously with the conclusion of this agreement, De Wet's son agreed with Senwes to pay all premiums on the life policy and, in the event of his failure to maintain the policy, pay Senwes any resulting shortfall in respect of the amount payable from the policy.

De Wet died in July 2005. The executor of his estate, Engelbrecht, contended that the estate was entitled to recession of the policy. Senwes contended that it was entitled to payment of the proceeds of the policy.

THE DECISION

Engelbrecht contended that a proper interpretation of the settlement agreement indicated that the parties intended that upon payment of the sum of R201 000, the cession of the life policy would fall away.

The intention of the parties was to be determined from the language of the agreement in its contextual setting and in the light of admissible evidence. The background facts constituted admissible evidence. The surrounding circumstances are admissible only if there remains ambiguity or uncertainty. Pre-contractual negotiations are admissible thereafter only if evidence of surrounding circumstances does not provide sufficient certainty.

In the present case, the language of the settlement agreement was not ambiguous. Consequently, apart from ordinary grammatical interpretation, only background facts were admissible in the interpretation of the agreement. These indicated that the life policy payout was to constitute a third instalment necessary to satisfy the claim being made against De Wet in the action brought against him by Senwes.

A further important background fact was De Wet's son's undertaking to maintain the policy while his father was alive. The inference to be drawn from this was that Senwes would be entitled to the proceeds of the policy.

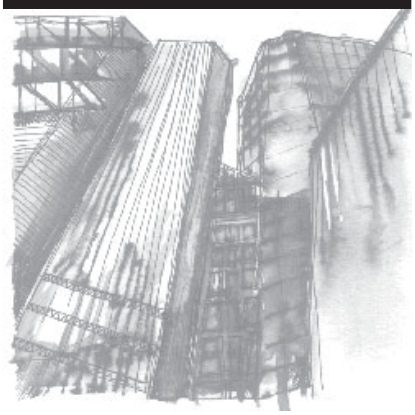
The estate was therefore not entitled to recession of the policy.

HOWICK DISTRICT LANDOWNERS ASSOCIATION v UMNGENI MUNICIPALITY

A JUDGMENT BY CAMERON J (ZULMAN JA, LEWIS JA, MAYA JA and THERON AJA concurring) SUPREME COURT OF APPEAL 21 SEPTEMBER 2006

2007 (1) SA 206 (A)

Property



A resolution passed by a municipality which incorrectly refers to the statute under which the resolution has been passed is not invalid merely because of that error.

THE FACTS

Umngeni Municipality issued rates assessments in respect of properties owned by 150 property owners, members of the Howick District Landowners Association. Until then, the properties had been unrated. The municipality did so after passing a resolution to advertise a valuation roll relating to the properties, and a resolution that a rate of 2.3 cents per rand would apply to them. Pursuant to these resolutions, the municipality issued three notices, a notice of preparation of the valuation roll, a notice of assessment of rates, and a notice of draft rates policy.

The Association attacked the notices on the grounds that they had not been preceded by the withdrawal of invalid notices previously issued and that the resolutions in terms of which the notices were issued incorrectly referred to the Municipal Systems Act (no 32 of 2000) which did not apply to the matters resolved.

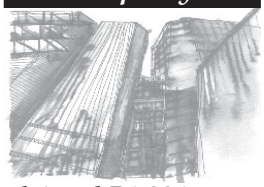
THE DECISION

The resolutions sought to amend previous errors. It was therefore clear that the municipality intended to refer to the correct legislation, which had been incorrectly referred to in previous resolutions, and had to be seen as such. Seen in this light, the authority the municipality sought to invoke was clear.

The fact that the previous resolutions were not withdrawn did not affect the validity of the later resolutions. In any event, the municipality was not bound to refer to any statute when it passed the resolutions. The fact that it did refer to a statute was therefore of no importance, and the fact that it referred to the wrong one, a simple slip-up.

The Association also objected to the assessments on the grounds that they were issued late and therefore without compliance with the Local Authorities Ordinance (no 25 of 1974). However, the Ordinance did not apply to their properties as they did not fall within a borough as defined in the Ordinance. The assessments had been effected under the Local Government Transition Act (no 209 of 1993) which did not specify the time limits specified under the Ordinance.

CITY OF CAPE TOWN v HELDERBERG PARK DEVELOPMENT (PTY) LTD



A JUDGMENT BY HARMS JA (MTHIYANE JA, NUGENT JA, CONRADIE JA and THERON AJA concurring)
SUPREME COURT OF APPEAL
31 AUGUST 2006

2007 (1) SA 1 (A)

The amount of compensation a property owner may receive following expropriation of its property is determined by an assessment of the market value of the expropriated property. A local authority's imposition of conditions which are unrelated to the expropriation should not be taken into account when determining the amount of compensation payable.

THE FACTS

The owner of erf 18835 applied for the consent of the municipality of Helderberg, Western Cape, to subdivide the property and rezone one of the three subdivisions from agricultural land to residential. The application was granted, subject to the condition that the owner was obliged to canalise a river running over the property and allow the conveyance of stormwater of any other erf across the property without compensation.

The new owner of that subdivision also purchased, in the name of a related company, Helderberg Park Development (Pty) Ltd, one of the other subdivisions and applied for its rezoning for mixed uses. In order to develop the first subdivision it had purchased, it undertook the canalisation required in the condition imposed by the local authority. This took place by way of the registration of a servitude on the second subdivision in favour of the local authority for the purposes of a stormwater canal and relief sewer line.

Following the registration of the servitude, the local authority expropriated the land to which the servitude related. The extent of the land expropriated was 6,5ha of the total 32,5ha purchased.

Helderberg contended that it was entitled to compensation as a result of the expropriation in terms of section 12(1)(a)(i) of the Expropriation Act (no 63 of 1975). This section provides that the amount of compensation to be paid in terms of the Act to the owner of property shall not exceed the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer.

Helderberg claimed R1 386 260,92. It contended that this represented the market value of the expropriated portion.

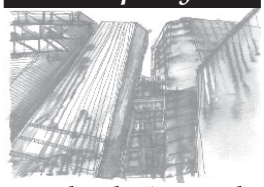
THE DECISION

Section 12(1) intends that what must be determined is the amount of compensation to be paid for expropriating the property. This entails determining the market value of the expropriated property.

One possible appropriate method of doing this is to measure the difference in value of the property before and after expropriation, another is to apply a rate per hectare. Either method would however, result in a negligible amount of compensation: because of the conditions imposed, the canal was a given and had little commercial worth to the owner.

Helderberg however, contended that it could avoid this conclusion by depending on section 12(5)(f). This section provides that in determining the amount of compensation to be paid, any enhancement or depreciation in value before or after the date of notice of expropriation which may be due to the purpose for which the property is expropriated shall not be taken into account.

The purpose of this section is to ensure that an expropriating authority does not employ planning restrictions to ensure that the property's potential prior to expropriation did not exist, so rendering the compensation payable lower than it might have been. This however, was not the case with Helderberg's property since there was no depreciation of the value of the land due to the purpose for which the property was expropriated. If the local authority's condition had not



been accepted, the land would have remained agricultural. Accordingly, there was never a depreciation.

The compensation determined by the local authority was made on the basis of a rate per hectare. This also appeared to be just and equitable as required under section 25(3) of the Bill of Rights in the constitution.

Helderberg was accordingly entitled to compensation in the sum of R207 400.

GOWAR v SECTION THREE DOLPHIN COAST MEDICAL CENTRE CC

A JUDGMENT BY COMBRINCK AJA (FARLAM JA, MTHIYANE JA, BRAND JA AND HEHER JA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2006

2006 CLR 509 (A)

A purchaser is entitled to enforce an agreement which fails to comply with section 29A of the Alienation of Land Act (no 68 of 1981) since the intention of the Act is not to render such an agreement null and void.

THE FACTS

The applicant[1] signed an offer to purchase a proposed sectional title unit in a double-storey commercial development for R148 000. Cowar Investments (Pty) Ltd accepted the offer. The agreement made no reference to section 29A of the Alienation of Land Act (no 68 of 1981).

Section 29A provides that a purchaser of land may within five days after signature of an offer to purchase or a deed of alienation, revoke the offer or terminate the deed by written notice delivered to the seller.

The applicant applied for an order compelling Cowar to complete the opening of the sectional title register and transfer the unit. Cowar opposed the application on the grounds that the agreement was null and void because it failed to comply with section 29A. It contended that nullity followed because section 2(2A) of the Act provides that a deed of alienation shall contain the right of a purchaser to revoke the offer or terminate the deed of alienation in terms of section 29A.

THE DECISION

The provisions of section 29A operate solely for the benefit of purchasers. There was no indication that the seller had to be notified of the rights provided for in this section. If any such right were to be found in the Act, it would have to be found in section 2(2A) by necessary implication. However, there was nothing to support such an interpretation of that section.

Section 2(2A) makes a clear distinction between an offer and a deed of alienation. The former does not have to make a reference to the rights provided for in section 29A. Accordingly, the seller is not given the same rights as the purchaser as provided for therein. Merely adding a reference to that provision does not constitute a counter-offer. A purchaser not given notice of its rights in terms of section 29A would undoubtedly receive notice of them in due course, when the procedures of transfer were given effect to.

The intention of the legislature was therefore not that an offer or deed not complying with the section is automatically invalid. Given that the applicant sought to enforce the agreement, rather than declare it void, the agreement should be considered enforceable and not inconsistent with the provisions of section 2.

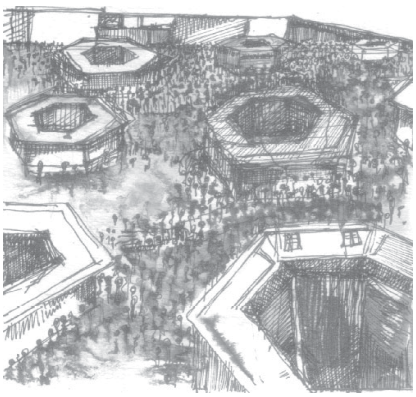
The application was granted.

KLEIN N.O. v MINISTER OF TRADE AND INDUSTRY

A JUDGMENT BY PRINSLOO J
TRANSVAAL PROVINCIAL DIVISION
24 AUGUST 2006

2007 (1) SA 218 (T)

Corporations



The Minister of Trade and Industry is obliged to furnish a company investigated under section 261 of the Companies Act (no 61 of 1973) with the inspectors' report made in terms of that section. The Minister is not entitled to delay delivery of the report pending the finalisation of his own perusal of the report and his own investigations.

THE FACTS

The Minister of Trade and Industry appointed two inspectors in terms of section 258(2) of the Companies Act (no 61 of 1973) to investigate the affairs of the Corpcapital group of companies after serious allegations had been made against the group and its management.

The inspectors conducted the investigation with the full co-operation of Corpcapital. They secured extensive witness statements and employed independent professional experts to assist in the investigation, and completed their report in May 2004. The Minister received the report in July 2004 after the inspectors obtained from the Minister an indemnity against any possible claim against them arising from anything done in the bona fide performance of the duties.

In the period June to September 2004, Corpcapital's attorneys attempted to obtain the inspectors' report from the Minister. However, the Minister adopted the attitude that the report could only be furnished after due consideration by himself and officials of his department and after referral back to the inspectors for further investigation, should this become necessary. Corpcapital's liquidator, Klein, then applied for an order that the Minister furnish the report as required by Corpcapital. The Minister defended the application on the grounds that since the report would be handed to Corpcapital only after any possible further investigation had been completed and the inspectors had reported thereon, the application was premature.

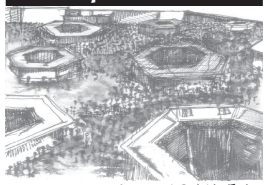
THE DECISION

Sections 251- 267 of the Companies Act make provision for the investigation into a company's affairs by inspectors appointed by the Minister. These provisions read as a whole, and specifically in section 261, establish the obligation that the Minister is to furnish any report made by such an inspector to the company they have investigated. This is an obligation resting on the Minister and it does not arise out of his own choice. The Minister does not have a discretion to withhold or delay the furnishing of such reports.

From the history of the attempts to secure the report from the Minister, it was evident that there had been considerable delay in the release of the report. This amounted to an unreasonable delay and constituted a failure to meet his obligations. In the circumstances, the application was not launched prematurely.

The application succeeded.

LEIBOWITZ v MHLANA



A JUDGMENT BY JAFTA JA (MPATI DP, STREICHER JA, LEWIS JA and VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2005

2006 (6) SA 180 (A)

For jurisdictional purposes, a company's principal place of business is the place where the central control and management of the company is situated.

THE FACTS

Mhlana and the other respondents applied for loans of small sums of money from Leibowitz. Their applications were made in Durban, where Leibowitz resided. They were teachers, resident in the Transkei.

A requirement for the loans, which were granted, was that the respondents were to take out insurance policies in connection with the loans. The respondents did so, in Durban. The insurance companies were situated either in Durban or Cape Town.

The respondents then brought an application for an interdict against Leibowitz and the insurance companies preventing them from ceding, surrendering or utilising the proceeds of the policies. They brought the application in the Transkei High Court. On appeal in that court, it was held that the court had jurisdiction to determine the matter.

Leibowitz appealed.

THE DECISION

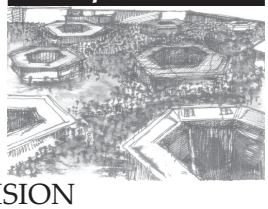
Leibowitz would be subject to the jurisdiction of the Transkei High Court if he had consented to its jurisdiction, or section 19(1)(b) of the Supreme Court Act (no 59 of 1959) applied. This section confers jurisdiction on a party outside of its area of jurisdiction who is joined as a party to any cause in relation to which the court has jurisdiction.

Leibowitz had not consented to the jurisdiction of the court, in spite of the fact that he was a party to other proceedings in the Transkei High Court.

It was contended that he was joined as a party to a cause of action brought against the insurance companies, and therefore fell within the terms of section 19(1)(b). However, the principal place of business of the insurance companies was not the Transkei, but Durban or Cape Town. For jurisdictional purposes, a company's principal place of business is the place where the central control and management of the company is situated. This was in Durban or Cape Town and not in the Transkei.

The Transkei High Court therefore did not have jurisdiction in the matter. The appeal was upheld.

MITTALSTEEL SOUTH AFRICA LTD v HLATSHWAYO



A JUDGMENT BY CONRADIE JA (MPATI DP, MTHIYANE JA, LEWIS JA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
30 AUGUST 2006

2006 CLR 485 (A)

A company which is subject to government control is a public body as understood in the Promotion of Access to Information Act (no 2 of 2002).

THE FACTS

Hlatshwayo wished to obtain reports or minutes of meetings of the Iscor Vanderbijlpark works management for the period 1965 to 1973, reports or minutes of meetings of compound or hostel managers of the Vanderbijlpark works for the same period, reports or minutes of meetings in respect of wages and conditions of service at the Vanderbijlpark works, and minutes of meetings dealing with health and safety issues at the Vanderbijlpark works for the same period.

Mittalsteel South Africa Ltd, the successor to Iscor, the company in control of this material at the time it was produced, refused to give Hlatshwayo the material. It contended that at that time, it was not a public body as defined in the Promotion of Access to Information Act (no 2 of 2002) and therefore not subject to the provisions of that Act.

Hlatshwayo applied for an order that Mittalsteel was obliged to provide the material.

THE DECISION

If Mittalsteel was properly characterised as a 'public body' as understood in the Act at the time the documents were created, then Hlatshwayo would be entitled to the documents. A 'public body' is equivalent to an organ of state as defined in the Constitution.

The documents in question were produced in the course of Mittalsteel's usual business as a steel producer. This took place under the Iron and Steel Industry Act (no 11 of 1928), legislation which ensured that Mittalsteel was, at the time, subject to government control. While the test of 'control' as a means of determining whether or not a body is a public body is not always appropriate, in the present case, it was clear that Mittalsteel had been subject to government control and was, because of that, a public body.

It followed that Mittalsteel was obliged to give the documents requested by Hlatshwayo to him. The order was granted.

NAIR v CHANDLER

A JUDGMENT BY MAVUNDLA J
TRANSVAAL PROVINCIAL DIVISION
19 JULY 2006

2007 (1) SA 44 (T)

Partnership

A partner has no claim against another partner for payment of expenses incurred in partnership business except in the form of a claim for specific performance of the partnership agreement. If it is alleged that the partnership has terminated, the claim should be formulated as one for an accounting following the dissolution and winding up of the partnership.

THE FACTS

Nair brought an action against Chandler claiming that the parties had entered into a tacit partnership agreement for the purpose of conducting and carrying on the business of public relations, advertising, marketing communications, consulting, event planning and celebrity management. The terms of the agreement were that Nair would contribute his goodwill and business experience in event planning and Chandler would make a capital contribution and payment of all reasonable costs of an event known as Summer Vibes South Africa. In the event of Nair incurring liability or expending money for the partnership, Chandler would reimburse him.

Nair's particulars of claim alleged that Chandler had instructed him to contract with Gearhouse South Africa (Pty) Ltd to provide, inter alia, lights audio, rigging, structures, crowd control and cameras for the Summer Vibes events. Nair did so, and was required by Gearhouse to provide a suretyship undertaking in respect of debts arising from its provision of these services. Nair did so. Chandler paid some of the amounts which subsequently became due to Gearhouse, but failed to pay R1 054 000. Gearhouse claimed payment from Nair in terms of his suretyship obligations.

Nair alleged that the partnership had terminated and claimed payment of R1 054 000 from Chandler. Chandler defended the action and Nair applied for summary judgment.

Chandler's defence to the action was based on the contentions that the action presupposed that the partnership had been wound up, but Nair had not alleged that this had taken place, merely that it had terminated.

THE DECISION

Nair contended that he was entitled to bring the action under the actio pro socio. However, this is an action which assumes the partnership continues. In the present case, Nair had alleged that the partnership had terminated.

Although there was a provision for the dissolution and winding up of the partnership, Nair had not claimed in terms of this either. The question whether or not a partner can sue a co-partner during the existence of the partnership was an open question and had not been decided but in the present case, the allegation made by Nair was that the partnership did not continue to exist.

There was authority that a partner suing a partner of a partnership which had terminated had to allege that the partnership had dissolved. In the absence of this allegation, his action could not succeed.

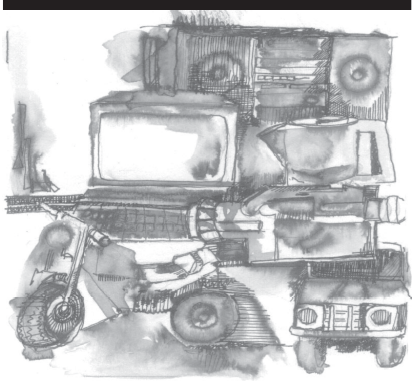
There were therefore triable issues in the action and summary judgment had to be refused.

PITT v IMPERIAL BANK LTD

A JUDGMENT BY COMBRINCK AJA
(FARLAM JA, MTHIYANE JA, MLAMBO JA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2006

2007 (1) SA 315 (A)

Credit Transactions



An instalment sale agreement which provides that the purchaser selects the goods and takes delivery from the supplier in such a manner that the seller becomes the owner for the duration of the agreement, in circumstances where the seller is financing the acquisition of goods and requires security for its loan, effectively excludes any implied warranty against eviction.

THE FACTS

Pitt and Imperial Bank Ltd concluded two instalment sale agreements, in which Pitt purchased from Imperial Bank certain aircraft and aircraft engines.

In terms of clauses 2.1 of the agreements, it was recorded that Pitt had selected the goods, furthermore that Imperial Bank had no knowledge of the purpose for which the goods were required by Pitt and did not guarantee that the goods were suitable for that purpose. Clause 2.2 provided that Pitt would take delivery of the goods from Imperial Bank or the supplier in such a manner that Imperial Bank would become the owner and hold the goods on behalf of Imperial Bank, as owner, for the duration of the agreement.

The background facts of the instalment sale agreements were that the bank was registered as a bank and its business was to advance finance to clients to enable them to buy goods which are sourced and selected by the client from a supplier. In most cases, the bank did not see the goods as delivery was effected directly from the supplier to the client. The instalment sale agreement was concluded in order to provide security for the financing transaction. In it, ownership in the goods was reserved by the bank until all amounts owing under the agreement were paid.

The aircraft and engines were sourced by Pitt and the bank played no part in the sourcing, nor in the selection and delivery of the aircraft. It received invoices from the supplier, which it paid.

The aircraft and engine were attached by the sheriff of the court in pursuance of a judgment granted following an application brought by Pinacle Trade and Commerce Ltd against Aircraft Services Africa (Pty) Ltd. Pinacle was the owner of the aircraft and engine.

The bank brought an action against Pitt for payment of the amounts outstanding under the agreements. Pitt defended the actions and raised a defence that the agreements were subject to the implied warranty that Pitt would enjoy full and undisturbed possession of the goods. As a result of the attachment, Pitt lost full and undisturbed possession of the goods, and consequently the bank was in breach of the implied warranty entitling Pitt to cancel the agreements.

The question for determination was whether the agreements were subject to the implied warranty alleged by Pitt.

THE DECISION

Clauses 2.1 and 2.2 read with the background facts of the matter made it clear that the parties intended to exclude the implied warranty against eviction. In clause 2.1, the parties recorded that the bank had in effect had no part in the selection of the goods. In clause 2.2 it was acknowledged that the bank was not the owner and an obligation was placed on Pitt to ensure that it became the owner.

It made commercial sense for the parties to place such an obligation on Pitt because the bank thereby obtained its security. That obligation was contrary to any implied warranty intended to protect Pitt in his possession of the goods

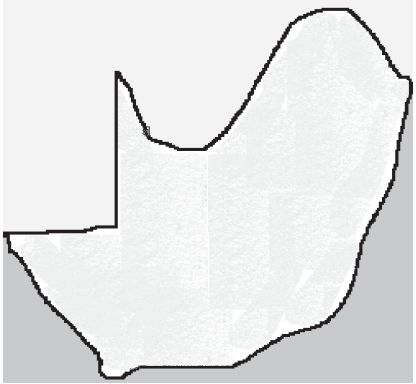
The agreements were therefore not subject to the implied warranty alleged by Pitt.

RICHMAN v BEN-TOVIM

A JUDGMENT BY ZULMAN JA (CAMERON JA, BRAND JA, MAYA JA AND THERON AJA concurring) SUPREME COURT OF APPEAL 29 NOVEMBER 2006

2006 CLR 498 (A)

Jursidiction



A South African court will recognise the jurisdiction of a foreign court if that court had jurisdiction in the matter according to its own rules of jurisdiction and according to the rules of international jurisdiction.

THE FACTS

Richman acted for Ben-Tovim in the furnishing of advice and drafting agreements between Ben-Tovim and companies in the De Beers group. Richman did so at a time when he was situated in London and was in practice there as a commercial and foreign law consultant.

During the period April to November 2000, Richman acted for Ben-Tovim in negotiations with those companies and in the preparation of proposed litigation against them, In consequence, Ben-Tovim became indebted to Richman in the sum of £51,165.25 in respect of fees for his work. On 31 March 2001, Richman sent an invoice to Ben-Tovim. By October 2001, this remained unpaid for another two years.

In November 2003, Ben-Tovim travelled to London. Richman sued for payment of his fee and process was served on Ben-Tovim when he was in London. In December 2003 and in London, Ben-Tovim agreed to pay the claim of £56,806.02. Richman requested confirmation of the terms of payment. When this was not forthcoming, he proceeded to obtain default judgment against Ben-Tovim.

Richman then brought provisional sentence proceedings against Ben-Tovim in the Cape High Court. The claim was based on the judgment obtained in England.

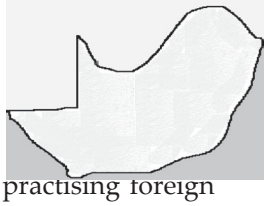
Ben-Tovim defended the action on the grounds that the English court which granted judgment against him did not have the jurisdiction to do so, that the Protection of Business Act (no 99 of 1978) protected him from enforcement of the judgment, and that public policy did not allow its enforcement.

THE DECISION

A foreign judgment will be enforced by a South African court if the court that gave judgment had jurisdiction in the matter according to its rules of international jurisdiction and recognition and enforcement of the judgment would not be contrary to public policy and not contrary to the provisions of the Protection of Business Act.

With regard to the first consideration, the English court had jurisdiction to determine the matter according to English law rules of jurisdiction—Ben-Tovim having been present in England when he was served with process for Richman's claim. According to the rules of international jurisdiction, it was necessary that (i) Ben-Tovim was physically present within the state to which the English court belonged at the time the action began (ii) alternatively was domiciled or resident within that state at that time, or (iii) he had submitted to the jurisdiction of the English court. The first criterion had been satisfied in the present case and accordingly, the English court had jurisdiction to determine the matter.

As far as the Protection of Business Act was concerned, the Act provided that a foreign judgment arising from an act or transaction connected with mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, was not to be enforced without the permission of the Minister of Economic Affairs. The judgment in the present case was however, not connected with the raw materials or substances referred to in this Act, but one for services rendered.



As far as public policy considerations were concerned, there was no evidence to show that Richman was not entitled to the fees he had charged, either as an attorney practising foreign law in England or a South African attorney claiming fees for services rendered in England.

The appeal succeeded.

There are compelling reasons why, as submitted by the plaintiff's counsel, in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen. In addition, it is now well established that the exigencies of international trade and commerce require '…that final foreign judgments be recognised as far as is reasonably possible in our courts, and that effect be given thereto.' This court (albeit in a slightly different context) said in Mayne v Main *that a 'common-sense' and 'realistic approach' should be adopted in assessing jurisdictional requirements because of '… modern-day conditions and attitudes and the tendency towards a more itinerant lifestyle, particularly among business people. And because not to do so might allow certain persons habitually to avoid the jurisdictional nets of the courts and thereby escape legal accountability for the wrongful actions.' In my view having regard to all of the above factors the view expressed by* Pollak *quoted with approval by Van Dijkhorst J in* Reiss *should be followed*.

UNILEVER BESTFOODS ROBERTSONS (PTY) LTD v SOOMAR

A JUDGMENT BY FARLAM JA (BRAND JA, NUGENT JA, MLAMBO JA AND CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2006

2006 CLR 527 (A)

Competition

An injury caused by a conspiracy does not cease from the moment the conspiracy comes to an end but from the moment after the injury has been committed.

THE FACTS

Soomar and the second respondent brought an action against Unilever Bestfoods Robertsons (Pty) Ltd and the other appellants in which they alleged that the latter had conspired together to damage or destroy their business operations in the manufacture and sale of edible oil and to cause damage to them generally. They alleged that this took place in the period 1993 to 2001.

The allegations in their summons further stated that Unilever and the other appellants, acting as conspirators, conducted investigations into their business activities and made allegations to the Police Service, the Revenue Service and the Customs Service, to the effect that they were selling oil on the local market when such oil had been declared to have been exported. The effect of that declaration was to confer a VAT credit as well as a customs duty rebate.

The allegations further stated that Unilever and the other appellants had brought about an assessment of customs duties and penalties of R5,984m, and the subsequent attachment of 475 tons of edible oil to secure payment thereof. A re-assessment which assessed liability for customs duty in the sum of R19m and the attachment of plant and machinery to secure payment thereof had also followed, as well as a re-assessment of VAT and the garnishing of VAT refunds which were needed for working capital. They also alleged that a criminal prosecution was brought about in which they were charged with fraud and uttering

In 1999, the criminal prosecution was withdrawn. In 2001, the claims for VAT and customs duty were also withdrawn..

Soomar and the second respondent alleged that as a result of the activities of the conspirators, the second respondent lost its export market and, in January 1994, it lost profits in the sum of R26,4m. In January 1998, it suffered an additional R19m in lost profits as a result of the withdrawal of credit, its bankers having called up its overdraft after its auditors qualified the company's financial statements.

Soomar and the second respondent brought their action against the appellants, and summons was served on them on 30 October 2001. The appellants contended that the claim against them had prescribed in terms of the Prescription Act (no 68 of 1969).

THE DECISION

The acts allegedly committed by Unilever and the other defendants could not be considered to be 'a continuing injury' in the sense that they gave right to a series of rights of action arising from time to time. They were alleged to be acts committed in January 1994 and 1998, not a continuing wrong.

There was no authority for the proposition that an injury caused by a conspiracy would cease from the moment the conspiracy came to an end. The plaintiffs in any event, had not depended on a delict of conspiracy.

The plaintiffs contended that their claim only arose from the time that the charges were withdrawn, and the VAT and customs duty reassessments set aside. However, their claim arose before this. In January 1994 and 1998, everything necessary to establish their claims had arisen. The running of prescription had therefore become complete three years after those dates.

The appellants' contention was upheld.

SPIRIT OF NAMIBIA
BIG RED ONE INCORPORATED v MARCO FISHING (PTY) LTD

A JUDGMENT BY SCOTT JA
(STREICHER JA, FARLAM JA, MTHIYANE JA and NUGENT JA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2006

SCOSA B335 (A)

Shipping

Although a court will sparingly exercise its discretion to order the sale of an arrested ship, the fact that there have been delays in an action claiming damages in relation to the arrested ship, while the ship has deteriorated and port dues have accrued, will be influential in exercising that discretion in favour of ordering its sale.

THE FACTS

On 7 June 2002, the *Meob Bay*, which was owned by Marco Fishing (Pty) Ltd, sank off the coast of Namibia. Marco alleged that the *Meob Bay* sank as a result of the negligence of Gemfarm Investments (Pty) Ltd, the subdemise charterer of the *Lady S*, which was the vessel it employed in the conduct of its business of marine mining. At that time, Big Red One Inc and Gemfarm were associated companies.

Marco obtained an interim order for the attachment of Gemfarm's right title and interest in the *Lady S* in order to found jurisdiction in an action it intended to bring for damages resulting from the sinking of the *Meob Bay*. Gemfarm could not produce security for the release of the *Lady S* but, by arrangement between the parties, the *Spirit of Namibia* was substituted as security for the *Lady S*. The *Spirit of Namibia* was then in Cape Town harbour and undergoing an extensive refit. It was owned by Big Red One and Gemfarm was the subdemise charterer of that vessel as well. Big Red One undertook liability for any amount found to be due by Gemfarm. Clause 7 of the substitution arrangement provided that in the event of Marco obtaining judgment in its action, it would be entitled to execute against the Spirit of Namibia.

Gemfarm and Big Red One opposed confirmation of the attachment, but in September 2003, confirmation of the attachment was ordered. Some fourteen months later, they appealed against this order. The basis of the appeal was that, properly construed, the substitution arrangement precluded the sale pendente lite of the *Spirit of Namibia*.

From the date of the original attachment, Marco had proceeded with its action for damages, but the trial was postponed on a number of occasions. During this period, the vessel's condition had deteriorated and port dues had accrued.

THE DECISION

Section 9(1) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) confers on a court a wide discretion to order at any time that property which has been arrested in terms of the Act be sold. The power conferred by the section will however, be sparingly exercised, especially where, as in the present case, the owner will be able to show that the ground for the arrest or attachment is not a good cause of action. However, this consideration was superseded in the present case, where there had been inordinate delays in the finalisation of the matter. These delays had meant the vessel had deteriorated in value, and various associated costs had increased substantially.

As far as the arguments based on the substitution arrangement were concerned, it had to be accepted that Big Red One's undertaking in respect of any amount found to be due by Gemfarm was not the undertaking of a surety but of a co-principal debtor. The property substituted, the *Spirit of Namibia*, was therefore in all respects subject to the same conditions as the property released, the *Lady S*, and the provisions of section 8(2) and 9(1) of the Act applied equally to it.

Clause 7 of the arrangement did not restrict Marco to enforcing the sale of the Spirit of Namibia only in the event of it obtaining judgment against Gemfarm or Big Red One. The clause was permissive, not restrictive.

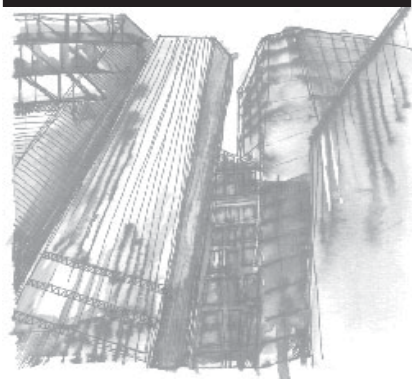
The appeal was dismissed.

ALLACLAS INVESTMENTS (PTY) LTD v MILNERTON GOLF CLUB

A JUDGMENT BY TRAVERSO DJP
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
24 AUGUST 2006

2007 (2) SA 40 (C)

Property



A property owner complaining of nuisance caused by a neighbour must show that, taking into account all relevant factors, the neighbour has acted wrongfully in causing the nuisance.

THE FACTS

Allaclas Investments (Pty) Ltd bought a house bordering on a golf course. The property was next to the fairway of the sixth hole of the golf course, the fairway being approximately 400 metres long.

From time to time, the house was struck by golf balls hit by players playing the sixth hole. In an attempt to prevent this from happening, it erected a 4,7 metre high net around part of the property. However, golf balls continued to strike the house.

The Milnerton Golf Club, owner of the golf course, planted trees between the fairway and the house as a long-term preventative measure. It also caused the hole to be played as a par 4 hole instead of a par 5 hole on all but two days of the wek. Allaclas contended that this did not prevent the nuisance of the golf balls striking its house and brought an application to bring about cessation.

THE DECISION

The fact that the golf course was situated where it was before Allaclas purchased the property alongside it was not decisive in determining whether or not it had caused a nuisance in allowing the continuation of golf play affecting the house. The overriding question was whether or not, objectively speaking, the golf course acted wrongfully. The fact that Allaclas bought property adjoining the golf course was relevant in deciding this but it was not the decisive factor.

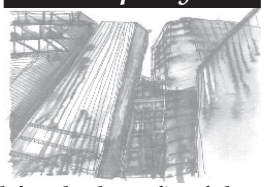
Factors relevant to the decision were that Milnerton Golf Club had conducted a golf course there since 1925, that Allaclas' complaint was not based on the allegation that the club had started using the property differently, or that the golf club was carrying on any unnatural or inappropriate activity, and that it was known when Allaclas bought the property that the golf course would be used for the playing of golf and would be susceptible to being hit by golf balls.

Taking these factors into account, and the fact that Allaclas was not prepared to adopt relatively inexpensive measures to protect its property, it could be concluded that Allaclas had to accept the risk of having its house next to the golf course, and that the golf club had not interfered unreasonably with its rights.

The application was dismissed.

The powers of ownership extend only as far as there is a duty on his neighbour to endure the exercise of those powers. If a neighbour exceeds these powers he infringes the right of his neighbour. A This constitutes wrongful conduct. (See Gien v Gien *1979 (2) SA 1113 (T) at 1121A - D.) How to approach the question of balancing the right of the owner of a property to do with his property as he likes and the right of the neighbour not to be interfered with will always be difficult to establish.*

LASKEY v SHOWZONE CC



JUDGMENT BY BINNS-WARD AJ
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
30 OCTOBER 2006

2007 (2) SA 48 (C)

Property owners are entitled to enjoyment of their properties without interference of noise above levels which would constitute an actionable nuisance but may not depend on noise regulations which are intended to benefit the public generally.

THE FACTS

Laskey lived in central Cape Town at premises adjoining those occupied by Showzone CC. Showzone started using its premises to operate a theatre-restaurant known as 'On Broadway' in the evenings from approximately 8.30pm to 11.30pm. Laskey contended that the noise created by this operation was causing a nuisance to him and detrimentally affected his enjoyment of his own property.

Tests carried out by experts indicated that the level of noise was approximately 10dBA higher than that determined as the maximum acceptable for noise in residential districts, a determination made and published by the South African Bureau of Standards.

The area in which Laskey lived was an area in which commercial activity took place and had taken place before he took up residence there. It was not an exclusively residential area.

Laskey brought an application for an order interdicting Showzone from causing a disturbing noise or a noise nuisance as defined in the noise control regulations and from conducting a business from the premises in a manner which constituted a nuisance.

THE DECISION

Noise control regulations promulgated under the Environment Conservation Act (no 73 of 1989) define a disturbing noise as one which is 7dBA higher than the ambient noise level. However, these regulations did not assist Laskey as they were promulgated for the benefit of the public in general and not for any particular person or class of persons. The fact that Showzone was in apparent breach of the regulations therefore did not entitle Laskey to an interdict. It was necessary for Laskey to show that breach of the regulations had caused him harm, which he could do if he showed that he had grounds for a private nuisance action against Showzone.

In general, everyone is free to use their own property as they like, provided that such use does not intrude unreasonably on their neighbour's use and enjoyment of their properties. What constitutes reasonable usage depends on various factors, including whether or not the property in question is situated in an urban area.

In the present case, the properties were used for commercial and residential purposes. This meant that a person residing there could not expect the same noise levels as those pertaining to purely residential areas. They were entitled to complain if noise levels were sufficiently high as to cause a nuisance, even if not causing specific disturbance to them, but not merely because the complainant was a person of a too refined or sensitive disposition. Laskey was entitled to complain: noise levels were sufficiently high to warrant the conclusion that an actionable nuisance was being perpetrated.

An interdict was ordered that Showzone was not entitled to continue its operations without adequate acoustical insulation.

STOCK v MINISTER OF HOUSING

A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
2 FEBRUARY 2006

2007 (2) SA 9 (C)

An owner of property is entitled to make representations in relation to adjoining property which is to be developed by the State in accordance with such owner's right to procedural fairness.

THE FACTS

Stock and the other applicants were owners of property adjacent to or in the vicinity of a Temporary Residential Area on erf 160, Philippi, an area of land in the noise corridor of the flight path to the Cape Town International Airport. The Minister of Housing began development of the Temporary Residential Area in order to provide temporary housing for local inhabitants.

After Stock became aware of the commencement of the housing development, his attorneys notified the Minister that the development was unlawful. Meetings took place between the parties but a settlement agreement between them could not be reached.

Stock brought an application of an interdict preventing further construction and occupation of houses in the Temporary Residential Area. He alleged that the decision to develop the area was irrational as it was an area unsuited to the construction of residential accommodation unless the houses were acoustically treated. He also alleged that the development failed to comply with the Land Use Planning Ordinance (no 15 of 1985) and other legislation.

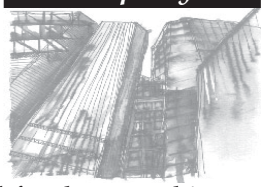
THE DECISION

It was clear that there had not been proper compliance with the Land Use Planning Ordinance. It was also clear that the Minister had not afforded Stock an opportunity to be heard on the question of the development before the decision to develop was made. There was no clear reason why the Minister did not give Stock this opportunity. The requirements of procedural fairness were therefore not met, and this affected the decisions and actions consequent upon this which were taken. As neighbouring property owners, Stock and the other applicants were entitled to have their views considered carefully before a decision was taken which might well affect their property rights.

All of the requirements for an interdict against the Minister had been met. However, the court would not interdict the Minister should the court, in the exercise its discretion, consider this to be the proper course. Taking into account the need for housing, and the constitutional right to housing, and the fact that the provision of housing in the Temporary Residential Area did not subtract from the property rights of neighbouring property owners, the court should refuse the interdict. This did not condone the failure to comply with relevant legislation.

The interdict was refused.

THORPE v TRITTENWEIN



A JUDGMENT BY SCOTT JA (CAMERON JA, CONRADIE JA, LEWIS JA and HEHER JA concurring)
SUPREME COURT OF APPEAL
24 MARCH 2006

2007 (2) SA 172 (A)

An agreement of sale of fixed property signed by only one of the trustees of a trust which is a party to the agreement, does not comply with section 2(1) of the Alienation of Land Act (no 68 of 1981) if the trust deed contains no provision entitling one trustee to perform acts on behalf of the trust without the co-operation of the other trustees.

THE FACTS

In December 2000, Thorpe signed an agreement of sale as trustee of the purchaser, the Brian Edward Thorpe Trust. He did so after being orally authorised to do so by the other trustees, and later obtained their ratification of his action. The sale agreement made provision for two purchasers, the first being the trust and the second not stated, the entry for the second purchaser having been left blank. The purchase price was stated to be R2 520 000 for stand 1 and R1 270 000 for stand 2, each stand being purchased by the two purchasers separately. Each purchaser was to pay one half of the deposit of R250 000 within eight days of conclusion of the sale.

Later that month, an addendum to the sale agreement was signed, in which the second purchaser was identified as Mr NJ Fuller as trustee for a close corporation to be formed.

Clause 4 of the agreement of sale provided that the sale was conditional on the seller, Trittenwein, establishing a township on the property.

The trust paid its share of the deposit. Fuller paid his corporation's share in March 2002. There were delays in applying for the establishment of the township and Trittenwein began to default in bond repayments relating to the property. He gave notice of cancellation of the sale agreement to Fuller, but Fuller proceeded with the sale. The bondholder proceeded with execution proceedings, but these were stopped when Condere Beleggings CC intervened with financial assistance.

Trittenwein sold the property to Condere. At about the same time, the approval for the township development was received.

Thorpe then brought an application for an order declaring that the first sale agreement was valid and enforceable. Trittenwein raised a number of defences, one of them being that the sale agreement was invalid because Thorpe had acted without the written authority of the other trustees, with the result that the agreement did not comply with section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE DECISION

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

Trustees of a trust must act jointly, unless the trust deed provides otherwise. They may authorise another party to act for them, provided this is allowed by the trust deed. The trust deed in the present case, did not provide that the trustees could authorise another party to act for them. It contemplated them acting jointly.

Whether or not Thorpe was seen as an agent as referred to in section 2(1) acting for the trust, it remained the case that the trustees had to act jointly in order to effectively bind the trust. In consequence, even if as an agent, he was authorised as required by that section, his signature to the agreement of sale did not create a binding agreement since the other two trustees did not act jointly with him in doing so.

Section 2(1) of the Act therefore had not been complied with. The appeal failed.

ERF 441 ROBERTSVILLE PROPERTY CC v NEW MARKET DEVELOPMENTS (PTY) LTD

Property

A JUDGMENT BY GOLDSTEIN J
WITWATERSRAND LOCAL DIVISION
21 SEPTEMBER 2006

2007 (2) SA 179 (W)

A description of land as a sectional title unit with the addition of a diagramme more fully describing the land, which omits to include the diagramme, is a sufficient description of land for the purposes of compliance with the formalities for the sale of land.

THE FACTS

Erf 441 Robertsville Property CC purchased fixed property from New Market Developments (Pty) Ltd under a written agreement of sale. Clause 1 of the agreement provided that the property sold was sectional title unit 12 mini units Northlands Deco Park, measuring approximately 750m^2, more fully indicated on a draft diagramme attached.

A draft diagramme was not attached. New Market Developments contended that because of this, the agreement of sale failed to comply with the statutory requirement that it be in writing. It also contended that the agreement was contrary to section 67(1)(a) of the Town Planning and Townships Ordinance (no 15 of 1986) (Gauteng) which provides that after an owner of land has taken steps to establish a township on his land, no person shall enter into any contract for the sale of an erf in the township.

Erf 441 applied for an order that the agreement of sale was valid and binding.

THE DECISION

Being a sectional title unit, the property included a participation quota. In terms of the sectional title scheme, this was determined by the developer, which in this case was New Market Developments. This it had done.

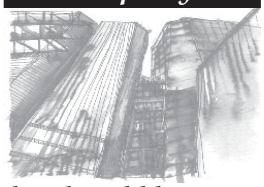
As far as the absence of the draft diagramme was concerned, the agreement expressly stated that this was added as 'more fully indicated ...' These words were therefore not essential to the description of the property. The property could be identified without recourse to the diagramme.

As far as the Ordinance was concerned, an 'erf' was defined as a particular portion of land. In this case, the property sold included an undivided share in common property and therefore did not constitute a particular portion of land. Accordingly, the sale was not affected by the provisions of the Ordinance.

The application was granted.

It seems to me that it can be correctly said of the unit purchased by the applicants that such contains a 'particular portion of land', that is, the 750 m^2 of the unit concerned. However, the agreement does not encompass that area alone, but also the participation quota which was to accompany it. The composite merx so purchased, including as it does an undivided share in the common property, cannot be said to constitute the 'particular portion of land' referred to in the definition of 'erf'. The ordinance was signed in Afrikaans and the relevant portion of the definition, consistent with my view, reads ' en omvat enige bepaalde gedeelte van grond .' It follows that the agreement was not concluded in contravention of s 67 of the ordinance.

POCOCK v DE OLIVIERA



A JUDGMENT BY JAJBHAY J
WITWATERSRAND LOCAL
DIVISION
10 OCTOBER 2006

2007 (2) SA 90 (W)

A restrictive condition of title affecting an adjoining property does not entitle the title deed holder to real rights in the adjoining property.

THE FACTS

Pocock owned erf 5554 Kensington Township Registration Division IR, Province of Gauteng. It adjoined erf 5555 in the same township, which was owned by De Oliviera. The title deeds of both properties incorporated a condition that they were not to be subdivided or split up except with the consent of the township owner, and a condition that only one residence with stables and outhouses could be built upon the block comprised of lot nos. 5554 and 5555. The two erven were developed jointly. A single house was built on erf 5554 and its outbuilding extended onto erf 5555. There was no visible boundary between the two erven.

In February 1998, the block comprising lot nos. 5554 and 5555 had been transferred to De Oliviera in a single deed of transfer. In October 2001, erf 5554 was sold by the sheriff by public auction pursuant to a warrant of execution issued out of the magistrates' court arising from a judgment obtained for unpaid rates an taxes levied against De Oliviera in respect of this property. Transfer was effected direct to Pocock.

Pocock took the view that as a result of the conditions of title, and by virtue of her purchase of erf 5554, she had obtained ownership rights in erf 5555. Pocock sought an order declaring that the two erven were notarially tied and could be regarded as one property for all intents and purposes and neither of them could be sold or transferred otherwise than to the same transferee.

THE DECISION

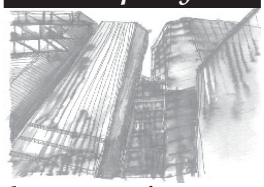
A notarial tie agreement is an agreement concluded between a local authority and two or more property owners. No such agreement had been concluded, and accordingly Pocock could not depend on this to contend that the two properties were tied.

Pocock's central contention was that erf 5555 had become part of erf 5554 by accession. In this regard, the test to be applied was whether or not the intention was that the portion of the land claimed was to be permanently attached to the adjoining land. The method and degree of attachment may indicate that the attachment is of such a nature that the property with the attachment formed a new and independent entity.

Pocock had failed to show that erf 5555 was capable of acceding to erf 5554, or that there was effective attachment. What Pocock had done was show that by mistake, she had thought she was purchasing both erven. She then attempted to elevate a restrictive condition of title to a real right granting her ownership of the other property.

The application failed.

ROELOFFZE N.O. v BOTHMA N.O.



A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
28 NOVEMBER 2006

2007 (2) SA 257 (C)

A right of way must be used and enjoyed in a reasonable and lawful manner. Whether or not it is so used, depends on all the facts and circumstances surrounding it and its use. A servient owner is entitled to use of the right of way if the enjoyment and use of its own property requires this.

THE FACTS

The Roeloffze Family Trust owned a smallholding known as Welbedacht, in the district of Stellenbosch. The property enjoyed a right of way over an adjoining property known as Helderzicht, which was owned by a trust whose trustees were Bothma and his wife. The right of way was created when the properties were first subdivided and was recorded in the title deeds of Welbedacht. It provided that the property was entitled to the benefit of a right of way 15 feet wide, which right of way would be for the use of the transferee and his successors-in-title only.

Bothma began construction of an electronic gate across the right of way at a point approximately 45 metres from the entry point. The purpose of the gate was to enhance the security of the property and keep in farm animals which he intended to keep on the property. Roeloffze had once intended to install a similar gate, but when prevented from doing so by a tenant, installed one at the end of the right of way.

When Roeloffze became aware of the construction of the gate, he and his wife made no objection to it but made suggestions as to its construction over the six week period during which it was being installed. Bothma assured them that they would be given the code necessary to open and close the gate, which could be done without having to exit their vehicle. Some two weeks later, Roeloffze obtained an opinion that the construction of the gate was unlawful and could lead to a claim for damages.

The Roeloffze Family Trust then brought an application for an interdict restraining Bothma from installing the gate. Bothma counter-applied, in his capacity as trustee of the owner of Helderzicht, for an order declaring that the Roeloffze Family Trust did not have the exclusive right to use the right of way and was obliged to use it reasonably and with minimum interference with its property rights.

THE DECISION

The installation of the gate was not unreasonable or unlawful. The gate was different from one which would be simply locked, and Bothma had offered to provide Roeloffze with the code necessary to open and shut the gate. The reasonableness of such a gate was also evidenced in the fact that the Roeloffzes themselves had once wished to install such a gate. Furthermore, their apparent acquiescence in the construction of the gate indicated that they themselves had considered the construction of the gate reasonable.

As far as the counter-application was concerned, this was brought because Roeloffze had taken the view that the wording of the right of way as recorded in the deed of transfer had conferred an exclusive right on the Roeloffze Family Trust. The use of the word 'only' therein did not however, have a single ordinary or literal meaning. Its meaning depended on the interrelation to the document as a whole and the nature and purpose of the transaction as it appeared from the document. They could not infringe the rights of the servient property owner so as to preclude it from using its own land. It was also apparent that at least for the first 45 metres of the right of way, Roeloffze had had no objection to the Bothmas using the right of way for their own benefit. The counter-application therefore should succeed.

The application was dismissed.

ESTATE AGENCY AFFAIRS BOARD v AZEVEDO

A JUDGMENT BY HORN J
(SCHWARTZMAN J and
BASHALL AJ concurring)
WITWATERSRAND LOCAL
DIVISION
14 JUNE 2004

2007 (2) SA 5 (W)

A person claiming against the Estate Agency Affairs Board in terms of section 18(1) of the Estate Agency Affairs Act (no 112 of 1976) must bring action against the estate agent against whom he has a claim as required by section 19(1) of the Act before any action against the Board can be brought.

THE FACTS

Azevedo paid R490 000 to an estate agent who absconded with the money. He took steps to trace the estate agent, but was unsuccessful. No action was brought against the estate agent.

Azevedo brought an action for payment of the lost R490 000 against the Estate Agency Affairs Board, basing the action on section 18(1) of the Estate Agency Affairs Act (no 112 of 1976). The section entitles a person who has lost money from theft of funds to an estate agent to claim their loss from the Board.

The Board appealed against judgment given against it, basing its appeal on the provisions of section 19(1) of the Act. This provides that no person shall without the permission of the board commence any action against the board, unless and until the claimant has exhausted all relevant rights of action and other legal remedies available against the responsible estate agent and others liable for the loss.

The Board had not given permission in terms of the section, and it contended that Azevedo had not exhausted all relevant rights of action against the estate agent.

THE DECISION

There was no onus on the Board to establish that, had Azevedo followed the procedure outlined in section 19(1), legal action would have been futile, or to investigate the estate agent's disappearance. The onus rested on Azevedo to show that he had complied with the provisions of the section.

The wording of the section is peremptory. It obliges an aggrieved party to take reasonable steps to exhaust his rights of action against the person responsible for the theft. This includes bringing legal action against the estate agent, taking judgment and executing on the judgment. The claimant is not absolved from this responsibility by assuming the thief has no assets or has absconded.

In the present case, Azevedo took no steps to institute action against the estate agent. The search conducted for him was insufficient to bring the claim within the ambit of the provision.

The action against the Board failed.

There is no onus on the appellant to establish that, had the respondent followed the procedure outlined in s 19(1), legal action would have been futile, or to investigate the circumstances of De Pont's disappearance. There is also no onus on the appellant to bring the provisions of s 19(1) of the Act to the attention of the respondent and to advise him in that regard. No such onus or duty on the part of the appellant is expressly stated in s 19(1), neither can it be so implied. The onus rests on the respondent to satisfy the Court that he had complied with the proviso to the section.

The wording of the proviso is peremptory. An aggrieved party is obliged to take reasonable steps to exhaust his rights of action and pursue other legal remedies against the person responsible for the theft. This includes instituting legal action against the estate agent and bringing such action to a conclusion, by obtaining judgment, followed by execution against the judgment and all other steps which will complete the relevant remedies, including, if need be, applying for the sequestration or liquidation of the estate agent.

ANGLO OPERATIONS LTD v SANDHURST ESTATES (PTY) LTD

Property

A JUDGMENT BY BRAND JA (HOWIE P, MTHIYANE JA, MLAMBO JA and THERON AJA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2006

2007 CLR 18 (A)

The holder of a mineral rights in property is in the position of a party holding servitudinal rights and is entitled to go on to the property, search for minerals and remove them if they are found. Such a party is entitled to conduct open cast mining operations if this is reasonably necessary for the exercise of its rights.

THE FACTS

Anglo Operations Ltd held all the rights to coal in, on and under property owned by Sandhurst Estates (Pty) Ltd. Its rights derived from a notarial cession of coal rights given by previous owner of the property and the coal rights pertaining thereto. The cession had been given in favour of African and European Investment Co Ltd which had later ceded its rights to Anglo.

In terms of the cession, Anglo was entitled to rights of access and temporary residence on the property for prospecting purposes and held the right to exercise an option to purchase up to 50 morgen of the property for the erection of buildings, machinery, dams and other installations which it might require for the proper exercise of its rights. The cession also conferred on Anglo associated and ancillary rights to enable it to exploit the coal reserves on the property. A similar notarial cession of coal rights was given by a party who held a one-sixth share in the coal rights pertaining to the property.

Anglo wished to use a portion of the property for open-cast mining purposes, and construct a stream diversion on the property. It contended that it was entitled to do so by virtue of its rights under the cessions, alternatively under common law, alternatively in terms of section 5(1) of the Minerals Act (no 50 of 1991). It applied for an order that it was entitled to exercise these rights.

THE DECISION

Recognition of the duty of lateral support owed by the holder of mineral rights in land, as referred to in *London SA Exploration Co v Rouliot* (1891) 8 SC 74, was not a matter the court needed to concern itself with. The real question was whether this principle of neighbour law should be extended to govern the relationship between mineral right holders and the owners of the same land.

There was no reason why it should be. Rouliot, constituting the introduction of judge-made law based on the perceived need to fill a lacuna in the law, provided no basis for any such extension. Furthermore, the owner of property and the holder of mineral rights in the property stand, in relation to each other, as owner and servitude holder. Because mineral rights are usually found under the surface of the land, the right to extract and remove the minerals can generally only be exercised by excavating the land. This involved a curtailment of the surface owner's rights. The difference between underground mining and open cast mining lay in the degree of such curtailment, not whether or not it would occur.

Given the respective rights of these parties, a degree of conflict between them would always arise. The management of the conflict was to be determined in accordance with the principles of law resolving conflicts between the holders of servitutal rights and owners of the servient properties. The holder of a servitude is entitled to go on to the property, search for minerals and remove them if they are found. Open cast mining does not create an exception to this rule. It should only be allowed if it is reasonably necessary, but it should be allowed when it is reasonably necessary in order to remove the minerals, provided this is done in a manner lest injurious to the interests of the surface owner.

The appeal succeeded.

WIGHTMAN v HEADFOUR (PTY) LTD

A JUDGMENT BY THRING J
(BLIGNAULT J concurring,
BOZALEK J dissenting)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
7 SEPTEMBER 2006

2007 (2) SA 128 (C)

Contract

Mere possession of keys to premises does not in itself signify possession of the premises since holding the keys must also entail control over the premises to the exclusion of others. If a duplicate set of keys is given to another party with the intention that that party obtains access to the premises, then, in the absence of fraud, the original holder abandons possession of the premises in favour of that party.

THE FACTS

In March 2004, Wightman and Headfour (Pty) Ltd concluded a contract in terms of which Wightman was to renovate and reconstruct a partially built cottage in Hout Bay. Wightman began the work. By July 2004, according to Wightman's calculations, Headfour owed him R220 451,87.

Disagreements arose between the parties, as a result of which, Wightman stopped work. He retained a set of keys for the premises and posted a guard there to secure the premises. The parties then entered into negotiations concluding in an agreement that Headfour would receive a duplicate set of keys for the premises, and the guard was removed. When Wightman next attended the premises, Headfour had taken occupation and prevented him from coming on to the premises to attach notices that he was exercising his builder's lien. Wightman's attorney later confirmed it was agreed that his having not attached the notices did not constitute a waiver of his builder's lien, and that the keys had been given to Headfour for inspection purposes only. To Wightman's knowledge however, other contractors attended the premises in order to execute work there.

Wightman then brought an application for the immediate restoration of possession of the premises, a mandament van spolie, contending that he had been unlawfully dispossessed of the premises by stealthy, improper and deceptive tactics. In argument, Wightman contended that he had never lost possession of the premises because he had always retained possession of the keys to the premises. If retention of the keys was considered insufficient in law to retain possession, he had lost possession by undue means, and was entitled to recover possession under the mandament van spolie.

THE DECISION

To have possession of a thing, one must have physical control of the thing, as well as the intention to hold it. Possession of keys to premises must be more than mere possession of the keys and must entail control over the premises to the exclusion of others. If the owner obtains keys to the premises and access to them, as a general rule the original possessor then loses possession. However, it is uncertain as to whether this rule applies when the other possessor gain possession of the keys by fraud or other undue means.

In the present case, Wightman gave the keys to the premises to Headfour, thereby consenting to his possession of the premises. After he became aware that Headfour had taken occupation, he was content to allow Headfour to retain possession of the duplicate set. Once Wightman delivered the duplicate keys to Headfour, and thereafter allowed him to retain them and use them for a different purpose, ie to give other contractors access to the premises, he surrendered physical possession of the premises, to Headfour. Possession was lost by surrendering the duplicate keys to Headfour and, thereafter, permitting it to retain and use them in the knowledge that they would be used for purposes other than mere inspection of the premises.

The question remained whether Wightman had surrendered possession of the keys through fraud, because if he had, he would be entitled to restoration of possession. There was insufficient

evidence to show that fraud had been used. Headfour disputed Wightman's version of the agreement concluded in July and accordingly it could not be said that Wightman had been induced by fraud to give the keys to it. Wightman was therefore not entitled to a mandament van spolie based on this ground.

The application was dismissed.

From a consideration of these principles and authorities it seems to me that several fundamental points emerge which are of importance in the present matter. They can, I think, be stated thus:

(1) There is no particular magic in the possession of keys to a building as a manifestation of possession of the building; as a mere symbol their possession alone will not per se necessarily suffice to constitute possession of the building; to have that effect they must render the building subject to the immediate power and control of the possessor of the keys: they must be the means by which the latter 'is enabled to have access to and retain control of' the building (Heydenrich v Saber and Others (supra) loc cit).

(2) To be effective in conferring possession of the building on or retaining it for the possessor of the keys, the keys must have the I effect of enabling their possessor to deal with the building as he likes (in the sense of affording him access thereto) to the exclusion of others (Scholtz v Faifer (supra) at 247); after all, that is the primary purpose which locks and keys are designed to achieve.

(3) Where, as here, possession of the building is sought to be retained adversely to its owner, possession of the keys must, subject to what follows, have the effect of excluding the owner, in the sense of precluding him from exercising the right of possession which an owner of property usually enjoys

...

Thus, the points which I have numbered (2) and (3) above must probably be qualified in terms which can, I think, be stated something like as follows:

(4) However, where the keys, or duplicate copies thereof, are obtained by another without the consent of their possessor by means of theft, fraud, deception, trickery or other unlawful or 'undue' means, it may possibly be that the resultant loss by the initial possessor of the keys of his exclusive access to the building will not necessarily mean that, in law, he has lost possession of the building: see Heydenrich v Saber & Others (supra) at 77 and Ploughall (Edms) Bpk v Rae (supra) at 891F - G; sed contra , it would seem, Donaldson v Estate Veleris 1938 TPD 269 at 271, where it was held that possession had been lost even where fraud had been an element in obtaining the F possessor's consent to part voluntarily with his possession.

(5) Alternatively, where this has happened, it may be that the initial possessor of the keys does indeed lose his possession of the building, but that he is entitled to be restored to such possession by means of a mandament van spolie.

CROWN CHICKENS (PTY) LTD v RIECK

A JUDGMENT BY NUGENT JA (FARLAM JA. MTHIYANE JA, MLAMBO JA and COMBRINCK AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2006

2007 (2) SA 118 (A)

A party to which employee services are rendered is not an employer of that person if such services have been rendered under a labour broking contract in which a third party has undertaken to supply such services to that party.

THE FACTS

Rieck concluded an employment contract with TMS-Shezi Industrial Services (Pty) Ltd. In terms thereof, TMS-Shezi was obliged to pay her salary and effect whatever deductions and contributions necessary in terms of tax and other legislation. Rieck was obliged to perform whatever services were required of her, and these services were in turn supplied by TMS-Shezi to Crown Chickens (Pty) Ltd in return for a fee. Rieck then performed her employment duties to Crown Chickens and became within its direction and control.

While performing her duties, which were those of a cashier at a retail shop attached to the poultry farm where Crown Chickens conducted its operations, a robbery took place. In the course of the robbery, Rieck was shot in the arm by one of the Crown Chickens security personnel.

Rieck brought an action for damages against Crown Chickens claiming that the security personnel had acted negligently. Crown Chickens defended the action, contending that they had not acted negligently, furthermore that the action was excluded by virtue of section 35(1) of the Compensation for Occupational Injuries and Diseases Act (no 130 of 1993). The section provides that no action shall lie by an employee for the recovery of damages in respect of any occupational injury resulting in the disablement of such employee against such employee's employer.

THE DECISION

The point of dispute was whether or not Crown Chickens was Rieck's employer. Crown Chickens contended that although TMS-Shezi had employed her, it was her employer for the period during which she worked for it.

The history of workmens' compensation legislation showed that in general, an employee is understood to have only one employer at any one time, ie the person with which the employee is in contractual relationship as employer, and this person remains the employer even if the employee performs his services for another person. The 1993 Act defines an employer as any person who employs an employee and includes 'if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person'. The words 'such employer' refer back to the word immediately preceding them, ie the person who employed the employee and who temporarily made the employee available to some other person. The definition therefore pointed to the initial employer as being the employer entitled to the indemnity provided for in section 35(1).

Crown Chickens was not Rieck's employer and therefore not entitled to the benefit of section 35(1). The appeal was dismissed.

REDDY v SIEMENS TELECOMMUNICATIONS (PTY) LTD

A JUDGMENT BY MALAN AJA (HOWIE P, NAVSA JA, NUGENT JA AND COMBRINCK AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2006

2007 CLR 1 (A)

Whether or not a provision in restraint of trade will be upheld depends on whether or not the provision is reasonable, reasonableness being determined on the basis of a value judgment taking into account policy considerations applicable to the matter.

THE FACTS

Siemens Telecommunications (Pty) Ltd employed Reddy. When entering employment, he agreed not to be employed with a competitor for a period of one year after termination of his employment with Siemens nor disclose trade secrets or confidential information belonging to Siemens.

Siemens, based in Germany, was one of the world's leading telecommunications providers in voice and data networks. It, and Ericsson, provided telecommunications installations and services to South Africa's three cellular telecommunications networks, MTN, Vodacom and Cell C. The two companies were competitors. However, Ericsson was the sole supplier of infrastructure and services to MTN. Ericsson did limited business with Vodacom but had signed a confidentiality agreement with Vodacom with a view to entering the Nigerian market. Ericsson provided services in forty three African countries including Kenya, where Vodacom did not operate.

Reddy resigned from Siemens. One month later, he took up employment with Ericsson. His duties were not to extend to any of Siemens' customers in South Africa and related only to Ericsson's long-standing customers, and customers outside of South African who were not Siemens customers.

Siemens contended that its software and its customisation to processes, methodologies and systems architecture developed by Siemens for implementation in the industry, was confidential to it and its trade secret. It contended that Reddy's training in the use of this software and these processes gave him skills in services having a unique identity and a competitive edge, and this entitled it to enforce the restraint of trade Reddy had signed upon taking employment with it. Reddy contended that his training with Siemens was irrelevant to the Ericsson products he would be working with and was of academic use only.

Siemens applied for an order for the enforcement of the restraint, and interdicting and restraining Reddy from being employed by Ericsson in the province of Gauteng for a period of one year.

THE DECISION

A restraint of trade provision that is reasonably required for the protection of the party seeking to enforce it is constitutionally permitted. Whereas there has been uncertainty as to which party bears the onus of proof in this regard, in the present case, this was not a pertinent issue, the facts concerning reasonableness or otherwise of the restraint having been fully explored in the evidence. If the facts showed that the restraint was reasonable, Siemens should succeed. This called for a value judgment upon the basis of the facts.

Taking into account the two principal policy considerations applicable—pacta servanda sunt on the one hand, and the desirability of productivity and the freedom to engage in trade and commerce on the other—it was clear that the provisions in question were not intended to preclude Reddy from being employed by a competitor for an unlimited period and this was intended to prevent the dissemination of Siemens' trade secrets and confidential information. Public policy requires that contracts be enforced, consistent with the constitutional values of dignity

and autonomy. The terms of the restraint in question were reasonable.

Siemens was therefore entitled to the order it sought.

However, all the facts must be considered. Siemens and Ericsson are competitors providing services to telecommunication network operators. Although Vodacom and Cell C are customers of Siemens Ericsson does some business with them. Siemens still has to acquire any of MTN's business. Reddy is in possession of trade secrets and confidential information of Siemens. Moreover, shortly before his resignation from Siemens he attended a training course updating his knowledge of the processes, methodologies and systems architecture developed by Siemens. Information of this kind, if disclosed, could be used to the disadvantage of Siemens. This is not a case such as Basson v Chilwan *where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed. Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in* BHT Water *Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens] in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist . The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy.*

... Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is correct that his employment with Ericsson will be restricted it remains a breach of his contractual undertaking. It follows that it is no answer to suggest that an undertaking would be sufficient to protect Siemens' interests and that less restrictive means could therefore achieve the same purpose as enforcing the restraint (s 36(1)(e)).

MV3 ARCHITECTS (PTY) LTD v PROPRO INVESTMENTS (PTY) LTD

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
29 JANUARY 2007

2007 CLR 73 (W)

A party which concludes a compromise agreement is entitled to revert to its rights under its original agreement if the compromise agreement is breached.

THE FACTS

MV3 Architects (Pty) Ltd was the principal agent appointed in the construction of Residence Rwayitare in Sandton. It was appointed as principal agent in terms of a Client Principal Agent Agreement concluded between it and Propro Investments (Pty) Ltd in July 2000. Propro was the owner of the land on which the residence was to be constructed.

In August 2000, Filcon Projects contracted with Propro to build the residence. Their contract was based on the Principal Building Agreement issued by the Joint Building Contracts Committee and it incorporated by reference a priced bill of quantities.

MV3 brought an action against Propro for payment of an amount due on professional fees owed in terms of the Client Principal Agent Agreement. The parties entered into settlement negotiations. MV3 alleged that the result was a compromise agreement in terms of which Propro agreed to pay R355 521,98 in full and final settlement of the outstanding balance of MV3's fees. Judgment was given in favour of MV3 in this amount and Propro paid this. Thereafter, Propro denied the conclusion of a compromise agreement. MV3 contended that the denial constituted a repudiation of the compromise agreement; it cancelled the agreement. MV3 proceeded to claim the amount due on professional fees owed to it, less the R355 521,98 paid by Propro. It defended MV3's action against it on the grounds that the claim had been extinguished by the conclusion of the compromise agreement, and that MV3 having elected to proceed against it based on that agreement, there was no basis for MV3's action.

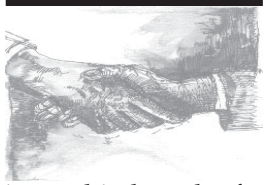
Propro also brought an action against MV3 claiming damages for negligently over-certifying a payment due to Filcon and under-certifying penalties to be deducted from amounts due to Filcon. MV3 defended this action on the grounds that it had granted Filcon a number of extensions of time for completion and that in disputes that arisen out of these, consensus had been reached between the parties on adjusted amounts then due to Filcon.

THE DECISION

The conclusion of the compromise agreement did not bring about a novation of the Client Principal Agent Agreement. It brought about a suspension of MV3's claim for payment of fees pending performance of the compromise agreement. Consequently, were the compromise agreement to be breached, MV3 would be entitled to revert to its rights in terms of the Client Principal Agent Agreement.

When MV3 brought its action based on the compromise agreement, it did not pursue a remedy inconsistent with those available to it under the Client Principal Agent Agreement. Those remained suspended and had not been waived. It was therefore entitled to payment in terms of its rights as recorded in that agreement.

As far as Propro's action was concerned, whereas it was clear MV3 had attempted to resolve disputes arising from the extended dates of completion, it was also clear that the parties had not dispensed with the terms of the Principal Building Agreement on which Propro now relied. That agreement required that variations to it be recorded in writing and no such variation had in fact been concluded. MV3 had not acted in terms of that



agreement when certifying the contested payments due to Filcon and the contested penalties to be deducted from amounts due to it. As such, and in its capacity as adjudicator, it acted in breach of the agreement. Accordingly, Propro was entitled to the amounts claimed by it in its action.

The two actions succeeded.

I have found that none of the applications for a revision of the date for practical completion should have been granted and that the owner's taking premature occupation does not constitute a bar to the running of penalties: the contractor is entitled to reasonable access 'to any portion of the works already handed over to the employer to fulfil his obligations'. MV3 have certified in the recovery statement that penalties amounted to only R 84 000. This amount was carried forward in interim payment certificate 22 and has to be reflected in the final payment certificate in terms of clause 34.6 of the Principal Building Agreement. It cannot be reversed. It follows that penalties continued to be incurred until the date for practical completion as certified by the principal agent, 27 March 2002, amounting to R483 000 (161 days at R3000 per day). MV3 has therefore undercertified penalties in an amount of R399 000, the amount representing Propro's loss in this respect. The principal agent where he acts as adjudicator is the agent of the owner and 'the limitations of his powers in this respect are defined by the terms of the [Principal Building Agreement]. MV3 in undercertifying the amount of penalties clearly acted in breach of this obligation.

CLAASE v THE INFORMATION OFFICER OF SOUTH AFRICAN AIRWAYS (PTY) LIMITED

Contract

A JUDGMENT BY COMBRINCK AJA (MPATI DP, BRAND JA, CLOETE JA AND MLAMBO JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2006

2007 CLR 47 (A)

A person's right to information requested under the Promotion of Access to Information Act (no 2 of 2000) is established upon showing facts which prima facie, though open to some doubt, establish that he has a right of access to the record which would protect his right.

THE FACTS

In terms of a retirement agreement between Claase and South African Airways (Pty) Ltd, Claase was entitled to two business class tickets on any of SAA's international flights every year.

In 2004, Claase travelled to New York and was booked to return to Johannesburg on 20 August 2004. He wished to return earlier, and therefore went to the SAA counter at the airport in New York to make a booking. He was told that business class seats were available but none could be allocated to him until bookings for the flight had closed. After all other bookings had been made, he was informed that there was only one seat left in business class.

Claase intended suing SAA for damages for breach of contract. In order to establish whether or not seats were available in business class when he attempted to make the booking in New York, he was told that this information could not be given to him. He submitted a Request for Access to Records in terms of the Promotion of Access to Information Act (no 2 of 2000) but the required information was not forthcoming.

Claase then applied for an order compelling SAA to furnish him with records reflecting the number of bookable seats on the flight, the number of seats booked on the flight, the number of people who arrived to take up their seats, and the number of people upgraded from economy class to business class.

THE DECISION

An applicant for information in terms of section 50 of the Act need only put up facts which prima facie, though open to some doubt, establish that he has a right of access to the record which would protect his right. The traditional standard of proof in applications for an interim interdict are appropriate in these circumstances.

In the present case, Claase had shown that he had such a prima facie right. The record he sought was a computer printout which would determine whether there were seats available in business class on that particular flight when he sought to make a booking. His evidence was that he was told so by an SAA employee and that he saw economy class passengers upgraded.

The record he sought was 'required' for the protection of the right. The substantial advantage was that the contents of the record would be decisive of the dispute between the parties. It would be bring a short end to the dispute.

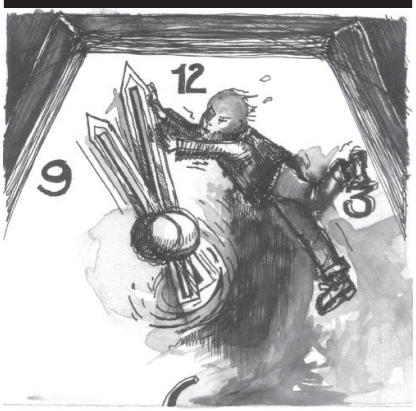
Claase was therefore entitled to the information he requested.

FAROCEAN MARINE (PTY) LTD v MINISTER OF TRADE AND INDUSTRY OF THE REPUBLIC OF SOUTH AFRICA

A JUDGMENT BY MALAN AJA (FARLAM JA, MLAMBO JA, MAYA JA AND COMBRINCK AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2006

2007 CLR 55 (A)

Prescription



Prescription in respect of a debt does not start to run until the creditor has completed those investigations which it is entitled to make as a pre-requisite to allowing or disallowing the claim from which the debt arose.

THE FACTS

In March 1995, Farocean Marine (Pty) Ltd informed the Department of Trade and Industry of a proposal to construct and export a yacht to a foreign purchaser. It contained details of a loan by Standard Merchant Bank to the purchaser, repayable over ten years commencing after completion of the yacht. It applied for benefits in respect of the sale, and lodged a claim against the Director-General of the department for benefits payable to exporters under the General Export Incentive Scheme.

In July 1996, benefits amounting to R1 723 861 were paid to Farocean. From November 1996 to January 1998, the Director-General conducted an investigation to verify the information given by Farocean in respect of its claim. As a result of the investigation, the Director-General determined that the export of the yacht did not constitute 'export sales' as defined in the Guidelines promulgated to govern the operation of the scheme. Paragraph 3.11 provided for the right of the Director-General to investigate claims made under the scheme and the right to disallow a claim made in circumstances where the claimant was unable to back its claim following a request for information. Paragraph 3.9 provided that all claims were subject to final verification.

The Director-General then sought to recover the amount paid to Farocean. Summons to do so was served in September 1999, more than three years after the decision to recover was made.

Farocean defended the action on the grounds that the Director-General, and not the Minister, should have brought the action against it, and also on the grounds that the claim for repayment had prescribed.

THE DECISION

In instituting action, the Minister was not exercising the powers of the Director-General, but was putting the department's case before court. There could be no objection to this.

As far as the plea of prescription was concerned, the question was when the debt arose and when it became due. Farocean contended that this was when the amount of R1 723 861 was paid to it. However, the provisions of paragraphs 3.9 and 3.11 of the Guidelines were relevant insofar as they entitled the Director-General to disallow a claim. They were not merely procedural provisions. The debt became due only after an investigation had been conducted to verify the information given by a claimant.

Farocean contended that because the department knew the purchase was to be facilitated by the loan given by the local bank, from the time it was first addressed with the application for benefits, it had sufficient knowledge to identify its debtor and the facts from which the debt arose. However, this was not sufficient knowledge for the department to know that payment did not emanate from a direct inflow of foreign exchange. This is what was determined by its investigation.

The officials of the department could therefore not reasonably have known of the facts from which the debt arose before completion of their investigation. The claim had not prescribed.

MUTUAL AND FEDERAL INSURANCE COMPANY v CHEMALUM (PTY) LTD

A JUDGMENT BY MPATI DP (STREICHER JA, NUGENT JA, HEHER JA AND MAYA JA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2006

2007 CLR 38 (A)

Insurance

An average provision in an insurance policy indemnifying for loss of profits is to be applied in respect of actual turnover as determined by assessment of what the insured would have obtained had the insured event not taken place.

THE FACTS

Mutual and Federal Insurance Company insured Chemalum (Pty) Ltd against loss following interruption of its business. The policy was in force for twelve months. It provided that the insurance in respect of gross profit was for loss of gross profit due to a reduction in turnover, and the amount payable would be in respect of a reduction in turnover calculated by applying the rate of gross profit to the amount by which the turnover during the indemnity period fell short of the standard turnover. The amount payable would be reduced proportionately if the sum insured in respect of gross profit was less than the sum produced by applying the rate of gross profit to the annual turnover where the maximum indemnity period was twelve months or less. Standard turnover and annual turnover were defined terms of the policy.

As a result of fire, Chemalum's business was brought to a standstill for two months. Chemalum claimed indemnity in terms of the insurance policy.

The parties agreed that the standard turnover for the twelve month period was R9 058 770, the actual turnover was R4 406 855, and the reduction of turnover was accordingly R4 651 909. Chemalum's rate of gross profit was 57%, so that its loss of profit in terms of the policy was R2 651 588, being 57% of the reduction of turnover.

The parties were in dispute as to the date from which Chemalum was entitled to interest on its claim, and whether the claim was to be reduced proportionately as provided for in the policy.

THE DECISION

The purpose of the average provision, which reduced the amount payable if the sum insured was less than the sum produced by applying the rate of gross profit to the annual turnover, was to arrive at a figure that would represent as nearly as was reasonably practicable, the insured's actual damage. There was therefore no reason why the factors applicable in determining the standard turnover should differ in the case of the determination of the annual turnover.

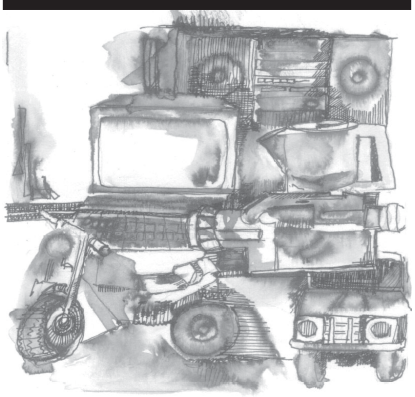
Since the period over which the standard turnover was determined was the same as the period over which the annual turnover was to be calculated, and the same adjustments were to be made to both amounts, the figure for both was necessarily the same. Applying the proportionate adjustment, the amount payable to Chemalum was R1 537 920.

ABSA BANK LTD v BISNATH N.O.

A JUDGMENT BY SWAIN J
DURBAN AND COAST LOCAL DIVISION
5 SEPTEMBER 2006

2007 (2) SA 583 (D)

Credit Transactions



A mortgagee is not obliged to compensate a mortgagor if it fails to collect rentals due in respect of the mortgaged property after it has enforced its rights of foreclosure under the bond. A mortgagee is obliged to account to the mortgagor for any profit made on resale of the mortgaged property after the sale in execution of the property.

THE FACTS

Absa Bank Ltd brought an action for repayment of a loan given to the trust of which Bisnath was the trustee. Judgment by default was granted against the trust.

Clause 13 of the mortgage bond under which it enforced its rights provided that the trust granted Absa the right to all rents and revenue accruing to the mortgaged property as additional security for such sums as might be claimable at any time under the bond, provided that such right would not be acted upon without the consent of the trust while the conditions of the bond were being fully complied with.

Bisnath contended that when Absa enforced its rights under the bond and obtained judgment against the trust, it became obliged to collect rentals due in respect of the property, and to account to the trust for the amounts collected. He contended that Absa had failed to meet these obligations and the trust was entitled to compensation in the amounts it had failed to collect.

At the sale in execution of the property, Absa purchased the property in order to protect its position as mortgagee. Thereafter, it sold the property, realising a profit of R165 980,20. Bisnath contended that the trust was entitled to be credited in the amount of this profit.

THE DECISION

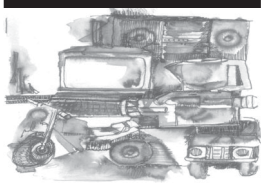
The benefits of a mortgaged property are subject to the rights of the mortgagee, and those obtained subsequent to judgment having been obtained against the mortgagor are applied in satisfaction of the debt. Applied to the present case, Absa was entitled to collect the rentals and the trust was no longer entitled to do so, once judgment had been given.

This however, did not mean that Absa was obliged to compensate the trust for rentals not collected. Such an obligation might arise if the mortgagee is in possession of the property and the mortgagor is then complying with the terms of the bond. But this was not the situation in the present case and Absa owed no duty to compensate the trust for any rentals not collected.

Clause 13 of the bond mirrored the common law position between the parties and did not impose on Absa any further duties toward the trust.

As far as the profit made on the second sale of the property was concerned, Absa stood in a different position from a third party which might have bought the property at the sale in execution. Unlike such a third party, as mortgagee it was obliged to credit the trust's account with the profit on the second sale. This is because upon purchase of the property at a sale in execution, the bond would have remained in place and Absa as mortgagee would not have been entitled to simply sell the property in order to satisfy its claim for payment as this would have amounted to the enforcement of an illegal pactum commissorium. Absa was therefore obliged to account to the trust for the profit and credit its account is the sum of R165 980,20.

EX PARTE FIRSTRAND BANK LTD v SHERIFF, BRAKPAN



A JUDGMENT BY GOLDBLATT J (BORUCHOWITZ J and TSOKA J concurring)
WITWATERSRAND LOCAL DIVISION
9 NOVEMBER 2006

2007 (3) SA 194 (W)

Service in terms of Rule of Court 46(3) takes place upon post by prepaid registered post of a letter containing the requisite notice to the address of the person intended to be served. Such address I shall be either the address chosen or furnished by the addressee as such person's address or the actual postal address of such party. A notice in terms of Rule of Court 46(3) must be served following an appropriate order of court in terms of Rule of Court 4.

THE FACTS

In foreclosure proceedings, Firstrand Bank Ltd would issue notices in terms of Rule 46(3) of the Uniform Rules of Court. The Rule provides that the mode of attachment of immovable property is to be by notice in writing by the sheriff served upon the owner thereof, and that any such notice is to be served by means of a registered letter, duly prepaid and posted addressed to the person intended to be served.

On a number of occasions, the letter would not reach the owner. The sheriff was aware of this, and would request an indemnity from the bank to cover him for the consequences following upon a sale which was later attacked and overturned on the grounds that there had not been proper compliance with Rule 46(3). The bank would be compelled to bring a separate application to court for service directions in regard to the notice required by the Rule.

The bank contended that these procedures were cumbersome and costly, and had become necessary because of judgment handed down in the case of *Sowden v Absa Bank Ltd* 1996 (3) SA 814 (W). This judgment had held that notice to the defendant in terms of Rule 46(3) should be ensured, and that merely serving notice by means of a registered letter as provided for in the Rule was insufficient to ensure that such notice had been given.

The bank applied for a declaratory order to the effect that service as provided in the Rule constituted sufficient compliance with the requirements of the Rule.

THE DECISION

The method of service provided for in Rule of Court 46(3) is imperative. Upon compliance therewith, the notice by the sheriff may be understood to have been served. The only condition for this is that the letter must be addressed to an address chosen by the addressee or an address that the sheriff either personally or through acceptable evidence knows to be the address of such party.

In order to give effect to the provisions of the Rule requiring the sheriff to appoint a date and place for the sale of the property not more than one month after service of the notice, the sheriff must know when service of the notice of attachment took place. If this depended on knowing when and if the addressee of the notice received such notice, it would create considerable uncertainty and difficulty in fixing a date for the sale. This could not have been the intention of the drafters of the Rule and they must have intended service in terms of Rule of Court 46(3) to mean that service occurred on the posting of the registered letter referred to in such Rule.

The views expressed in the *Sowden* case do not reflect a proper interpretation of Rule of Court 46(3).

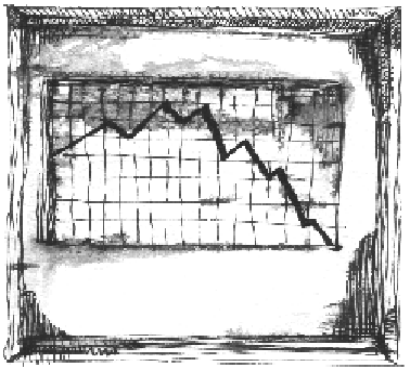
Service in terms of Rule of Court 46(3) takes place upon post by prepaid registered post of a letter containing the requisite notice to the address of the person intended to be served. Such address I shall be either the address chosen or furnished by the addressee as such person's address or the actual postal address of such party. A notice in terms of Rule of Court 46(3) must be served following an appropriate order of court in terms of Rule of Court 4.

CORPORATE LIQUIDATORS (PTY) LTD v WIGGILL

A JUDGMENT BY
HARTZENBERG J
(MAVUNDLA J and RANCHOD
AJ concurring)
TRANSVAAL PROVINCIAL
DIVISION
10 OCTOBER 2005

2007 (2) SA 520 (T)

Insolvency



An order of court incorporating a settlement agreement ordering that property falling into a joint estate is to become that of one of the spouses, effectively vests ownership of that property into the separate estate of that spouse upon granting of that order.

THE FACTS

Wiggill was married to her husband in community of property until their divorce in 1998. At the time of their divorce, two fixed properties fell into the joint estate, portion 13 of the farm Goedehoop and erf 833 Louis Trichardt. The divorce order included an order that a settlement agreement concluded between Wiggill and her husband was made an order of court.

The settlement agreement provided that portion 13 was to be sold for R290 000 and the purchase price used to pay off the mortgage bond over erf 833. Erf 833 was then to be subdivided, Wiggill to take ownership of one half and Mr Wiggill to take ownership of the other half subject to a lifelong usufruct over that half in favour of Mrs Wiggill's parents.

Mr Wiggill sold portion 13 but did not effect transfer into the purchaser's name. He failed to effect the subdivision of erf 833 and the transfers referred to in the settlement agreement. Wiggill then brought an application to compel him to give effect to the settlement agreement. The following month, Mr Wiggill's joint estate—he having remarried—was surrendered in insolvency proceedings brought in the same court.

The trustee in the insolvent joint estate of Mr Wiggill and his wife took the view that Wiggill, his ex-wife, only had personal rights against the insolvent estate since as at the date of divorce, she and Mr Wiggill were co-owners of their joint estate and co-debtors in respect of estate liabilities. The settlement agreement never having been implemented, this position remained as at the date of sequestration with Wiggill consequently a concurrent creditor in relation to the insolvent estate.

The trustee appealed a finding adverse to the view taken by him.

THE DECISION

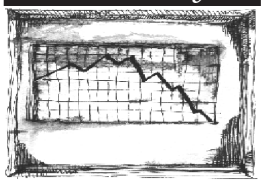
Section 7(1) of the Divorce Act provides that a court granting a decree of divorce may, in accordance with a written agreement between the parties, make an order with regard to the division of the assets of the parties. This means that formal delivery of an asset awarded to one of the parties is unnecessary to transfer ownership thereof. The effect of the order is that the joint estate is immediately divided in terms of the order and ownership vests immediately in the party entitled thereto. Registration of transfer into the name of that party is unnecessary.

The settlement agreement provided precisely for what was to happen with regard to the fixed properties and there was no discretion left to Mr Wiggill in this regard. The subdivision had to be effected and the resulting properties transferred to each party. The divorce order therefore clearly provided for matters which would result in the vesting of ownership of the respective subdivisions in each party.

As far as Wiggill's parents were concerned, the position was however, different. They were third parties as far as the divorce settlement was concerned, and there was no automatic vesting of their rights when the divorce order was granted. Holding only personal rights as against Mr Wiggill, they were concurrent creditors in his insolvent estate.

The appeal failed.

McCARTHY LTD v GORE N.O.



A JUDGMENT BY THERON AJA (HARMS ADP, BRAND JA, NUGENT JA AND JAFTA JA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2007

2007 CLR 188 (A)

A party which conducts business operations incidental to its primary business operation is not a trader in relation to such incidental business operations, and accordingly not a trader as defined for the purposes of application of section 34(1) of the Insolvency Act (no 24 of 1936).

THE FACTS

Ramsauer Transport (Pty) Ltd conducted business as a transport contractor, conveying goods long-haul. From time to time, it sold some of its vehicles, and recoupments in respect thereof were recorded in its books of account.

The company also concluded a factoring agreement with Cutfin (Pty) Ltd. The factoring agreement and the sale of its vehicles were done in order to improve Ramsauer's liquidity.

To alleviate its cash-flow problems, in December 1999, Ramsauer sold to McCarthy Ltd twenty eight of its vehicles, for a purchase consideration of R2 052 000. Later in the same month, the price was paid and the vehicles transferred to McCarthy. The vehicles remained in the possession of Ramsauer however, and continued to be operated by it. The financing of the purchase was arranged through Roadfin (Pty) Ltd, a company within the Roadcorp group which received payment of the purchase price after it raised an invoice against McCarthy. A few days after this, Ramsauer was placed in liquidation.

The liquidator of Ramsauer contended that the sale of the vehicles should be declared void as it fell within the terms of section 34(1) of the Insolvency Act (no 24 of 1936). He sought an order declaring the sale void and ordering repayment of the R2 052 000 paid to McCarthy.

THE DECISION

Section 34(1) provides that if a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt) and such trader has not published a notice of such intended transfer in the Gazette between thirty and sixty days of such transfer, the transfer will be void as against his creditors for a period of six months after such transfer.

The purpose of this legislation is to protect creditors by preventing a trader from transferring a business asset to a third party who is not liable for the debts of the business. It applies to a 'trader'. Consequently, it was necessary to determine whether or not Ramsauer was a 'trader' in relation to the sale of the twenty eight vehicles.

A 'trader' is defined in the Insolvency Act. The definition does not include a transport haulier. Ramsauer could fall within the definition only if it were considered a party carrying on a business in which property was sold. The sale of vehicles by Ramsauer was an activity which was incidental to its primary activity of conveying goods long-haul. It was not a 'trader' in the sense that it conducted the business of selling vehicles, and therefore not a trader as referred to in the section.

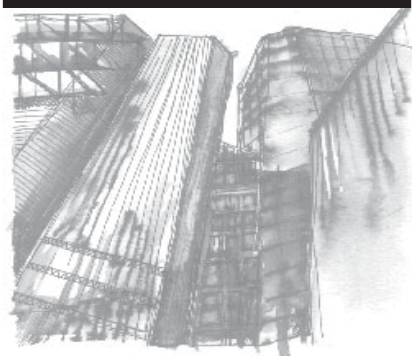
The sale of the vehicles was therefore not a transaction to which section 34 applied. The liquidator's application was refused.

DE BEER v ZIMBALI ESTATE MANAGEMENT ASSOCIATION (PTY) LTD

A JUDGMENT BY NICHOLSON J
NATAL PROVINCIAL DIVISION
11 MAY 2006

2007 (3) SA 254 (N)

Property



A person holding rights of access to property does not have possession of the property. Possession of property entitling a person to restoration of possession under a spoliation application must be exclusive possession.

THE FACTS

Zimbali Estate Management Association (Pty) Ltd was the homeowners association managing the Zimbali resort development and authorised to do so as a condition of registration of the development. The property had three access points leading to different parts of the development. One of them led to a beach estate where Casandav Property CC held the sole right to sell properties. De Beer was employed by Casandav.

In January 2003, Zimbali invited applications for approval to operate as accredited estate agents on the remainder of the Zimbali estate. De Beer applied but was not approved. De Beer however, denied that she was not approved. She was able to obtain access to all areas of the estate with the use of a disc which opened the boom gates at the various entrances.

In October 2005, Zimbali disabled the disc so as to prevent access by De Beer to any part of the estate. She demanded re-activation of the disc and brought a spoliation application for an order restoring her rights of access to the estate.

THE DECISION

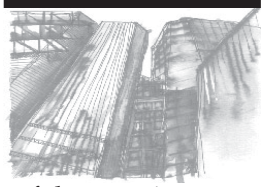
In order to succeed, De Beer had to show that she had been deprived unlawfully of the whole or part of her possession of the property she formerly held.

It was clear that the boom or gate was effectively locked as far as De Beer was concerned. The disc was, in effect, a key which would normally make access to the whole estate possible. The de-activation of the disc facilitating access amounted to the same thing as changing the locks on a door. The essential question was therefore whether De Beer had originally had possession of the whole estate.

What De Beer had originally was access to the entire estate, not possession of it. This was clear from the fact that others had possession of the estate, ie the owners, and in no sense did De Beer have possession thereof to the exclusion of other parties. These other parties continued to have undisturbed possession of the property. Accordingly, a spoliation order in respect thereof would be inappropriate in circumstances where their possession had not been affected.

De Beer was entitled to continue to have access to the beach estate, but was not entitled to an order restoring rights of access to the rest of the estate. The application was dismissed.

GREAVES v BARNARD



A JUDGMENT BY BLIGNAULT (DESAI J and VELDHUIZEN J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
3 AUGUST 2006

2007 (2) SA 593 (C)

A person who is both employed by a company and a director and shareholder of the company may be unlawfully dispossessed of rights of occupation of company premises since that person's rights of possession may derive from his position as director and shareholder and not merely from his position as employee.

THE FACTS

Barnard was the marketing director and a shareholder in Carl Greaves Brokers (Pty) Ltd. In terms of a shareholders' agreement concluded between Barnard, Greaves and the second appellant, each party was an executive director of the company, and held shares in the company in proportions specified in the agreement. The agreement provided that all benefits accruing to the company would be divided equally between the parties, and the shareholders would owe a duty of good faith to each other, their relationship being construed as quasi partners. Barnard, and the other parties, were also employed by the company.

The parties conducted their work for the company at business premises which was owned by a subsidiary company.

On 4 April 2005, Greaves addressed a letter to Barnard alleging that Barnard had acted in breach of his duty of good faith toward the company. Barnard responded to the letter, but was then informed that he was suspended as a director of the company and should not attempt to gain access to the business premises. On 8 April 2005, Barnard discovered that the lock to the front gate of the premises had been replaced and he could not gain access.

Barnard brought a spoliation application in order to be restored to possession of the premises. Greaves contended that Barnard's possession of the premises had derived from his position as employee and as such he was not entitled to a spoliation order.

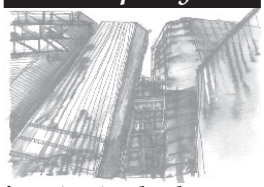
THE DECISION

Barnard was not just an employee of the company. It was clear from the shareholders' agreement that his position was that of a director and shareholder. He therefore did not derive his rights of occupation of the premises merely from the fact that he was an employee but also from his position as director and shareholder. In doing so, he was also fulfilling his function as director and shareholder which itself would have increased the benefits flowing to the company.

While it might be said that an ordinary shareholder of a company does not have rights of possession in regard to company premises, Barnard's position as shareholder was different from the theoretical shareholder of other companies. His particular position as shareholder in this particular company was such that he was entitled to possession of the company premises in order to execute his duties as director.

Since Barnard had been in undisturbed and lawful possession of his offices in the company, the dispossession he had experienced as unlawful and he was entitled to restoration of possession.

SOUTH AFRICAN HERITAGE RESOURCES AGENCY v ARNISTON HOTEL PROPERTY (PTY) LTD



A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
30 SEPTEMBER 2006

2007 (2) SA 461 (C)

A property owner does not obtain vested rights to develop its property merely because building plans have been approved in terms of the National Building Regulations and Building Standards Act (no 103 of 1997). A property owner is, in certain circumstances, entitled to make representations regarding the provisional protection of an area including its property in terms of the National Heritage Resources Act (no 25 of 1999).

THE FACTS

Arniston Hotel Property (Pty) Ltd owned a hotel in Arniston. It applied to its local authority for the approval of building plans for the alternation of the hotel, and these were approved. The alterations were to take place in two phases. The first phase had reached completion at a time when the South African Heritage Resources Agency notified Arniston that provisional protection had been extended under the National Heritage Resources Act (no 25 of 1999) to an area including the hotel and that for a period of two years, no alterations to property within that area were permitted without a permit issued by the agency.

Section 29(10) of the Act provides that no person may, inter alia, alter the planning status of a provisionally protected place without a permit issued by a heritage resources authority or local authority responsible for provisional protection.

Arniston ignored the provisional protection order and began building operations for phase two of its development. The Agency then sought an interdict restraining it from continuing with the building operations.

Arniston took the view that the provisional protection order did not preclude the carrying out of building work previously approved by the local authority and that the procedure followed prior to the decision to invoke section 29(10) was not fair.

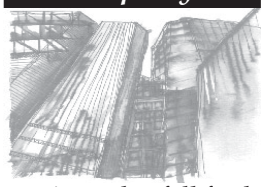
THE DECISION

The approval of the building plans did not establish an accrued and vested right. The plans were approved in terms of the National Building Regulations and Building Standards Act (no 103 of 1997) whose purpose is to promote uniformity in the law relating to the erection of buildings. The Act provides that no person shall erect any building without the prior approval of the local authority in question. The Act does not refer to the granting of any rights upon the granting of such approval. Arniston's rights of ownership were also subject to restrictions created by such factors as the need to conserve nature and preserve the environment.

The question of procedural fairness was central to the matter. The question was whether the decision taken by the Agency's executive committee to provisionally protect the area was procedurally fair to Arniston. Section 27(8) of the Act required that before a property could be declared a national heritage site, the detailed procedure provided for in the Act had to be followed. This included giving notice to the owner and other interested parties, who would have at least 60 days to make submissions regarding the declaration. This procedure was contrasted with that provided for in section 29 which concerned provisional protection only.

While there were differences in procedure between the two, the provisional protection was for a lengthy period, ie two years. It was also important that extensive renovations and alterations to the hotel had been under way for some time, that the hotel was the largest employer in Arniston, that a provisional protection order would have far-reaching consequences, that Arniston had not been consulted, and that the motivation for including Arniston in the protected area was contained in a report by an individual with a particular view of the matter.

Taking these factors into

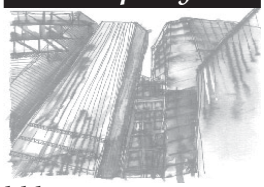


consideration, Arniston was entitled to be heard prior to the decision being taken to provisionally protect the area.

The Agency's actions also fell foul of the Promotion of Administrative Justice Act. The application was dismissed.

This brings me to what I consider to be the nub of the case, namely, whether the decision taken by the executive committee on 17 September 2005 was procedurally fair to the respondents. In respect of this issue also, the applicant's counsel highlighted the fact that the Act distinguishes between the procedure to be followed in relation to investigating the desirability of declaring particular areas as national heritage sites, declaring such places heritage sites and provisionally protecting such sites for the purposes of investigation. Before a property can be declared a national heritage site in terms of s 27(5) of the Act, the detailed procedure described in s 27(8) of the Act must be followed. This requires notice to be given to the owner, mortgage holder and I occupier and other persons with a registered interest in the property, as well as to interested conservation bodies. These persons are given at least 60 days to make submissions regarding the declaration and the owner may 'propose conditions under which the action would be acceptable'. This procedure is contrasted with the procedure in terms of s 29, which is merely to protect provisionally, for a maximum period of two years, any heritage resource which the applicant wishes to investigate in terms of s 27(1) of the Act. Counsel stressed the fact that since the provisional protection under s 29 is far less drastic in scope and duration than the consequence of declaring an area a national heritage site, all that is necessary for the applicant to do is to notify the owner of the property in writing, in terms of s 29(4), of the proposed provisional protection prior to publishing the notice of provisional protection. The reason why the owner is not consulted in advance is because the protection is only provisional and may not be converted into final protection. As I have already remarked, the submission on behalf of the applicant that the freezing of the area is only temporary would have carried much more weight had the period of the freezing order been shorter. The two-year period of the order, on the other hand, clearly has serious and perhaps far-reaching consequences for the respondents and brings into sharp focus whether they should have had prior notice of the applicant's intention to invoke the provisions of s 29(10) of the Act. In considering this question, regard should be had to s 10 of the Act.

O'GRADY v FISCHER



A JUDGMENT BY VAN REENEN J
(YEKISO J concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
17 MAY 2006

2007 (2) SA 380 (C)

A party alleging that his neighbour is constructing a building without permission required in terms of the National Building Regulations and Building Standards Act (no 103 of 1977) must show that the neighbour was not exempted from the need to obtain such permission.

THE FACTS

Fischer constructed a paved parking area of approximately 400 m^2 on his property. O'Grady's property was on the other side of the road to Fischer's property.

O'Grady objected the paved parking area on the grounds that it would invade his privacy, that he had not had an opportunity to comment on it or object to it, that the local authority had not approved it, that it would infringe on his enjoyment of his privacy, constitute a traffic hazard and impede his restaurant business, constitute a deleterious visual impact directly opposite his personal residence, and impact upon his personal privacy because Fischer's establishment was frequented at all hours of the night.

O'Grady brought an application for an interdict to prevent Fischer from completing the paving work and to remove what had already been done.

THE DECISION

In the absence of any proof that the paving had been done without the approval of the local authority, the only basis upon which the interdict could be granted would be upon demonstration that the paving work constituted a 'building' subject to the building regulations provided for in the National Building Regulations and Building Standards Act (no 103 of 1977).

A building is referred to in an extended sense, including structures in the broad sense. This would include the construction of the paved area since it was to be used in connection with the accommodation or convenience of people.

The approval of the local authority was required for buildings in respect of which plans were to be drawn and submitted in terms of the Act. Such plans need not be submitted in respect of all buildings. In particular, a minor building work does not require submission and approval. O'Grady had however, not shown any evidence that exemptions such as this one did not apply to Fischer's paving work. There was therefore insufficient evidence to show that Fischer was required to have obtained the approval of the local authority for that work.

The application was dismissed.

JUST NAMES PROPERTIES 11 CC v FOURIE

A JUDGMENT BY JAJBHAY J
WITWATERSRAND LOCAL
DIVISION
7 MAY 2006

2007 (3) SA 1 (W)

A document recording an agreement of sale of fixed property given by the seller which contains signed blank pages which are completed at a later stage fails to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE FACTS

On 17 January 2003, a certain Mr A Baladakis and Fourie signed a written agreement in terms of which Fourie sold fixed property to Baladakis. The agreement provided that Baladakis acted as agent for a corporation to be formed, Just Names Properties 11 CC. When formed, Just Names adopted and ratified the agreement.

When Fourie signed the agreement, because of certain reservations she had concerning the terms of the agreement, she signed two blank pieces of paper which later became one of the pages of the agreement, page 3. The agent arranging the sale, took the blank pages and they formed this page after insertion of provisions relating to occupational interest and a suspensive condition relating to local authority approval for the development of the property. The document was then signed by Baladakis.

Just Names brought an action to enforce performance of the agreement. Fourie raised the defence that the agreement failed to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981) in that it was not in writing. Just Names contended that the agent could have been orally authorised to change the offer and that this did not constitute a failure to comply with that section.

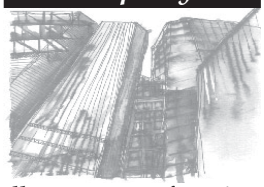
THE DECISION

The agent was not an agent in the technical sense of the word because she acted merely as a conveyor or nuntius between the two parties. The amendment to the written agreement was therefore not authorised in the sense contended for by Just Names. The provisions incorporated in page 3 contained material terms and therefore the constraints of section 2(1) applied to it.

It was clear from the evidence that Fourie herself would not have agreed to the terms contained on page 3 of the agreement. The failure to comply with section 2(1) was precisely the non-compliance which the section was specifically promulgated to avoid. Consequently, the agreement was invalid for want of compliance with the section.

The action was dismissed.

ETHEKWENI v TSOGO SUN KWAZULU-NATAL (PTY) LTD



A JUDGMENT BY HEHER JA
(HOWIE P, BRAND JA, MUSI AJA and THERON AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2007

2007 CLR 164 (A)

A municipality's response to an application for approval of building plans which amounts to a requirement that the applicant first ensure compliance with conditions such as those of a development plan before the building plan can be approved, amounts to a refusal of the application as envisaged in section 7(1) of the National Building Regulations and Building Standards Act (no 103 of 1977). An aggrieved applicant should proceed by way of review to the review board referred to in that Act and not by way of application to the High Court.

THE FACTS

In November 2004, Tsogo Sun Kwazulu Natal (Pty) Ltd submitted three plans for approval to the eThekwini Municipality in order to comply with licence conditions imposed by the Kwazulu-Natal Gambling Board. The third plan was for the construction of a multi-level car park which Tsogo was to construct by 31 July 2005.

By 24 January 2005, the municipality had still not approved the plan and on that date, Tsogo's attorneys sent the municipality a demand that it approve or reject the plan by the 28th of that month. On 31 January 2005, the municipality replied. It stated that prior to it being able to consider the application, Tsogo had to ensure that the plan complied with the Integrated Development Plan, or that application to amend the Integrated Development Plan was made in order to allow for the proposal. It invited Tsogo to collect the plans for the purposes of effecting any amendments and re-submitting them to the municipality.

Tsogo then brought an application for an order compelling the municipality to approve the plan, or to grant or refuse the plan within five days of the granting of the order.

THE DECISION

Section 7(1) of the National Building Regulations and Building Standards Act (no 103 of 1977) provides that if a local authority shall grant or refuse its approval of a building plan within sixty days of receipt of the application in cases where the architectural area of the building is 500 square metres or larger.

Tsogo contended that the municipality's response to its demand was to neither approve nor refuse the plan and accordingly constituted a failure to comply with section 7(1).

The section envisages an unequivocal approval or rejection of a building plan. In the present case, the question therefore was whether or not the municipality's reply constituted either an approval or a refusal to approve. The letter informed Tsogo that before further consideration could be given to the plan, it did not approve the application as it was submitted for approval. This indicated that the municipality in fact refused the application. Its response was therefore unequivocal. The fact that it invited Tsogo to amend the plan in order to achieve compliance with the Integrated Development Plan indicated that the refusal could be changed in future. This was inconsistent with an equivocal response, ie one in which the municipality merely avoided the decision to approve or reject the plan.

Tsogo's application had to be refused on this ground, and on the ground that Tsogo should have firstly brought an application to a review board reviewing the municipality's action in terms of section 9(1) of the Act.

DE VILLIERS v POTGIETER

A JUDGMENT BY MLAMBO JA
(STREICHER JA concurring,
COMBRINCK AJA dissenting)
SUPREME COURT OF APPEAL
1 DECEMBER 2006

2007 (2) SA 311 (A)

A party which admits that another is owner of the property which that party occupies must demonstrate the basis of the right to assert continued occupation of the property when the owner brings eviction proceedings against him.

THE FACTS

De Villiers bought all the issued shares in Bulpan Beeste (Edms) Bpk for R553 680. The seller, Mr KG Keeley, warranted that Bulpan would be the owner of a farm as at the effective date. On that date, payment was due and transfer of the shares had to be effected. Keeley also warranted that as at the effective date, the company would have no debts, including any debts for income tax.

De Villiers took occupation of the farm. Payment for the shares was not made, neither were the shares transferred to him.

De Villiers then discovered that Bulpan was indebted to the Receiver of Revenue. When he addressed Keeley concerning this, Keeley proposed that the share sale agreement be cancelled and De Villiers purchase the property direct from Bulpan. De Villiers agreed to this, but only a cancellation agreement was then concluded, the new sale agreement being deferred.

Bulpan then sold the property to the trustees of the Potgieter Family Trust. De Villiers objected to the sale and informed the trustees of his objections. The property was nevertheless transferred to the trustees.

The trustees brought an application for the eviction of De Villiers from the farm. In a separate action, De Villiers claimed an order setting aside the transfer of the property to the trustees on the grounds that they had been aware of his claim in respect of the property before transfer was effected.

The trustees' application was successful. De Villiers appealed against the eviction order.

THE DECISION

De Villiers' contention was that under the doctrine of notice, the trustees could not claim to have a valid title to the farm, and that this prevented them from asserting their rights of ownership against him.

Assuming that the cancellation agreement was subsequently cancelled and the share agreement revived, the doctrine of notice would apply. This however, would not result in the transfer of the property to the trustees being a nullity. They would remain the owners until the transfer was cancelled and retransfer to another party took place. The trustees would therefore be entitled to assert their rights of ownership against De Villiers.

De Villiers' defence to the trustee's assertion of their rights consisted in an allegation that his occupation was lawful. However, the only basis for this allegation was that he had concluded a share sale agreement in respect of the previous owner. He did not allege that he took occupation in terms of some agreement with Bulpan and he derived no rights of occupation on any other basis. His allegation that he was the shareholder and director of Bulpan was not borne out by the facts of the case: they showed he never became either shareholder or director.

The eviction order was confirmed.

GLADIATOR SAMSUN CORPORATION v SILVER CAPE SHIPPING LTD, MALTA

JUDGMENT BY SOUTHWOOD AJ
DURBAN AND COAST LOCAL DIVISION
14 SEPTEMBER 2004

2007 (2) SA 401 (D)

Shipping

Security for a claim may be ordered if it is show that applicant has a prima facie cause of action against the respondent. The requirement that the applicant show that its need for security is genuine and reasonable should not fetter the court's discretion in determining whether security should be ordered.

THE FACTS

Gladiator Samsun Corporation time chartered Silver Cape Shipping Ltd's ship, the *Gladiator*. During the charterparty, the ship was damaged in a storm and had to undergo repairs. Silver Cape contended that Samsun was responsible for the damages and brought arbitration proceedings against Samsun in London. Samsun raised a counterclaim.

Samsun arrested the Gladiator in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) as security for its counterclaim and costs. Silver Cape provided a guarantee, and the ship was released.

Silver Cape then applied for an order that Samsun provide security for its claim in the arbitration proceedings, and that the arrest order be varied by reducing the amount of security and that the order lapse if Samsun failed to provide security as provided in Silver Cape's application.

Both Samsun and Silver Cape were peregrini of the court.

THE DECISION

The circumstances in which a court will order the giving of security in the case of a peregrinus litigant are the same as those applicable to an incola litigant. For security to be ordered in terms of section 5(2)(b) of the Act it must be shown that the party requiring it has a prima facie cause of action. It has also been held that the applicant has a genuine and reasonable need for security.

The requirements for security to be given under section 5(3) are slightly different. Under this section, it is not a requirement that the applicant show that its need for security is genuine and reasonable. A court's discretion in whether or not to order that security be furnished should not be fettered by ensuring that this requirement has been met.

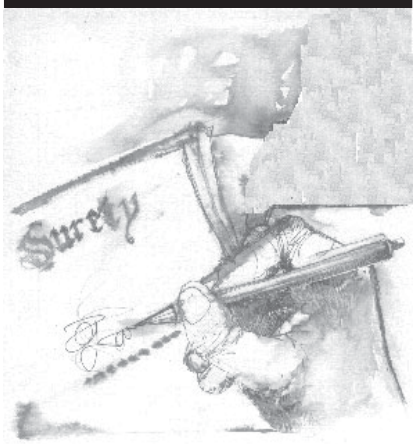
In the present case, taking into account all the factors relevant to the need for security, Silver Cape was entitled to an order that Samsun provide security and that the arrest order would lapse if Samsun failed to provide such security.

HANEKOM v BUILDERS MARKET KLERKSDORP (PTY) LTD

A JUDGMENT BY SCOTT JA
(ZULMAN JA and BRAND JA concurring)
SUPREME COURT OF APPEAL
2 MARCH 2006

2007 (3) SA 95 (A)

Suretyship



The 'previously obtained' consent referred to in section 52 of the Close Corporation Act (no 69 of 1984) may be disregarded in the case of a sole member of a close corporation signing a suretyship agreement for the close corporation. If the sole member of a close corporation signs a deed of suretyship on behalf of the close corporation, the express previously obtained consent in writing to the execution of the deed is thereby given, as required by the section.

THE FACTS

RTMC Marketing CC executed a deed of suretyship in favour of Builders Market Klerksdorp (Pty) Ltd in respect of the debts of LSL Konstruksie (Pty) Ltd. Hanekom was the sole shareholder and director of LSL and the sole member of RTMC.

LSL incurred debts toward Builders Market to the extent of R865 931,87 for goods sold and delivered. It began liquidation proceedings against LSL and RTMC and both were placed in liquidation.

Hanekom then applied for an order declaring that the deed of suretyship was invalid and unenforceable due to non-compliance with section 52 of the Close Corporation Act (no 69 of 1984). Section 52 provides that a corporation shall not make a loan or provide security to a corporation in which one or more of its members holds more than a 50% interest, unless the express previously obtained consent in writing of all the members of the corporation has been obtained.

Hanekom contended that because the previously obtained consent of all the members of RTMC had not been obtained, the prohibition contained in section 52 applied and the suretyship was accordingly void.

THE DECISION

The object of section 52 is to protect non-consenting members of a close corporation from another member who uses the resources of the corporation to their detriment. Their prior consent is required if the corporation is to make a loan or provide security. This object is however, inapplicable if the close corporation only has one member. The clear and unambiguous meaning of the section however, applied to all close corporations. The question therefore was whether a departure from this meaning was justified in order to avoid a manifest absurdity.

To give effect to the clear and ambiguous meaning of the section would result in a manifest absurdity. Nothing could be achieved by requiring that a sole member give his prior consent to the making of the loan or the provision of security. The member's signature to such a transaction would constitute sufficient indication of his consent and the fact that the consent was not given prior to that and in writing should be regarded as unnecessary.

The object of the section being to protect non-consenting members, a literal interpretation of the section does not achieve that object. It does no more than provide a sole member of a corporation with a defence which could never have been intended by the legislature. The words 'previously obtained' should therefore be disregarded.

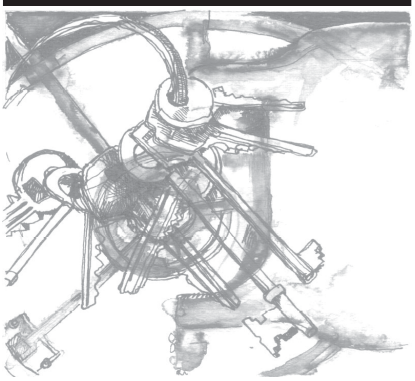
Hanekom's contentions were rejected. The appeal failed.

NEL v METEQUITY LTD

A JUDGMENT BY STREICHER JA (CAMERON JA, MLAMBO JA, MALAN AJA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
22 NOVEMBER 2006

2007 (3) SA 34 (A)

Trusts



There is an identity of interests between trustee and beneficiary in the achievement of trust goals and a trust is not invalid merely because of such an identity of interests.

THE FACTS

Nel and the other appellants were sureties for the debts of NWN Eiendomme (Edms) Bpk in favour of Metequity Ltd in its capacity as trustee of the Jan Nel Bond Trust.

Metequity obtained default judgment against NWN for payment of R437 060,88. It brought an action against Nel and the other appellants for payment of the balance of this debt. Nel defended the action on the grounds that the trust was not a valid trust in that there was an identity of interests between the trustees and the beneficiary.

The trust was created by Metequity and Investec Business Services Ltd, the other respondent, in terms of a trust deed which provided that Metequity settled upon the trustees R400 000 which would be advanced to NWN on loan. The income of the trust would be paid to Metequity or any other beneficiary to whom Metequity might cede its rights. Metequity and Investec were subsidiaries of Metboard Ltd and had no other function than those provided for in the trust deed.

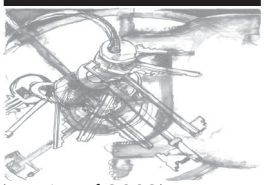
THE DECISION

There were two trustees and one beneficiary, all of which were wholly-owned subsidiaries of the same company. However, this did not mean that they held an identity of interests which vested in the same person purporting to act in different capacities. In any event, the interests of beneficiary and trustee were not necessarily inimical to each other. In relation to the fulfilment of trust objects, an identity of interests would invariably exist.

The fact that the trustees were subsidiaries of the same company was not a reason to infer that there was an identity of interests between the trustees and the beneficiary. The separate legal personality of each company could not be disregarded merely because the two companies in question had the same shareholder and the same directors. No improper conduct had been alleged or proved and the fact that both companies appointed the same nominee to carry out the trust was of no significance.

The action succeeded.

YARRAM TRADING CC v ABSA BANK LTD



A JUDGMENT BY BRAND JA (MPATI DP, MTHIYANE JA, BRAND JA, MALAN AJA AND THERON AJA concurring) SUPREME COURT OF APPEAL 30 NOVEMBER 2006

2007 (2) SA 570 (A)

A trustee under a Collective Investment Scheme is entitled to bring action for enforcement of the rights of investors.

THE FACTS

Yarram Trading CC concluded a lease as tenant with Bryanston Hobart (Pty) Ltd as landlord. The commencement date of the lease was 1 November 2003, but prior to that date, Bryanston Hobart sold the leased property to Absa Bank Ltd in its capacity as trustee of the Allan Gray Property Trust Collective Investment Scheme.

Clause 21.01 of the lease provided that Yarram would not be entitled to elect not to be bound to a new landlord and the lease would continue in full force and effect. Clause 20.08 provided that the parties acknowledged that Broll Management (Pty) Ltd was the agent of the landlord and Broll could exercise on its behalf all its legal rights and claims in terms of the lease.

In 2004, Absa alleged that Yarram had breached the lease by failing to pay rental due and failing to submit statements of its monthly turnover. On the instructions of Broll, its attorneys demanded that the breach be remedied. Yarram denied that it was in breach. The attorneys then cancelled the lease. Absa applied for the eviction of Yarram from the leased premises.

Yarram opposed the application on the grounds that Absa did not have locus standi to bring the application, that the attorneys' demand and cancellation of the lease had not been properly authorised, and that the disputes of fact between the parties were unresolvable on the papers.

THE DECISION

Yarram contended that the owner of the property was the investors in the Allan Gray Property Trust Collective Investment Scheme, not Absa in its capacity as trustee. However, analysis of the trust deed and the Collective Investment Schemes Control Act (no 45 of 2002) showed that the trustee held legal ownership of the underlying assets in the scheme. The investors do not acquire ownership but acquire a participatory interest in an investment portfolio.

The fact that, in terms of the Financial Institutions (Protection of Funds) Act (no 28 of 2001) a trustee is obliged to keep trust property separate from its own assets in its books of account and trust assets do not form part of the assets of the property does not change the law relating to ownership of immovable property held in trust. These provisions mirror the common law under which trust property is considered to be separate from other property owned by a trustee, but legal ownership remains vested in the trustee.

As far as the defence based on lack of authority was concerned, clause 20.08 precluded any reliance by Yarram on any lack of authority on the part of Broll. Broll's authority had in any event, been established by prior agreement and the subsequent conduct of the parties. Furthermore, the Act and the trust deed conferred control of the property on Allan Gray as manager, or its duly appointed agent. That included the power to demand payment of rental and cancel the lease.

As far as the disputes of fact were concerned, it appeared that this centred on the amount alleged to be owing in rental, rather than whether any rental was owing. The denial of the allegation that Yarram had failed to submit statements of its monthly turnover was unconvincing and untenable and could be rejected on the papers.

An order evicting Yarram from the premises was granted.

MANO v NATIONWIDE AIRLINES (PTY) LTD

A JUDGMENT BY CONRADIE JA (ZULMAN JA, FARLAM JA, CONRADIE JA, MAYA JA AND THERON AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2006

2007 (2) SA 512 (A)

Contract

An agent is entitled to commission upon the conclusion of a contract only if it is the effective cause of the contract.

THE FACTS

Nationwide Airlines (Pty) Ltd agreed with Mano that Mano would seek out and obtain aircraft to replace Nationwide's fleet of aircraft. Mano would be paid a commission in the amount of one percent of the purchase price of an aircraft.

Towards the end of April 1999, Mano's representative, a Mr Stark, had sent to Nationwide the specifications of two Boeing 737-200's, aircraft then owned by El Al. Mano and Nationwide concluded a Mutual Non-Circumvention Non-Disclosure Agreement, the purpose of which was to ensure that Nationwide would not conclude a sale of aircraft to avoid payment of commission on any transaction.

Mano began preliminary negotiations with El Al with a view to purchasing the aircraft for Nationwide, but no sale resulted as El Al sold the aircraft to another party. Later that year, Nationwide purchased two Boeing 737's from Croatia Airlines.

The following year, as a result of impending flight restrictions imposed by the civil aviation authorities, Nationwide was compelled to accelerate its programme of replacing its fleet of aircraft. Its chief executive officer, Mr Bricknell, noticed an advertisement for the sale of the two El Al aircraft, the earlier sale having been cancelled. He contacted El Al and purchased the two aircraft.

Mano claimed commission on the sale.

THE DECISION

An agent is entitled to commission on a sale if the agent is the effective cause of the sale. This entitlement may persist even if negotiations for a sale are broken off since the agent's introduction of a seller may still be overridingly operative in the conclusion of an eventual sale.

In the present case, it was clear that when Bricknell noticed the advertisement for the sale of the two aircraft, he remembered his previous dealings with El Al. However, there was no evidence that this resulted in Bricknell choosing to enter into negotiations for their purchase in preference to other advertisements he had noticed at the same time. Whether or not he did conduct negotiations for other aircraft was unknown.

Mano had stopped trying to find aircraft for Nationwide when the first sale had failed to take place and Nationwide had found the alternative aircraft with Croatia Airlines. This was well before Nationwide purchased the aircraft. Thereafter, it was the introduction of the new flight restrictions that prompted Nationwide to resume its efforts to find alternative aircraft.

It followed that Mano was not the effective cause of the sale and was not entitled to commission.

GUTSCHE FAMILY INVESTMENTS (PTY) LTD v METTLE EQUITY GROUP (PTY) LTD

Contract

A JUDGMENT BY CACHALIA JA (HARMS ADP, FARLAM JA, JAFTA JA AND PONNAN JA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2007

2007 CLR 157 (A)

An arbitration subject to the rules of appeals as provided for in appeals from the High Court prevents the arbitrator from determining an appeal against the dismissal or acceptance of an exception. An arbitrator does not have the power to determine the question of his own jurisdiction to hear an appeal.

THE FACTS

Gutsche Family Investments (Pty) Ltd concluded a sale agreement as seller with Mettle Equity Group (Pty) Ltd as purchaser. The agreement provided that disputes arising from it were to be referred to arbitration, in accordance with the rules of arbitrations under the Arbitration Foundation of South Africa (Afsa).

Gutsche referred a dispute to arbitration involving a claim for R4 803 558,89. Mettle filed a counterclaim exceeding this sum, alleging that Gutsche was in breach of warranties included in the agreement. Gutsche raised two exceptions to the counterclaim. The arbitrator dismissed the first and upheld the second in part. Gutsche appealed. Mettle objected to the arbitrator's jurisdiction to hear an appeal on the grounds that the parties had agreed on an appeal procedure only against the arbitrator's final award and not against an interlocutory ruling.

The parties then agreed that the arbitrator could decide on the jurisdiction question as well as the merits of the matter. The arbitrator decided in favour of Gutsche on both issues. Mettle then began review proceedings on the grounds that the arbitrator had wrongly assumed jurisdiction.

The review was successful. Gutsche appealed.

THE DECISION

The first question was whether the dismissal of the exception was appealable. The answer depended on the implications of incorporating the Afsa rules in the agreement. These rules provided that the nature of an appeal and the powers of an appeal arbitrator shall be the same as if it were an appeal to the Appellate Division of the Supreme Court of South Africa.

The appeal agreement provided only for an appeal procedure according to the Afsa rules. It did not provide for any other procedure. Accordingly, it was to the rules applicable to appeals to the Appellate Division that one had to look to determine whether the dismissal of the exception was appealable. These rules are to the effect that a High Court order dismissing an exception is not appealable. It followed that the arbitrator's order was not appealable

The second question was whether the arbitrator had the power to decide the appealability issue and thus determine his own jurisdiction. The arbitration agreement did not confer such a power on the arbitrator. Accordingly, as in the case of the High Court, he did not have the power to determine this. The agreement concluded between the parties did not go so far as to allow him this power.

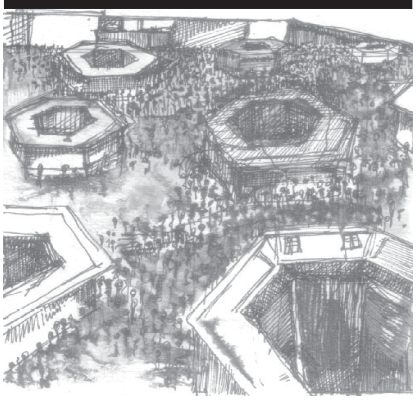
The appeal was dismissed.

GHERSI v TIBER DEVELOPMENTS (PTY) LTD

A JUDGMENT BY CLOETE JA (HOWIE P, JAFTA, JA PONNAN JA AND CACHALIA JA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2007

2007 CLR 145 (A)

Companies



A curator appointed in terms of section 266 of the Companies Act (no 61 of 1973) must conduct his investigation upon the grounds advanced in the application for his appointment. There must also be sufficient basis in the investigation he has conducted to warrant the recommendation that proceedings by instituted against the directors of the company.

THE FACTS

Ghersi and the other appellants were shareholders in Tiber Developments (Pty) Ltd. They served a statutory notice on the company requiring it to institute proceedings against the directors for payment of amounts totalling R98 288 446,53 which they alleged had been misappropriated by the directors, interest on that amount, and a statement of account of transactions undertaken by the directors who were alleged to have been improperly funded by the company.

Tiber Developments instructed its auditors to investigate the allegations made. After consideration of their report, it decided not to institute proceedings. Ghersi then brought an application in terms of section 266 of the Companies Act (no 61 of 1973) for the appointment of a curator ad litem for the purpose of instituting and conducting proceedings on behalf of the company against the directors.

A provisional curator ad litem was appointed and he proceeded to investigate the grounds for proceedings against the directors and the desirability of the institution of such proceedings.

The curator reported that the claim for R98 288 446,53 and interest could not be sustained and that there had been no loss or damage or deprivation of opportunity as a result of the contravention of section 266 on any grounds set out in the application. The curator went on to recommend the institution of proceedings against the directors for a statement of account of all property developments and opportunities undertaken by them over the previous 23 years which were not offered to the company.

The provisional order appointing the curator was discharged. Ghersi appealed.

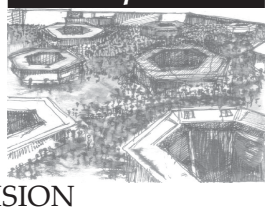
THE DECISION

The provisional curator is not confined in his investigation to the remedies suggested by the shareholder, but he is confined to the grounds advanced by the shareholder in the application. In the present case, the grounds advanced by the shareholder were based on the allegation that the directors had misappropriated funds. The notice of motion did not refer to the taking of corporate opportunities.

The curator's report did not support the finding that the directors had appropriated corporate opportunities. What would have been required for this would be for him to have investigated the ambit of the directors' fiduciary duty, an examination of the property developments undertaken by them, and an investigation as to the extent of the profits earned from those developments. Such an investigation was not adequately performed by the curator and the investigation he had undertaken was insufficient to warrant the massive litigation he had recommended.

The appeal was dismissed.

KOFAHL v KEILEY



A JUDGMENT BY JAFTA JA
(STREICHER JA AND HEHER JA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2007

2007 CLR 179 (A)

In determining the value of shares in a company, one must determine what a reasonable willing buyer would pay for the shares, taking into account all factors which such a buyer would prudently inquire into at that time.

THE FACTS

In November 1995, Kofahl and Keiley agreed that Keiley would market and sell brick-making machines which Kofahl had invented and patented. For this purpose, they decided to form a company, Palmerfield Ltd, to perform the joint venture which was to market and sell the machine in countries outside of Africa. Kofahl was allocated 80% of the shares in the company, and Keiley and another party 10% each. Palmerfield had no assets other than the licence to sell the machines.

Palmerfield marketed and sold the machine in Argentina. However, by May 1996, sales of the machine had turned out to be minimal. The company had attracted no capital and no investments and relations between Kofahl and Keiley became strained. In September 1996, Kofahl repudiated the joint venture agreement. Keiley accepted the repudiation and cancelled the agreement. Keiley sued Kofahl for damages being 10% of the value of Palmerfield. So far as liability for damages was concerned, his action succeeded. The trial court postponed the determination of the value of Palmerfield.

The value of the company was later determined to be US$1m, entitling Keiley to 10% of this in damages. Kofahl appealed against this evaluation.

THE DECISION

The correct approach to the valuation of the shares in the company was to determine what a willing buyer would have paid for 10% of the shares.

The factors a buyer would have taken into account were that there was a large market for the machine, that the machine had impressive qualities which attracted interest from those to whom it was introduced, and that Palmerfield had an exclusive licence to sell the machine. The buyer would also have taken into account the negative factors which showed there had been few sales of the machine and that the company had no assets other than the licence to sell the machine.

The fact that the marketing and sale of the machine had been unsuccessful in Argentina was a factor that could be taken into account as this indicated what a buyer would have discovered had he, as a prudent buyer, made full enquiries. A prudent buyer, discovering such information, might not be willing to pay anything for 10% of the shares. Since Keiley did not lead evidence to counter this fact, there was insufficient evidence upon which it could be determined that the value of the shares was US$100 000. Absolution from the instance should have been granted.

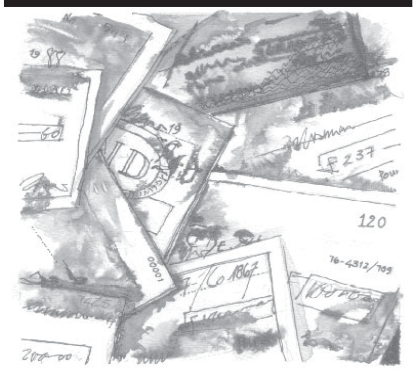
The appeal succeeded.

WYPKEMA v LUBBE

A JUDGMENT BY SNYDERS AJA (HARMS ADP, BRAND JA, LEWIS JA AND THERON AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2007

2007 CLR 195 (A)

Cheques



A cheque drawn on an attorney's trust account is drawn by the attorney as principal and not as representative of a particular client.

THE FACTS

Wypkema agreed to lend Rooihak Eiendomme (Edms) Bpk R1 850 000 as bridging finance pending the registration of a mortgage bond over certain property. A fee for the loan in the sum of R350 000 was payable to Wypkema.

Prior to advance of the funds, Rooihak's attorney, Lubbe, gave Wypkema a cheque for R2,2m being the amount of the loan plus the fee. It was given under cover of a letter to Wypkema in which it was stated that the cheque was to be presented for payment no earlier than 29 September 2004 and that registration of the mortgage bond would take place no later than 28 September 2004. When the cheque was presented for payment, it was dishonoured and returned to Wypkema with the note 'effects not cleared'.

Wypkema brought an action for provisional sentence against Lubbe. Lubbe defended the action on the grounds that he issued the cheque in a representative capacity as agent for Rooihak and was therefore not personally liable on the cheque, that he had not accepted liability as surety for Rooihak, and that the repayment of the loan with the cheque had been subject to the registration of the mortgage bond over the property.

THE DECISION

Money deposited into an attorney's trust account does not form part of his assets but becomes an asset of the bank. The attorney is entitled to operate on the account and when he draws a cheque on the account, he does so as principal and not in a representative capacity. The attorney does not issue the cheque on behalf of his client. It followed that when Lubbe drew the cheque in favour of Wypkema, he did so in his personal capacity.

The letter under cover of which the cheque was paid did not contain a suspensive condition, the only relevant term being that the cheque was not to be presented for payment before 29 September 2004.

None of the grounds advanced by Lubbe in defence of the action could be sustained.

Wypkema had alleged that the agreement to give the cheque as security for the loan was an illegal agreement because it was a cheque drawn on a trust account whose funds should not have been applied in that manner. However, there was no evidence to show that in issuing the cheque, Lubbe had put other clients' funds at risk, and in fact did not do so because the cheque had been dishonoured.

The appeal was upheld.

GOVERNMENT EMPLOYEES PENSION FUND v BUITENDAG

A JUDGMENT BY CLOETE JA (HARMS JA, ZULMAN JA, CONRADIE JA and PONNAN JA concurring)
SUPREME COURT OF APPEAL
27 SEPTEMBER 2006

2007 (4) SA 2 (A)

Pensions

A pension fund board should decide on the proper allocation of a gratuity upon the basis of the facts relevant to that decision. If in the exercise of its discretion in regard thereto, that body makes a mistake, the decision may be reviewed and set aside, provided that this is in the public interest and the beneficiaries are not themselves responsible for the mistake.

THE FACTS

Mrs Oosthuizen had been a member of the Government Employees Pension Fund before she died. When she died, a gratuity became payable and this was awarded to her husband or her husband and stepson in equal shares. At this time, the fund was unaware of the existence of Oosthuizen's children by a previous marriage.

Those children, Buitendag and the other respondents, brought an application for an order reviewing and setting aside the decision of the board of the fund to award the gratuity in the manner it had, and alternatively claimed damages from the provincial government which had employed Oosthuizen and had failed to inform the board of the childrens' existence.

The fund was established in terms of the Government Employees Pension Fund Law (no 21 of 1996). Neither its provisions nor the rules made under it provided for the payment of a gratuity to the dependants of a deceased member. Section 22 of the Law provides that a member may notify the board of his or her wish that any gratuity payable upon death be paid to specified beneficiaries. The board would be entitled to pay the gratuity at its discretion in accordance with the member's wish.

Buitendag's application succeeded. The fund appealed.

THE DECISION

The provincial government contended that the children were not dependants as defined in the law because they were self-supporting individuals. However, the definition of 'dependant' in the Law did not exclude self-supporting individuals. Furthermore, given the purpose of the Law, there was no reason to exclude self-supporting individuals. The children were dependants and were entitled to be considered by the board of the fund when it exercised its discretion as to which dependants should receive the gratuity.

The question then was whether the fact that the board was unaware of the existence of the children when it exercised its discretion provided a ground for the decision to be set aside. This depended upon whether or not the board's decision constituted lawful administrative action as referred to in section 31 of the Constitution, a provision which applied to its actions at the time they were done. The section provided that every person had the right to lawful administrative action where any of their rights or legitimate expectations were affected or threatened.

A material mistake of fact is a basis upon which a court can review an administrative decision. Such a decision should be made upon the material facts which should have been available to the decision-making body. Applying this principle to the present case, taking into account the public interest that decisions of the board in relation to the administration of the fund should be properly taken and the fact that the children were not responsible for the board's mistake, the decision of the board had to be set aside.

The appeal failed.

THE JOINT MUNICIPAL PENSION FUND v GROBLER

A JUDGMENT BY HOWIE P (NUGENT JA, PONNAN JA AND MUSI AJA concurring, HEHER JA dissenting)
SUPREME COURT OF APPEAL
MARCH 2007

2007 CLR 232 (A)

An established benefit under a pension fund is a benefit to which a member has become entitled, even if it is not a benefit which has yet accrued to the member.

THE FACTS

Grobler entered municipal service in 1974. During his employment, he was a member of the Joint Municipal Pension Fund. Due to a ruling made by the Commissioner of Pensions, he was obliged to change his membership to the Municipal Gratuity Fund.

In October 1996, Grobler became employed by the Joint Municipal Pension Fund as a Financial Manager, and he then became a member of the Munpen Retirement Fund. At that point, he had a transfer value in the Joint Municipal Pension Fund which took into account his municipal pensionable service up to that time. He was entitled to a withdrawal benefit from that fund which he took and invested privately.

Fourteen months after he took up employment with the Joint Municipal Pension Fund, Munpen's rules were changed so as to amend the definition of 'pensionable service'. The effect of the amendment was to calculate Grobler's retrenchment benefit by reference to the period of his employment with the Fund and not the period preceding this when he was employed in municipal service.

In terms of rule 49 of Munpen's rules, amendments were permitted at any time provided that the value of an established benefit before such amendment would not be decreased.

Grobler made a complaint regarding the amendment to the Pension Funds Adjudicator, who rejected his complaint. Grobler then applied for an order that the decision be set aside and the decision to amend the rules also be set aside. The application was successful. The Fund appealed.

THE DECISION

The Fund's central contention was that Grobler had acquired no 'established benefit' under the rules of the Fund, and accordingly no benefit had been removed from him when the amendment was made.

The reference to an established benefit in rule 49 is a reference to a benefit which has accumulated at the time the amendment is made, not a claim to a benefit that has finally matured. Such a claim may in fact never arise. The intention of the rule is to empower the trustees to amend the rules in such a way that further benefits will not accumulate from the time the amendment is made but that the member may not be deprived of benefits that have accumulated when the amendment is made.

What the amendment did was to limit Grobler's pensionable service, the effect being to reduce the benefit to which he had become entitled. At this point, it would have been possible to calculate the benefit to which he would have become entitled had he been retrenched. This was the established benefit. It was a benefit to which he would have been entitled, even if it was not one which had accrued. The effect of the amendment was to decrease the value of Grobler's established retrenchment benefit.

The argument that the Pensions Adjudicator lacked jurisdiction to determine the matter was incorrect.

The appeal was dismissed.

REGISTRAR OF PENSION FUNDS v ANGUS N.O.

A JUDGMENT BY HOWIE P (BRAND JA, PONNAN JA AND MUSI AJA concurring, HEHER JA dissenting)
SUPREME COURT OF APPEAL
30 MARCH 2007

2007 CLR 247 (A)

Pension funds established by agreement published under the labour relations legislation are exempt from the provisions of the Pension Funds Act (no 24 of 1956) to the extent provided for in section 2(1) of that Act.

THE FACTS

The Engineering Industries Pension Fund was established in August 1957 and the Metal Industries Provident Fund was established in March 1991. Constitutions in respect of both were adopted at meetings called to establish each fund and rules in respect of both were also formulated for each fund. The agreement in respect of the first fund was published in July 1957.

Section 2(1) of the Pension Funds Act (no 24 of 1956) provides that its provisions shall not apply in relation to any pension fund which has been established in terms of an agreement published or deemed to have been published under section 48 of the Industrial Conciliation Act (no 36 of 1937) except that such fund shall from time to time furnish the Registrar with such statistical information as may be prescribed by the Minister.

Angus and the other respondents, the employer trustees of the two funds and the Steel and Engineering Industries Federation of South Africa applied for an order that the provisions of the Act did not apply to the funds and the purported registration of the funds by the Registrar of Pension Funds was of no force and effect. The Registrar contended that the funds were not established in terms of an agreement published under the Industrial Conciliation Act and were therefore not subject to the exemption provided for in section 2(1).

THE DECISION

Whether or not the exemption applied depended on whether or not the funds were established 'in terms of' an agreement published under the Industrial Conciliation Act.

It appeared that the agreements were established in accordance with the stated purposes and aims of the industrial council. Its terms referred to the council and obliged employers to pay contributions to the council. The Engineering Industries Pension Fund therefore appeared to have been established in terms of the agreement published in July 1957. The agreement relating to the Metal Industries Provident Fund followed a similar pattern. These agreements formed part of the legislative structure provided for in labour relations enactments, both those promulgated before the coming into force of the Pension Funds Act and those coming into force afterwards. The purpose of this legislation is to give due expression to the industrial council parties' freedom to bargain collectively to resolve matters of mutual concern. In this context, the agreements were to be seen a having been published under that legislation, and therefore subject to the exemption provided for in section 2(1).

The appeal was dismissed.

OLD MUTUAL LIFE ASSURANCE CO (SOUTH AFRICA) LTD v PENSION FUNDS ADJUDICATOR

A JUDGMENT BY FOURIE J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
26 OCTOBER 2006

2007 (3) SA 458 (C)

A long-term insurer is entitled to reduce the benefits payable under a policy in accordance with generally accepted actuarial principles if the insured prematurely terminates the policy.

THE FACTS

In 1983, Old Mutual Life Assurance Co (SA) Ltd issued a retirement annuity policy to the fourth respondent, the life assured being the second respondent. The policy benefits due to the fourth respondent would become available to purchase an annuity for second respondent upon her retirement.

Rule 3.4 (a) of the fourth respondent's rules provided that on non-payment of periodic contributions to the fund within the days of grace allowed by the underwriter, a member would be deemed to have discontinued contributions and would retain such fully paid-up reduced benefits under that annuity policy as the underwriter would determine.

The second respondent ceased payment of premiums on 1 September 2002. Due to the cessation of premiums Old Mutual recalculated the paid-up value of the policy. This resulted in a reduction of the fund value of the policy by R4 591,52.

Second respondent complained about the reduction to the Pension Funds Adjudicator. It held that Old Mutual was not entitled to reduce the investment value of the fund and ordered Old Mutual to credit the amount reduced.

Old Mutual applied for an order setting aside the adjudicator's decision.

THE DECISION

In terms of the rules, Old Mutual was entitled to reduce the benefit payable to the member, notwithstanding the fact that the member had not reached retirement age. There was not reason to interpret the rules as allowing Old Mutual to apply the reduction only upon the member having reached retirement age.

In terms of section 29 of the Long-term Insurance Act (no 52 of 1998), a long-term insurer must maintain its business in a financially sound condition by, inter alia , conducting its business so as to be in a position to meet its liabilities and capital adequacy requirement at all times. To this end Old Mutual was obliged to have a statutory actuary who was to perform a number of important duties under the Act, including the recalculation of benefits payable after a member ceased paying premiums.

Old Mutual's reduction of the fund value was effected after taking into account the expenses that had to be recouped as a result of the fact that they could not be recouped over the life of the policy had it not been prematurely terminated. Old Mutual had thereby demonstrated that the calculation of the paid-up reduced benefit took place in accordance with generally accepted actuarial principles.

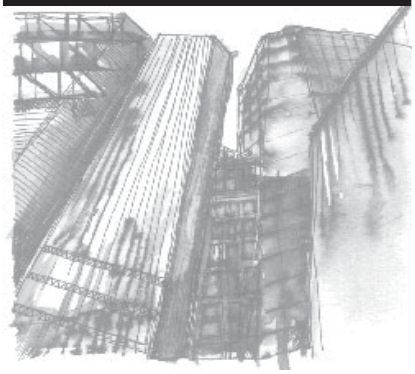
The application succeeded.

CDA BOERDERY (EDMS) BPK v NELSON MANDELA METROPOLITAN MUNICIPALITY

A JUDGMENT BY CAMERON JA (MPATI DP, MTHIYANE JA and THERON AJA concurring, CONRADIE JA dissenting) SUPREME COURT OF APPEAL 6 FEBRUARY 2007

2007 (4) SA 276 (A)

Property



A local council is not subject to the restrictions of an ordinance relating to the levying of rates which was enacted prior to the present constitutional dispensation and which can be understood to have been impliedly repealed by the new constitutional dispensation.

THE FACTS

The Nelson Mandela Metropolitan Municipality imposed assessment rates on properties owned by CDA Boerdery (Edms) Bpk. Such rates had not been imposed on CDA prior to the amendment of the Transition Act (no 209 of 1993) in 1996. In that year, section 10(G)(6) was enacted, providing that a metropolitan local council was to ensure that properties within its area of jurisdiction were valued for purposes of imposing rates on the property. Section 10(G)(7) provided that a council could levy and recover property rates in respect of immovable property within its area of jurisdiction.

The municipality assessed all rateable properties to tax within its municipal area - including CDA's property - by a resolution passed in 2002. This took place after municipal elections had taken place and the municipality had become a fully fledged municipality under the provisions of section 12 of the Municipal Structures Act (no 117 of 1993). This Act incorporated the provisions of section 10(G)(6) and (7) of the Transition Act.

CDA contended that the municipality had been obliged to obtain the consent of the Premier (formerly the Administrator) of the province to the imposition of rates greater than two cents in the rand as required by section 82(1) of the Municipal Ordinance 20 of 1974 (Cape) and that since it had not obtained such consent, the levying of the rates on its property was invalid. CDA applied for an order declaring the valuation of its property to be unlawful and that it was not liable for rates for the period 2002 to 2004.

THE DECISION

With the introduction of the new constitutional order, municipalities assumed a new competence and were no longer at the bottom of a hierarchy of lawmaking power. The Administrator's role in approving or disapproving rates greater than two cents in the rand was to be understood in this setting which was applicable before the introduction of the new Constitution.

The new constitutional order conferred a radically enhanced status on municipalities, each level of government deriving its powers directly from the Constitution. Municipalities are no longer creatures of statute enjoying only delegated or subordinate legislative power. They are now interdependent bodies of local government. The ordinance's requirement that the Premier must approve rates over two cents in the rand did not survive this change and should be understood to have been impliedly repealed by the later legislation.

Further indications that such implied repeal has taken place is given in the fact that the Premier has no supervisory role under the new Constitution and the fact that municipalities now perform valuations or properties 'subject to any other law'. The latter compares to the provision empowering municipalities to levy and recover property rates without any such proviso. Furthermore, were the ordinance to apply there would be a repugnancy between the scheme of preconstitutional distribution of power and the scheme under the Constitution.

CDA also contended that the rates sought to be levied violated section 229(2)(a) of the Constitution. However, without joinder of the national and provincial governments in the application, this issue could not be determined in the present case.

The application was dismissed.

ENGLISH v C J M HARMSE INVESTMENTS CC

A JUDGMENT BY HURT J
NATAL PROVINCIAL DIVISION
14 MARCH 2006

2007 (3) SA 415 (N)

Reasonableness is not the sole criterion in determining whether a party should be given a right of way over his neighbour's property

THE FACTS

English owned two properties adjoining that of CJM Harmse Investments CC. Before Harmse owned its property, English made regular use of roads on that property. They afforded a more convenient method of exercising his right of way in order to access a gate on the eastern side of Harmse's property and made his cattle farming operations more efficient. English did however, have another means of access to the gate by way of a road over his own property which could be used, though not as conveniently for his cattle farming operations.

Harmse locked a gate used to access his property in exercising the right of way over it. It contended that English did not need to use the roads over its property except in situations of emergency, and that the use of the roads by English and his employees and guests would disturb the privacy of property occupants and detrimentally affect the game conservation area it was preparing.

English brought an action for an order that he was entitled to a way of necessity over Harmse's property.

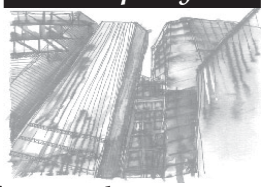
THE DECISION

Harmse accepted that English had a right of way to the east gate in any emergency situation. The issue was whether he had a more permanent and regular means of access over Harmse's property in order to enable him to conduct a viable farming operation (a jus viae plenum).

Section 25(1) of the Constitution provides that no-one may be deprived of property except in terms of law of general application. This right may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society. A court will therefore always be careful not to interfere with rights of ownership until dictates of reasonableness and fairness necessitate such interference. This does not mean however, that reasonableness is the sole criterion in determining whether or not a jus viae plenum should be recognised.

Given the fact that English could travel from one side of his property to the other in a reasonable time, and that Harmse would suffer prejudice were a right of way over its own property given to English, this was not a case where the needs of English were such that it was necessary to reduce Harmse's full rights of ownership by registering a right of way over it.

QUALIDENTAL LABORATORIES (PTY) LTD v HERITAGE WESTERN CAPE



A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
14 JUNE 2006

2007 (4) SA 26 (C)

A heritage resources authority is entitled to attach conditions to the demolition of structures which are subject to the National Heritage Resources Act (no 25 of 1999), such as those older than 60 years.

THE FACTS

Qualidental Laboratories (Pty) Ltd owned the property situated at 6 Marsh Street, Mossel Bay. It applied to Heritage Western Cape for a permit authorising the demolition of a villa and an annex built on the property. The Built Environment and Landscape Permit Committee, a committee of Heritage Western Cape, approved the demolition of the annex but not the villa, and attached certain conditions to the demolition in terms of section 48(2) of the National Heritage Resources Act (no 25 of 1999). These conditions were that plans for any new development had to be submitted to Heritage Western Cape for approval, the new development had to be subsidiary to the main building, and the building was to be put on the Heritage Register.

The reason for the imposition of the conditions was that Heritage Western Cape considered the villa to be worthy of protection and any new development that would detract from the villa and its surounds would be contrary to its obligation to protect the villa's status.

Qualidental submitted building plans in respect of its proposed new development. However, the committee decided not to approve the plans. Its reasons were that the two proposed apartment blocks would obscure the view of the villa from the street and they were intrusive and out of keeping with the context created by the villa and other buildings in the surrounding area.

Qualidental ignored the denial of approval, and proceeded with building plans contrary to the conditions imposed in the permission authorising demolition of the annex. Heritage Western Cape issued a stop works order against Qualidental.

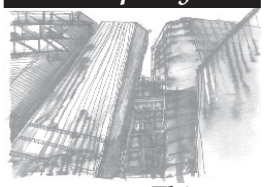
Qualidental brought an application for an order reviewing the demolition permit given by Heritage Western Cape by the deletion of the conditions attached to it and reviewing and setting aside the stop works order.

THE DECISION

Section 48(2) of the Act provides that on application by any person, a heritage resources authority may in its discretion issue to such person a permit to perform such actions at such time and subject to such terms, conditions and restrictions or directions as may be specified in the permit, including a condition stipulating the design proposals be revised. Qualidental contended that this section did not apply to it because neither the buildings on the property nor the property itself had been declared heritage sites in terms of the Act. It contended that Heritage Western Cape only had the power to approve or decline an application to alter or demolish the villa or annex.

Section 34(1) of the Act provided that no person could alter or demolish any structure. There was no reason why this did not entitle Heritage Western Cape to allow such alteration or demolition subject to conditions. Nothing in the Act suggested there should be no such conditions. On the contrary, section 48(2) envisaged that a condition could be attached to any permission so granted because it included the condition that an applicant might be obliged to give security to ensure satisfactory completion of the work it intended to do. The preamble to the Act suggested that the inclusion of a condition was within the powers of the authorising body.

Where a particular demolition



impacts upon a heritage resource that is clearly identified by applicant's own expert, Heritage Western Caoe must, pursuant to the very objectives of the Act, have a statutory duty and responsibility to protect and manage such a resource. This was exactly what happened in the present case, where the villa in respect of which a demolition order had been refused required protection.

The application was dismissed.

The question arises as to whether first respondent can impose a condition when granting a permit to demolish or alter a building which has not as yet been given formal protection in terms of ch 2 Part I of the Act.

There are in my view at least three reasons why the answer to this question must be in the affirmative. Firstly, the wording of s 34(1) does not compel an interpretation as urged upon me by the applicant. Why, for example, should conditions not be attached to an alteration of a building? There is nothing in the Act that suggests that there should be no such conditions imposed. Secondly, if the wording of s 48(2) (a) is examined, it envisages that a condition can be attached to the permission granted in terms of s 34(1). Section 48(2) (a) , for example, reads:

'That the applicant give security in such form and such amount determined by the heritage resources authority concerned, having regard to the nature and extent of the work referred to in the permit to ensure the satisfactory completion of such work, or the curation of objects and material recovered during the course of the work.'

In short, an applicant may have to provide relevant security if permission to demolish or effect alterations is granted. That in itself is a form of condition.

In the third place, recourse must be had to the very purposes of the Act. To limit s 48 to instances inside conservation areas as set out in ch 2 Part I of the Act would significantly restrict the very powers of first respondent. First respondent would be confined to focus upon a very small area concerned and this would exclude instances of potential abuse from first respondent's power of protection, save if it had recourse to the powers under the formal protections contained in the Act.

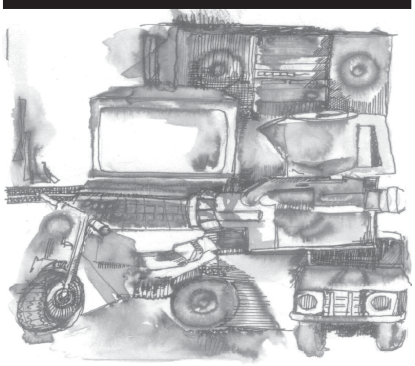
That itself seems to construe the Act unduly restrictively and appears G to run contrary to the purpose of the Act and the regulations as set out.

DREAM SUPREME PROPERTIES CC v NEDCOR BANK LTD

A JUDGMENT BY STREICHER JA (MTHIYANE JA, MLAMBO JA and MALAN AJA concurring, FARLAM JA dissenting)
SUPREME COURT OF APPEAL
13 MARCH 2007

2007 (4) SA 380 (A)

Credit Transactions



A sale in execution may not be set aside on the grounds that the property has been sold by the execution debtor. The execution creditor may proceed with such a sale and confer good title on a purchaser irrespective of the fact that it is known the execution debtor has so sold the property.

THE FACTS

In November 2001, Dream Supreme Properties CC bought sections 16, 13 and 64 in the sectional title scheme Glen Waters situated at Camps Bay, a property consisting of an apartment and two garages. It bought the property from the owner of the property, Mr C Costas after a sale agreement had been negotiated between himself and his wife. His wife nominated Dream Supreme Properties CC as purchaser and the purchase price was set at R860 000, the price at which an estate agent had valued the property.

In the year prior to the conclusion of this sale, Nedcor Bank Ltd obtained judgment against Costas for payment of R1 144 409,21. After the conclusion of the sale, the bank attached the property in execution. Another creditor, which was owed R720 441,18, acted similarly. The sheriff arranged for the property to be sold in November 2002. Dream Supreme informed Nedcor of the sale of the property in November 2001. However, Nedcor proceeded with the sale in execution.

A Ms TM Kirkham bought the property for R1 175 000 at the sale in execution. Dream Supreme contended that its prior purchase of the property superseded the sale to Kirkham. It applied for an order that the sale in execution be set aside.

THE DECISION

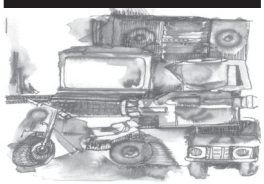
By attaching the property, Nedcor acquired a real right to the property. This entitled it to proceed with a sale in execution. This right was not affected by its knowledge of the prior sale of the property as it would be were the sale not to have been a sale in execution but one between two parties. In those circumstances, where an inference of fraud could be drawn from the second sale, that sale could be set aside. However, no such inference can normally be drawn where an execution creditor attaches the assets of its debtor in order to obtain satisfaction of the debt.

An execution creditor's right to enforce payment of the debt is provided for in section 36 of the Supreme Court Act (no 59 of 1959) and in Rule 45 of the Uniform Rules of Court. This right was not affected by the prior sale of the property, just as it would not be if Costas had been sequestrated by the time the sale in execution took place. Nedcor did what it was entitled to do in terms of these provisions and the sale to Dream Supreme could not affect its rights.

Were the claim of a prior purchaser such as Dream Supreme to be entertained in these circumstances, unscrupulous debtors would be afforded an opportunity to fabricate personal rights which it would be difficult for a creditor to expose for what it was. This would discourage purchasers at a sale in execution who would be obliged to investigate any such claim and open themselves to potential litigation against a third party in order to assert their rights.

The sale in execution was affirmed.

MOODLEY v NEDCOR BANK LTD



A JUDGMENT BY CACHALIA JA (HARMS ADP, HEHER JA, SNYDERS AJA AND THERON AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2007

2007 CLR 307 (A)

The situation of mortgaged property within the area of jurisdiction of a High Court is sufficient to confer jurisdiction on that court when the bond holder enforces its rights against the debtor under the bond.

THE FACTS

In Johannesburg, Nedcor Ltd agreed to lend Moodley R180 000 on the security of a mortgage bond. The bond was passed over property situated in Kwazulu-Natal.

Four years later, Nedcor brought an action in the Pretoria High Court for repayment of the loan and an order that the property be declared specially executable. It obtained judgment against Moodley but the judgment was subsequently rescinded. Moodley raised a counterclaim in which he contended that the court lacked jurisdiction. Nedcor withdrew the action and brought a new action against Moodley in the Durban and Coast Local Division.

Moodley raised the defence that the Pretoria High Court held exclusive jurisdiction in the matter because the cause of action had arisen in its area of jurisdiction. Nedcor contended that his failure to raise this defence before pleadings had closed constituted a waiver of his right to object to the Durban High Court's jurisdiction.

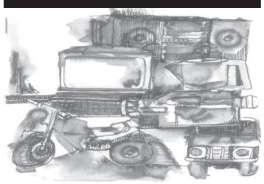
THE DECISION

A court's jurisdiction is determined not only where the cause of action has arisen but to all connecting factors relevant to jurisdiction at common law. What had to be determined in the present case was whether the situation of the hypothecated property in Durban constituted a connecting factor giving the Durban court jurisdiction. In the past, the existence of hypothecated property within the area of jurisdiction of a court has been considered to be a connecting factor conferring jurisdiction of the court.

The fact that the property in question played a vital part in the loan transaction under which the bank advanced a loan to Moodley indicated that the property itself was a connecting factor giving rise to the jurisdiction of the court. The property was the bank's security and was the asset to which it would look in satisfaction of the judgment it obtained against Moodley, as indicated in the order declaring the property specially executable. This showed that the court with jurisdiction was the Durban court and that a connecting factor to that court existed.

The defence was rejected.

ABSA BANK LTD v NTSANE



A JUDGMENT BY
BERTELSMANN J
TRANSVAAL PROVINCIAL
DIVISION
1 NOVEMBER 2006

2007 (3) SA 554 (T)

A court may take all relevant information into account when determining whether or not to grant an order declaring a debtor's property executable and will not grant such an order if the effect is to terminate the debtor's right to adequate housing.

THE FACTS

Absa Bank Ltd brought foreclosure proceedings against Ntsane and his wife. It applied for default judgment. Because it claimed an order that the property mortgaged to it be declared executable, the application was referred for consideration in motion court in the High Court.

Absa's affidavit in support of the application stated that as at the date of application for default judgment, Ntsane was in arrears with payment of his mortgage bond in the sum of R18,46. At that point, the outstanding balance of the mortgage bond was R62 042,43.

The mortgaged property was the home of the Ntsanes. They had been in arrears for some time but had reduced the amount of the arrears to R18,46 by the time the application for default judgment was made. They were in arrears with payment of municipal rates and services in the sum of approximately R20 000.

The court raised questions regarding the propriety of granting an order for the sale in execution of the property as applied for by the bank.

THE DECISION

A court may take into account a debtor's conduct of its account with a mortgagee when determining the propriety of ordering a forced sale of the mortgaged property. It may also take into account the fact that the debtor has paid book fees and penalty interest on arrears, as these facts indicate whether or not the mortgagee has suffered any loss as a result of the debtor's default.

It appeared that the property was the Ntsane's first home. If they lost it because of a forced sale, they would not qualify for a State subsidy for the purchase of a new home.

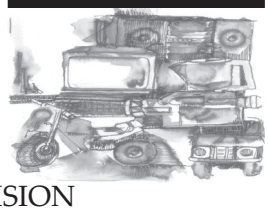
Absa's right to commercial activity and the right to enforce agreements lawfully entered into had to be balanced against the Ntsane's right to adequate housing. The proportionality of the harm that might result if judgment was granted had to be considered, and weighed against the harm Absa might suffer if the agreement underlying the registration of the mortgage bond was rendered commercially ineffective. This would deny Absa the right to enforce a covenant properly and lawfully entered into, and it might create uncertainty and distrust in commercial activities and investment in the economy might be negatively affected if courts were to be seen to interfere with established commercial practices.

In considering these rights, the court must take all relevant information into account. These factors include the value of the bonded property; the past history of payments made by the debtor; the amount outstanding on the bond, any assets other than the immovable property the debtor might possess, particularly movable assets capable of easy attachment and sale in execution, any other debts that the bondholder is aware of, such as arrear rates and municipal taxes, whether the debtor is employed or not.

It was clear that to order the forced sale of the Ntsane's house would be in conflict with section 26 of the Constitution as this would terminate their right to adequate housing.

Absa was entitled to payment of the arrear amount of R18,46 but not an order declaring the property executable.

FRASER v ABSA BANK LTD



A JUDGMENT BY VAN DER WESTHUIZEN (LANGA CJ, MOSENEKE DCJ, MADALA J, O'REGAN J, SACHS J, SKWEYIYA J and YACOOB J concurring)
CONSTITUTIONAL COURT
15 DECEMBER 2006

2007 (3) SA 484 (CC)

A creditor of a person against whom action has been taken under the Prevention of Organised Crime Act (no 121 of 1998) has an interest in applications brought under that Act and is entitled to protection of that interest by intervening in any application brought by the National Director of Public Prosecutions under that Act. A decision by a court in terms of section 26(6) to allow a creditor to intervene does not automatically result in an order that ring-fences its claim against the applicant's right to use funds to meet legal expenses.

THE FACTS

Fraser was arrested on 16 November 2003 on charges relating to racketeering and money laundering. His arrest was effected under the Prevention of Organised Crime Act (no 121 of 1998).

In terms of the Act, the membership interest in Portion 3 Lavianto CC and the immovable property it owned, were placed under restraint by order of the Durban High Court obtained ex parte on 26 November 2004. The membership interest in the close corporation was held on behalf of Fraser by his fiancée, having been transferred to her by Fraser in order to avoid attachment of the property by Absa Bank Ltd. Absa held a default judgment against Fraser for payment of the sum of R673 281.

Fraser then applied for an order directing that the curator bonis appointed in terms of the restraint order sell the immovable property and/or the membership interest in the close corporation, and pay the proceeds to his attorneys to meet his reasonable legal expenses in his criminal trial.

Absa applied to intervene in the application. The National Director of Public Prosecutions (the NDPP) which had obtained the restraint order, opposed Fraser's application and applied for confirmation of the restraint order. Fraser opposed Absa's application to intervene.

The Supreme Court of Appeal allowed Absa's application to intervene. It also held that Fraser was not entitled to payment of any amount for reasonable legal expenses which would reduce the value of assets held under the restraining order to less than Absa's claim against him.

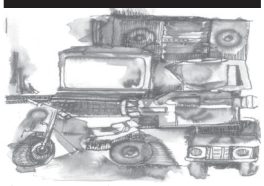
Fraser appealed to the Constitutional Court.

THE DECISION

Section 26(1) of the Act provides that The National Director of Public Prosecutions may apply to a competent High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates. Section 26(6) provides that a restraint order may make such provision as the High Court may think fit for the reasonable legal expenses of such person in connection with any proceedings instituted against him or her in terms of the Act or any criminal proceedings to which such proceedings may relate.

Fraser alleged that the interpretation placed on this section by the Supreme Court of Appeal failed to promote the spirit, purport and objects of the Bill of Rights. This meant that the spirit, purport and objects of the protection of the right to a fair trial had to be considered. A constitutional matter has therefore been raised, and the court accordingly had jurisdiction to hear the matter.

The next question was whether a creditor such as Absa, should be entitled to intervene in an application made under section 26. When a defendant's estate is under a restraint order and thus beyond the reach of creditors, it is in the interest of creditors that as much of the estate as possible is preserved, because part of it might still become available for the satisfaction of its claim. If the defendant is paid an expense allowance from his or her estate while it is under restraint, the effect is to dissipate the estate and so reduce the creditor's prospects of recovery. It is accordingly usually in its interest to oppose any application in terms of



section 26(6) to persuade the court not to allow the defendant to draw a legal expense allowance. A creditor may therefore intervene in an application involving consideration of this.

In determining the rights of the parties in this regard, a court must exercise its discretion and consider a report by the curator appointed in the matter. A court on appeal will have limited scope for overturning or amending the discretion thereafter exercised. In the present matter, it appeared that the Supreme Court of Appeal was wrong in ordering that Absa's claim against Fraser had to be practically secured against the provision of his reasonable legal expenses. This decision was based on the notion that Absa's claim as a concurrent claim must automatically take priority over Fraser's legal expenses. It also assumed incorrectly, that Fraser bore an onus to justify his claim to reasonable legal expenses over the claims of concurrent creditors. A decision by a court in terms of section 26(6) to allow a creditor to intervene does not automatically result in an order that ring-fences its claim against the applicant's right to use funds to meet legal expenses.

Because facts relevant to the matter, such as the present value of the property, were unavailable to the court, it was appropriate that the matter be referred back to the Supreme Court of Appeal to exercise its discretion as required by section 26(6).

The decision of the Supreme Court of Appeal to allow Absa to intervene in this case cannot be faulted. However, the Supreme Court of Appeal was incorrect in proceeding to order that Absa's claim against the applicant must practically be secured against the provision of his reasonable legal expenses. The decision is based on the notion that Absa's claim as a concurrent claim must automatically take priority over an applicant's legal expenses. A decision by a Court in terms of s 26(6) to allow a creditor to intervene does not automatically result in an order that 'ring-fences' its claim against I the applicant's right to use funds to meet legal expenses. Whether it does, will depend on the circumstances of each case which the Court will take into account when exercising its discretion. Where possible a defendant will be neither unduly prejudiced nor advantaged by the fact that his or her property has been restrained.

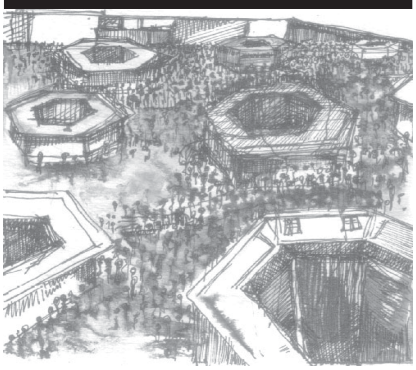
The Supreme Court of Appeal's judgment on Absa's appeal against the High Court order is brief, consisting of four paragraphs. The statement in para 32 that no proper grounds have been shown why Mr Fraser should be permitted to expend moneys on legal expenses that would ordinarily have been available to creditors suggests that the Court assumed that the applicant bore an onus to justify his claim to reasonable legal expenses over the claims of concurrent creditors. This approach is incorrect. The defendant does not bear an onus of this sort. Instead, as stated above, the defendant's request to use his property to cover reasonable legal expenses - given that the defendant has a constitutional right to legal representation - must be carefully weighed by the Court against both the State's interest in securing the defendant's property for possible confiscation later, as well as the claims of the defendant's creditors. The discretion conferred on a Court by s 26(6) must be exercised in the light of all relevant circumstances and based on the best available evidence. The conclusion reached by the Supreme Court of Appeal to 'ring-fence' Absa's claim might well be correct in the circumstances of the present case, not because concurrent claims automatically take precedence over legal expenses, but because of the particular circumstances of this case, where it appears that Mr Fraser sought to evade his legal obligations to Absa by hiding his assets in a close corporation and only taking possession of them again once the restraint was in operation.

HENEWAYS FREIGHT SERVICES (PTY) LTD v GROGOR

A JUDGMENT BY ZULMAN JA (CLOETE JA and THERON AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2006

2007 (2) 561 (A)

Companies



In determining whether or not a director of a company has engaged in fraudulent or reckless trading as referred to in section 424 of the Companies Act (no 61 of 1973) the essential inquiry is whether the directors genuinely believe that difficulties facing the company will dissipate and that the company will survive such difficulties.

THE FACTS

Grogor was the sole director and manager of a company which traded under the name *The House of Sports Cars*. In the course of trading, he gave creditors cheques which were either stopped or dishonoured when they fell due for payment. At the same time, he sought credit from Heneways Freight Services (Pty) Ltd.

Heneways alleged that Grogor's actions amounted to reckless trading as referred to in section 424 of the Companies Act (no 61 of 1973). The section provides that when it appears that any business of the company is being carried on recklessly or with intent to defraud creditors of the company a court may declare that any person who was knowingly a party to the carrying on of the business in that manner, shall be personally responsible for all or any of the debts or other liabilities of the company as the court may direct.

The stopped and dishonoured cheques were among seven hundred cheques drawn by Grogor for the company, most of which were honoured on presentation. Grogor alleged that the cheques were stopped because he had made alternative arrangements for payment with the creditors concerned, and gave evidence of having made such arrangements in certain instances. The company was experiencing cash flow problems which resulted in shortage of funds for payment of cheques on various occasions.

At the time Heneways accepted Grogor's company's application for credit and raised its first invoice against the company, Grogor was involved in discussions with the Imperial Group of companies for the initiation of a joint venture. This would involve the recapitalisation of the company business and the injection of R10m by the Imperial Group. This proposed transaction however, did not proceed.

Heneways brought an application for an order declaring Grogor personally liable for the debts of his company.

THE DECISION

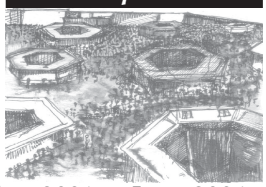
The crucial question was whether, when credit was obtained from the appellant, there were grounds upon which a reasonable person in the position of Grogor would have believed that a deal with the Imperial Group would be concluded.

Grogor had been under the impression that the joint venture transaction with Imperial Group would proceed. Being under that impression, he would have anticipated the injection of capital which would have ensured that his company's creditors were paid, including Heneways. Grogor's denials that he acted fraudulently in stopping cheques were supported by the fact that he stopped cheques for reasons other than to deny payment to creditors, and the fact that the great majority of cheques were in fact honoured upon presentation.

Where the assets of a company exceed its liabilities, this will have a bearing on whether or not the directors were justified in carrying on the business of the company. A company which is solvent in this sense will be seen to be able to pay its debts when they fall due. The essential inquiry remains whether the directors genuinely believe that difficulties facing the company will dissipate and that the company will survive such difficulties.

Heneways had not shown that Grogor acted either fraudulently or recklessly. The application was dismissed.

DORBYL LIGHT AND GENERAL ENGINEERING (PTY) LTD v INSAMCOR (PTY) LTD



A JUDGMENT BY BRAND JA (HARMS JA, BRAND JA, NUGENT JA, PONNAN JA and SNYDERS AJA concurring) SUPREME COURT OF APPEAL 12 MARCH 2007

2007 (4) SA 467 (A)

A company which has been deregistered and then restored to the register of companies is not merely reinstated to the position it was in prior to deregistration because third parties may be affected by the restoration. An application for the restoration of a company to the register of companies after it has been deregistered, must be brought on notice to parties affected by the restoration. It must also fully disclose those facts which are relevant to the granting of such an order.

THE FACTS

In 1985, an agreement was concluded between Insamcor (Pty) Ltd, Saunders Valve Co Ltd and Dorbyl Light and General Engineering (Pty) Ltd's predecessor. In terms of this agreement, Dorbyl granted to Insamcor the right to use certain know-how to manufacture, assemble and sell certain products in South Africa. Dorbyl was obliged to provide technical know-how and assistance to Insamcor and Insamcor was obliged to pay royalties to Dorbyl and observe certain restraint of trade conditions. Clause 28.2 of the agreement provided that if either party became insolvent or was dissolved for any reason, then the other party would be entitled to terminate the agreement forthwith.

In 1989, Dorbyl became a division of its parent company, and from that time was no longer able to comply with its obligations under the agreement. Due to an oversight, the rights and obligations of the 1985 agreement were not transferred to the parent company but remained vested with Dorbyl. However, the parent company then carried on the business formerly carried on by Dorbyl as if it was the holder of the rights and obligations of the agreement.

In 1996, Dorbyl was deregistered as a company. In 2001, the parent company sold the business previously conducted by Dorbyl, including the agreement which was listed as an asset of the business, to Dynamic Fluid Control (Pty) Ltd.

In 2004, without the knowledge of Insamcor, Dorbyl was restored to the register of companies, following the bringing of an application for its restoration to the register. It then brought an action against Insamcor for payment of royalties for the period October 2001 to June 2004, and enforcement of the restraint of trade conditions. This action succeeded and Insamcor appealed.

At the time the action was brought, Insamcor applied for an order setting aside the restoration of Dorbyl to the register of companies. This application succeeded and Dorbyl appealed.

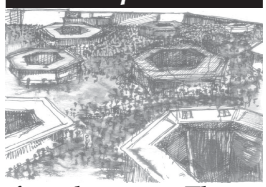
Both appeals were heard simultaneously.

THE DECISION

Section 73(6) of the Companies Act (no 61 of 1973) provides that a court may, on application by any interested person or the Registrar, if it is satisfied that a company was at the time of its deregistration carrying on business or was in operation, or otherwise that it is just that the registration of the company be restored, make an order that the said registration be restored accordingly; and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

A restoration order does not simply reinstate a company to the position it was in prior to its deregistration without affecting third parties. The effect of restoration can cause severe prejudice to third parties. In the present case, its effect could be to prevent Insamcor from raising the defence to Dorbyl's action for royalties that upon deregistration its rights and duties under the 1985 agreement came to an end.

It followed that Insamcor should have been notified of the application to restore Dorbyl to the register of companies. Its rights were affected by the restoration, and obligations which had not existed before the restoration were deemed to have been recreated by the restoration order. These obligations were of a serious nature and imposition of



them could have meant that Insamcor would be prevented from trading for the period of the restraint, and would be liable for royalties for a period during which Dorbyl had not been in existence.

When the application for restoration was made, insufficient facts were placed before the court to justify the granting of the order. Furthermore, facts which were relevant to the application were not placed before the court. These included the fact that the business had been sold to Dynamic Fluid Control, the fact that it had been conducting its business and performing its obligations thereunder. The 1985 agreement was not referred to. These deficiencies were grounds for the setting aside of the restoration order granted.

Dorbyl's appeal failed. In consequence, Insamcor's appeal succeeded.

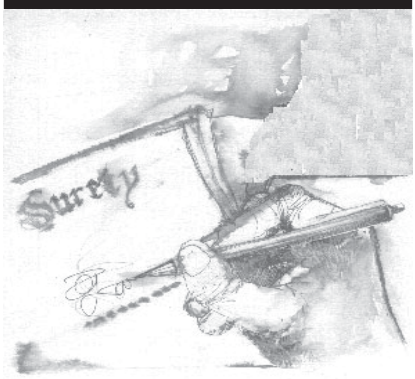
In the premises it is, in my view, self-evident that third parties who will or may be prejudiced by the restoration order must be given the opportunity to persuade the Court not to exercise its discretion in favour of a restoration order. Alternatively, they may endeavour to persuade the Court to make the order subject to such directions under s 73(6) (b) as may serve to alleviate its prejudicial consequences. The inevitable conclusion I draw from all this is that third parties who will or may suffer prejudice as a result of the restoration order, have a 'direct and substantial interest' in the outcome of the application for such an order. It follows that they should be joined as necessary parties to the F application (see eg Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659).

LANGEVELD v UNION FINANCE HOLDINGS (PTY) LTD

A JUDGMENT BY WILLIS J
(LAMONT J concurring)
WITWATERSRAND LOCAL
DIVISION
1 FEBRUARY 2007

2007 (4) SA 572 (W)

Suretyship



A contract of suretyship may be recorded in a document which records another contract, as where the terms of the former are incorporated in the latter and the surety appends a signature to indicated that he accepts the terms therein contained.

THE FACTS

OEP Financial Services (Pty) Ltd and Asset Protection Consultants Guarding CC concluded a Master Rental agreement in terms of which OEP was to provide a telephone system at new premises occupied by Asset Protection. Langeveld, the sole member of Asset Protection, instructed the corporation's bookkeeper, a certain Ms Griesel, to negotiate the agreement.

Langeveld signed the agreement on the front page and in five different places which provided for an agreement to lease the telephone system, a debit-order authorisation, a suretyship undertaking, an agreement to follow a schedule of payments, and a warranty that she was authorised to enter into the agreement with OEP Financial Services (Pty) Ltd on behalf of Asset Protection Consultants Guarding CC.

Under the suretyship section Langeveld's full names, physical address and her identity number were recorded. The provision read: 'I hereby bind myself as surety and co-principal debtor in accordance with the suretyship terms and conditions overleaf.'

OEP ceded its rights under the agreement to Union Finance Holdings (Pty) Ltd. Union brought an action to enforce payment under the suretyship provision. Langeveld defended the action on the grounds that when she signed the agreement, there were blank spaces at the points were she signed. She also contended that Griesel had not acted as her agent when negotiating the agreement but as the agent of Asset Protection.

THE DECISION

The essence of Langeveld's defence was that she was unaware that she was signing a suretyship agreement when she signed the Master Rental agreement. The probabilities were that when she signed the agreement, the blank spaces were completed - she was an experienced businesswoman who would know that signing a contract involved a commitment to the obligations provided for therein. The facts of the matter were like those in the matter of *Sneech v Hill Kaplan Scott and Partners* 1981 (3) SA 332 (A) which held that a contract of suretyship may be recorded in a document which records another contract, as where the terms of the former are incorporated in the latter and the surety appends a signature to indicated that he accepts the terms therein contained.

As far as the defence based on agency was concerned, it made no difference who Griesel acted on behalf of, because she had not signed the agreement. The agreement was signed by Langeveld, and when she signed the provisions binding herself as surety, she signed in her personal capacity.

The action succeeded.

MANNA v LOTTER

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
8 MARCH 2007

2007 (4) SA 315 (C)

Contract

A court has jurisdiction over a peregrinus which owns property within its area of jurisdiction. A late acceptance of an offer to purchase does not prevent the formation of a binding contract provided that the offeror waives the right to require acceptance within the stipulated period.

THE FACTS

Manna offered to buy a property in Sedgefield from Lotter for R485 000. The agreement of sale provided that Manna's offer was irrevocable and expired at noon on the 8th November 2003. On acceptance, it would become a binding agreement of sale irrespective of whether the purchaser has been notified of such acceptance or not.

The offer was faxed to Lotter in Wales. Lotter signed her acceptance of the offer on 12th November 2003.

The agreement of sale contained a provision that the sale was subject to fulfilment of a suspensive condition that Manna obtain a loan for payment of the purchase price within twenty one days of acceptance. Manna failed to obtain a loan for the full amount of the purchase price but only for 75% of it.

Lotter failed to co-operate with the transfer of the property, when called upon to do so by the conveyancers. Manna applied for leave to sue Lotter by edictal citation and brought an application to compel transfer of the property. Lotter opposed the application on the grounds that the court did not have jurisdiction over her as she was a peregrinus of the court, that the offer had lapsed before acceptance and could not have become a binding agreement, and that the suspensive condition had not been fulfilled.

THE DECISION

A court will not have jurisdiction over a peregrinus if any judgment made against such a person will not be effective. An attachment to confirm jurisdiction will render a judgment effective against a peregrinus but if the court can give an effective judgment without an attachment having taken place, such attachment would be unnecessary. In the present case, the property in question was situated within the area of jurisdiction of the court. This meant that it was irrelevant where Lotter was resident, as any order compelling her to give transfer of the property could be implemented. This conclusion was consistent with the general principle that in any claim relating to immovable property, the court within whose territorial jurisdiction the property is situated will have jurisdiction to entertain such a claim.

As far as the late acceptance of the offer was concerned, to state that an offer lapses if it is not accepted within the prescribed time, is to state the position too widely. This is the position if an offeror rejects the late acceptance of an offer, but not necessarily if an offeror does not do so. In the present case, Manna had chosen to accept the late acceptance of his offer.

The appropriate construction of the provision on acceptance was to regard it as a stipulation inserted for the benefit of the buyer, Manna. To regard the late acceptance as a counter-offer would be artificial and the source of further difficulties. Manna had in fact regarded the provision as a stipulation inserted for his benefit because he had stated that he waived his right to insist on acceptance within the stipulated period. The effect of that waiver was that a binding contract had come into existence at the time Lotter signified her acceptance.

As far as the suspensive condition relating to the loan was concerned, this was clearly inserted for the benefit of Manna and could be waived by him. His conduct indicated that he had done so, unequivocally and timeously.

Lotter was ordered to effect transfer of the property into Manna's name.

ZALVEST 20 (PTY) LTD v VESTLINE 123 (PTY) LTD

Contract

A JUDGMENT BY VAN ZYL J
(DESAI J AND HJ ERASMUS J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
15 MAY 2007

2007 CLR 205 (C)

An option to purchase fixed property will not be valid and binding if the essential and material terms of the purchase are not recorded in writing at the time the option is concluded.

THE FACTS

Vestline 123 (Pty) Ltd concluded a lease agreement as lessor with the trustees of the Magtech Trust as lessee in respect of certain fixed property situated in Somerset West. The lease was for a fixed period of five years commencing on 1 August 2004 and at a fixed monthly rental set out in a schedule.

At the time the lease was concluded, Vestline granted Zalvest 20 (Pty) Ltd an option to purchase the property. The option was attached to the lease agreement and recorded that Zalvest had the option to purchase at any time during the lease period at a nett return of 12% per annum based on the rentals as set out in the schedule. The option recorded that it was to be exercised in writing on the deed of sale attached thereto and presented to a broker who would present the directors of Vestline with the same. No deed of sale was attached to the option, but was at the time, in the possession of the broker.

In May 2005, Zalvest exercised the option, and annexed a deed of sale recording a purchase price of R1.8m, a figure calculated in accordance with the formula set out in the option.

Vestline contended that the option to purchase was not valid and that it had never accepted Zalvest's offer of an option to purchase. It also contended that as the deed of sale had not been attached to the option, it had never accepted all of its essential and material terms and conditions.

THE DECISION

Vestline intended to offer Zalvest an option to purchaser the property for the duration of the lease. The option contained the essential terms of an agreement of sale. The deed of sale was intended to be an integral part of the option. For the effective exercise of the option therefore, all the material terms of the deed of sale needed to be included in it. The deed of sale however, was not attached to the option.

The failure to attach the deed of sale meant that material terms, required by statute to be in writing, did not form part of the offer to sell the property as contained in the option. Even if it had been attached, blank spaces contained in it indicated that the parties would still have to reach agreement in respect of some of the terms. Without them, there was a failure to comply with the formalities prescribed by section 2(1) of the Alienation of Land Act (no 68 of 1981).

The offer made by Zalvest was, properly understood, in effect a counter-offer and was not an exercise of the option. The terms inserted in the blank spaces could not be said to have been agreed between the parties.

The option therefore could not have given rise to a valid and binding agreement of sale. Zalvest did not possess a valid and binding option which it could have exercised.

MARGATE CLINIC (PTY) LTD v GENESIS MEDICAL SCHEME

A JUDGMENT BY HUGO J
DURBAN AND COAST LOCAL DIVISION
5 JUNE 2002

2007 (4) SA 639 (D)

A medical aid scheme which, by mistake, authorises treatment of a party not covered by its scheme cannot be held liable for payment to the hospital in respect of treatment then given.

THE FACTS

Mrs Katanzi was a member of the Genesis Medical Scheme. Her daughter was registered as a dependant of Mrs Katanzi on the scheme. In May 2000, her daughter was admitted to the Margate Clinic (Pty) Ltd in order to deliver a baby and the clinic obtained authorisation from Genesis for this.

The baby was born prematurely and needed urgent intensive care. The clinic obtained authorisation from Genesis for the care of the baby. The authorisation was given by mistake by an authorised representative of Genesis. A month later, Genesis stated that it was not liable for the clinic's bill of R93 000 in respect of the care of the baby because its rules provided that a dependant of a dependant is not entitled to cover for treatment.

The clinic contended that Genesis was liable to it for payment in respect of the treatment of the baby and brought an action for payment of the R93 000 owed to it.

THE DECISION

A hospital is entitled to rely on an authorisation given by a medical aid scheme. However, this is still subject to the two contracts that apply when a member of a medical aid scheme obtains treatment at a hospital. The first contract is that between a member and the medical aid and the second is between the member and the hospital. The medical aid scheme does not guarantee payment to the hospital and confines its liability to that subsisting between itself and its member.

Accordingly, if the medical aid scheme is not obliged to compensate its member in some respect, then it is also not obliged to pay the hospital in that respect. In authorising treatment it does not authorise treatment of a non-member.

The scheme undertakes to pay the hospital in accordance with the applicable tariff, provided it is bound to do so as against its member. If it later appears that the person treated was not a member or a dependant of the member, then there is no undertaking that the fund would nevertheless pay the hospital. Such an undertaking would be contrary to the scheme's own rules and therefore ultra vires. When Genesis gave its authorisation, it could therefore not be seen to have intended to undertake payment for the dependant of the dependant of its member.

Genesis was absolved from the instance.

HONDA (SOUTH AFRICA) (PTY) LTD v HOFFMANN INTERNATIONAL (PTY) LTD

JUDGMENT GIVEN IN THE WITWATERSRAND LOCAL DIVISION ON 22 MAY 2007 BY MALAN J

2007 CLR 222 (W)

Competition

A plaintiff claiming damages due to passing off must prove that the defendant's passing off resulted in damages even if the plaintiff has earlier successfully obtained an interdict to prevent such passing off.

THE FACTS

Honda Motor Company Ltd and Honda (South Africa) (Pty) Ltd brought an application for an interdict against Hoffman International (Pty) Ltd and the three other defendants to restrain them from passing off the 'KAMA' engine, which Hoffman sold, as being an engine emanating from Honda Motor Company. The interdict was granted.

Honda (South Africa) (Pty) Ltd then brought an action against Hoffman in which it claimed damages for passing off the KAMA engine as emanating from Honda Motor Company. It alleged that Hoffman imported and sold the KAMA engines in South Africa, that it was interdicted from passing off the engines as emanating from Honda Motor Company, and that it had suffered damages as a result. The damages were alleged to consist in lost profits on lost sales and sales effected at discount prices and rebates.

Hoffman contended that the interdict proceedings determined the matters raised in those proceedings only and did not determine the passing off alleged to have taken place in Honda's action.

The court raised the question of what the import and effect of the judgment given in the interdict proceedings was upon the issues to be proved in Honda's action and upon the admissible evidence that had to be led.

THE DECISION

Honda intended to rely on the interdict judgment to establish passing off: it made no allegations regarding particular instances of purchasers having bought the KAMA engine thinking it emanated from the Honda Motor Company.

Its action for damages based on passing off required that it prove not only the passing off but also the loss sustained as a result thereof. In the interdict application, it was determined that the applicants had established a reputation and goodwill attaching to their engines and that the KAMA engines were a potential source of confusion. Honda was one of two parties in that application. It therefore had to establish that on its own, it had locus standi in the present action and that the reputation and goodwill attaching to the engines pertained to itself. The interdict furthermore, was directed at the prevention of future instances of passing off, not those past, to which the damages claim related.

It followed that the causes of action in the application and in the action were not the same. Honda was required to prove Hoffman's liability by admissible evidence showing that it suffered damages as a result of passing off.

BARKHUIZEN v NAPIER N.O.

A JUDGMENT BY NGCOBO J (LANGA CJ, MOSENEKE DCJ, MADALA J, MOKGORO J, NGCOBO J, NKABINDE J, O'REGAN J, SKWEYIYA J, VAN DER WESTHUIZEN J and YACOOB J concurring, SACHS J dissenting)
CONSTITUTIONAL COURT
4 APRIL 2007

2007 (5) SA 323 (CC)

Insurance

Public policy does not absolutely prohibit time-limitation clauses. Such clauses need to be examined individually, and in each case the question will be whether the time-limitation clause affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law.

THE FACTS

Barkhuizen insured his 1999 BMW 328i motor vehicle for R181 000 with a syndicate of Lloyd's underwriters represented by Napier. Clause 5.2.5 of the policy provided that if the insurer rejected liability for any claim, it would be released from liability unless summons was served within ninety days of repudiation.

In November 1999, Barkhuizen's car was damaged. He notified the insurer but in January 2000, it rejected liability for any claim. Barkhuizen issued summons for payment under the policy in January 2002.

The insurer defended the action on the grounds that clause 5.2.5 released it from liability. Barkhuizen contended that the clause denied him his common law right to invoke the courts and was in breach of section 34 of the Bill of Rights in that it deprived him of his right to have a justiciable dispute decided in a court of law.

Section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

THE DECISION

The determination of the matter depended on a proper approach to constitutional challenges to contractual terms in circumstances where both parties are private parties. Ordinarily such challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy, which represents the legal convictions of the community. Public policy is rooted in the Constitution and the values that underlie it.

Following this approach, the doctrine of pacta sunt servanda may be applied, but at the same time courts may decline to enforce contractual terms that are in conflict with constitutional values even though the parties may have consented to them.

Section 34 reflects the foundational values underlying our constitutional order, and it also constitutes public policy. It was therefore necessary to determine whether clause 5.2.5 was inimical to those values as expressed in section 34 and was thereby contrary to public policy.

Public policy does not absolutely prohibit time-limitation clauses. Such clauses need to be examined individually, and in each case the question will be whether the time-limitation clause affords a contracting party an adequate and fair opportunity to have disputes arising from the contract resolved by a court of law. In approaching this question a court will bear in mind the need to recognise freedom of contract, as well as the need to ensure that contracting parties have access to courts. In applying this to contractual provisions, once it is accepted that the clause does not violate public policy and non-compliance with it is established, the onus is upon the claimant to show that in the circumstances of the case there was a good reason why there was a failure to comply.

In the present case, the period of ninety days began to run once the claim had been lodged and repudiated by the insurance company. At that stage the applicant knew what his cause of action was, and he also knew the identity of the defendant as well as the amount of his claim. All that he had to do was issue summons, which he could do, as

he eventually did. It was clear that ninety days was not a manifestly unreasonable period.

Barkhuizen had also not furnished the reason for non-compliance with the time clause. He waited for two years after the insurer had repudiated his claim before instituting legal proceedings and there was nothing in his particulars of claim indicating why he had waited for such a long period.

The insurer's defence was upheld.

As it is impracticable for ordinary people in their daily commercial activities to enlist the advice of a lawyer, most consumers A simply sign or accept the contract without knowing the full implications of their act. The task of endlessly shopping around and wading through endless small print in endless standard forms would be beyond the expectations that could be held of any ordinary person who simply wished to get his or her car insured. What the insured in fact B looks for is a reliable insurer that offers what he or she thinks are reasonable terms as regards cover and premiums. Indeed, to expect the would-be purchaser of short-term insurance to seek full legal advice on every term in the standard-form contract would both require that the expense of the premium be exceeded many times over, and result in the C absurdity of the short term of the cover expiring before comprehensive clarity on each and every provision was obtained.

Standard-form contracts such as the one in the present case undoubtedly provide benefits for those who produce and rely on them. In the context of mass production of goods and services, the use D of standard forms gave rise to the most significant new phenomenon in the practice of making contracts in the 20th century - the application of mass contracts to consumer transactions.

SANTAM BPK v DE WET BOERDERY & TRANSPORT

A JUDGMENT BY THRING J
(CLEAVER J and DHLODHLO J concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
3 FEBRUARY 2007

2007 (3) SA 358 (C)

An insurer may depend on an exemption from liability in the case of a vehicle being driven by a person not licensed to drive if the exemption provided for in the relevant insurance policy refers to a licence as provided for in legislation and the driver has failed to comply with such provision.

THE FACTS

Santam Bpk insured De Wet Boerdery & Transport for damage to three of its vehicles. In terms of clause 1(c)(ii) of the policy, Santam would not be liable for damage caused to a vehicle while the vehicle was being driven by a person not licensed to drive the vehicle, unless De Wet was unaware that the driver was unlicensed and could show that in the normal course of its business procedures were in place to ensure that only licensed drivers were allowed to drive insured vehicles. The clause also provided that any driver would be considered to be licensed if he had fulfilled all the requirements of the licensing laws, or if there had been a failure to comply with a licensing law only to the extent that there had been a failure to renew a license required to be renewed by periodic renewal or because a licence was not required under the licensing laws or because a driver was a learner driver and had complied with the licensing laws relating to learner drivers.

In September 2002, while the policy was in force, an insured vehicle was involved in a collision. On that date, the driver held a valid code 14 driving license. However, a professional driver's permit which had been issued to him in August 1999 had expired two years after date of issue and was no longer valid. The driver was therefore not entitled to drive the vehicle on a public road at the time of the collision.

Santam repudiated liability for a claim of R907 863,56 submitted by De Wet being damages resulting from the collision. It contended that the driver was not a person licensed to drive within the meaning of clause 1(c)(ii) of the policy.

THE DECISION

The meaning of 'licensed' in clause 1(c)(ii) referred to a driving licence as provided for in the National Road Traffic Act (no 93 of 1996). The question was what meaning should be attributed to 'a person not licensed to drive the vehicle' as referred to in clause 1(c)(ii): was a broad meaning intended, which would exclude a person competent to drive the vehicle, or a narrower meaning, which would include any person not licensed to drive the vehicle, whether competent to do so or not?

A person could be competent to drive the vehicle without being licensed to drive it. The policy however, referred to a person not 'licensed' to drive, not to a person not 'competent' to drive. There was therefore no reason to consider clause 1(c)(ii) as referring to a person not competent to drive. The clause intended to ensure that Santam would not be liable for damage resulting from a collision in which a driver was not licensed within the meaning of the word in the Act. An unlicensed driver included a driver who did not possess the professional driver's permit as required by the Act. Accordingly, Santam was not liable for damage resulting from the collision which in September 2002.

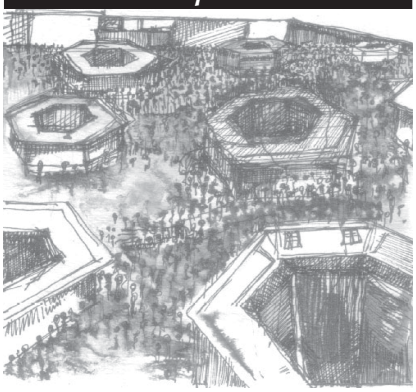
De Wet's claim failed.

GIDDEY N.O. v J C BARNARD AND PARTNERS

A JUDGMENT BY O'REGAN J (LANGA CJ, MOSENEKE DCJ, MADALA J, MOKGORO J, NKABINDE J, SACHS J, SKWEYIYA J, VAN DER WESTHUIZEN J and YACOOB J concurring)
CONSTITUTIONAL COURT
1 SEPTEMBER 2006

2007 (5) SA 525 (CC)

Companies



In exercising its discretion in terms of section 13 of the Companies Act (no 61 of 1973) whether or not to order a plaintiff company to furnish security, a court must take into account the provisions of section 34 of the Constitution.

THE FACTS

Giddey, the liquidator of Sadrema Explorations Ltd, brought an action against JC Barnard and Partners in which he claimed US$100m. Giddey alleged that the partnership had failed to conserve these funds in trust and that an accounting firm had been implicated in the loss.

JC Barnard defended the action. It sought an order in terms of section 13 of the Companies Act (no 61 of 1973) that the company pay security for costs of the action should the action fail. Section 13 provides that where a company or other body corporate is plaintiff or applicant in any legal proceedings, the court may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant or respondent if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.

Giddey opposed the application on the grounds that it anticipated success in another claim for R90m which the company in liquidation was then pursuing, which would enable it to pay any costs should it fail in its action against JC Barnard. He contended that the plea filed by JC Barnard was unlikely to succeed and that the issues relating to the integrity of the accounting firm were matters of public interest. He also contended that the claim brought against JC Barnard was the reason for the company's impoverishment.

An order compelling Giddey to furnish security was given and confirmed on appeal. Giddey then appealed to the constitutional court, contending that the court's discretion in ordering the company to furnish security was wrongly exercised in the light of section 34 of the Constitution. That section provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

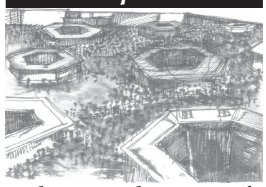
THE DECISION

The right embodied in section 34 does not prevent courts from regulating their own procedures and imposing rules impeding the progress of an action when a party has failed to comply with those rules. Any such limitation must be justifiable in terms of section 36 of the Constitution, and if it is so justifiable, then as long as the rule is applied properly, that party has no cause for complaint.

In the present case, Giddey had not challenged the constitutionality of section 13. Accordingly, the issue for decision was whether or not the court's exercise of its discretion in determining that security should be furnished was properly exercised. An appeal against an award of security based on section 13 should only succeed if it can be shown that the award was made by a court which did not act judicially, or on a misapprehension of the facts, or on wrong principles, including a failure to take into account the provisions of section 34.

The exercise of the discretion in question involves a balancing of the interests of the parties, the potential injustice to the plaintiff if it is prevented from pursuing a legitimate claim, and the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs.

In its application for security,



the company did not clearly allege that an order to furnish security would result in it being unable to pursue its action. The liquidator in fact argued that he would probably have the means to meet JC Barnard's costs should he be ordered to pay them. He had not indicated what sources were available to the company to fund its litigation. Allegations of fraudulent conduct on the part of JC Barnard as the cause of the company's liquidation were the most important factor supporting the provision of security. However, the court a quo had weighed up all considerations relevant to its order that security should be furnished and there was no indication that it had not exercised its discretion properly.

The appeal failed.

LETSENG DIAMONDS LTD v JCI LTD TRINITY ASSET MANAGEMENT (PTY) LTD v INVESTEC BANK LTD

A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL DIVISION
28 JUNE 2006

2007 (5) SA 564 (W)

A shareholder does not have an 'existing, future or contingent right or obligation' in relation to contracts concluded between its company and a third party.

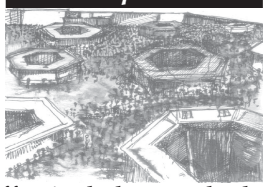
THE FACTS

Letseng Diamonds Ltd and Trinity Asset Management (Pty) Ltd were both shareholders in JCI Ltd. They brought two separate applications claiming that certain transactions concluded between JCI and Investec Bank Ltd be declared void or voidable. The two companies' applications were based on the allegation that JCI's board of directors had concluded the transactions while acting as a rogue board.

In the months preceding August 2005, JCI had sought loan funding. In that month, Investec expressed an interest in advancing a loan to JCI and agreement was reached on a loan of R540m to be given by Investec to JCI, subject to a number of terms and conditions. Among these was an undertaking by JCI to pay R50m or 30% of the increase in the value of its assets, whichever would be the greater on due date of repayment, as a raising fee. The entire board of JCI would resign and be replaced by a board nominated by Investec.

The board of JCI then resigned, a new Chief Executive was appointed by Investec, and the loan agreement was concluded by him on behalf of JCI as well as further agreements relating to additional loan amounts and additional security.

By September 2006, JCI had repaid the loan. The raising fee, then estimated at R400m, remained payable. Letseng and Trinity sought an interdict to prevent a meeting of shareholders ratifying the agreements concluded with Investec and prevent the payment of the raising fee. The meeting of shareholders had been required by the Johannesburg Stock Exchange as a condition for listing of JCI shares on the stock exchange. These matters were suspended pending finalisation of their application claiming that the transactions concluded with



Investec were void or voidable.

JCI and Investec contended that Letseng and Trinity, as shareholders, lacked the locus standi to bring the application.

THE DECISION

The question to be determined was whether Letseng and Trinity were persons interested in an 'existing, future or contingent right or obligation' with a direct right concerning the subject-matter of the litigation and not merely a financial interest in it.

Letseng and Trinity claimed that the directors contracted on behalf of JCI and did so in breach of their fiduciary duties, and that Investec was aware that the directors were acting in breach of their fiduciary duties. The legal consequence of this claim was that JCI, and only JCI, could at its election, avoid the contracts because the directors owe their fiduciary duties to the company and not to individual shareholders. A shareholder cannot usurp the functions of directors and exercise that election on behalf of the company. It was JCI as a company, not individual shareholders, such as Letseng and Trinity, which was entitled to challenge the alleged breaches of fiduciary duty.

Shareholders have no right as shareholders individually to attack these transactions. The general body of shareholders may elect a new board who could then act as it chooses, but as shareholders, they have no rights in that regard. The agreements attacked on behalf of Letseng, could only effectively be attacked by JCI.

The JCI board of directors, whether characterised as 'rogue' or not, acted intra vires in entering into the agreements with Investec, whether these actions were honest or not. The terms and conditions relating to the loan, its repayments and any raising fees to be paid were an issue between JCI and Investec, and not between it and any individual shareholder. Whether JCI wished to repay the loan for good sound business reasons was a question between these two parties, and a shareholder could not interfere with it.

Letseng and Trinity therefore lacked the locus standi to bring the application.

STRUT AHEAD NATAL (PTY) LTD v BURNS

A JUDGMENT BY SWAIN J
DURBAN AND COAST LOCAL DIVISION
24 APRIL 2007

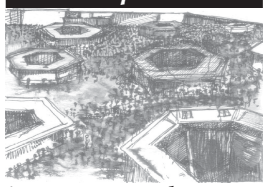
2007 (4) SA 600 (D)

A creditor which gives prima facie evidence that a person has conducted the affairs of his company without genuine concern for its prosperity and has incurred indebtedness by the company while doing so imposes an evidential burden on that person to show why such conduct does not amount to reckless trading as contemplated in section 424 of the Companies Act (no 61 of 1973).

THE FACTS

Legacy Power (Pty) Ltd arranged a credit facility with Strut Ahead Natal (Pty) Ltd. This enabled it to purchase electrical goods on credit from Strut Ahead. Accounts were not paid on due date, and Legacy negotiated an extension of the time period of the facility from 30 days to 90 days. At the same time, Legacy purchased goods from Strut Ahead, paying cash on delivery. At this time, Burns was the sole shareholder and, initially, the sole director of Legacy.

During 2002, Legacy's purchases resulted in a debt to Strut Ahead of R164 643,55, this debt continuing to subsist as at October of that year. Burns ran the company, opened its bank account and engaged the services of a firm of accountants to form the company. He appointed Mr Qoloshe as its sole director, with the object of obtaining the benefits of the black economic empowerment initiatives. All contracts between the company and third parties were concluded by Burns representing the company, or by one of its employees, but always with the express authority of Burns. No directors' meetings were held, and there were no shareholders' meetings while the company was



actually operating. Burns never informed Qoloshe that the company had commenced operations and Burns was the only individual with intimate personal knowledge of the financial affairs of the company with the result that he was the only individual with the ability to keep proper books of account of the company. Burns was the only individual able to furnish the company accountants and auditors with the necessary information to compile the annual financial statements of the company, but he failed to do so. Burns did not produce any financial statements or other books of account for the company.

By April 2003, Legacy had ceased trading, and had no assets other than a claim against Grid Construction. Burns had asserted that this amount was owed to him and not Legacy, an assertion he later retracted. The decision to stop trading was made by Burns and without consultation with Qoloshe.

Strut Ahead contended that Legacy had traded recklessly, as contemplated in section 424 of the Companies Act (no 61 of 1973). It brought an action for an order declaring Burns personally liable for the R164 643,55 debt.

THE DECISION

The probable reason for the closing down the operations of the company was the financial predicament of the company. As at October 2002 the company was unable to pay the plaintiff the amount of R164 643,55 and this was probably the precipitating cause of the decision to stop trading.

The question remained whether or not Burns was knowingly a party to the carrying on of the business of the company recklessly, or with intent to defraud creditors of the company.

The significance of the false statement by Burns that the claim against Grid Construction was owed to him and not Legacy, albeit corrected by him at a later stage, lay in the fact that Burns falsely stated to a representative of a creditor of the company that money owed to the company, which could be used to satisfy the claims of creditors, was not so available. This was not only prejudicial to the rights of creditors, but also to the company.

The prima facie inference to be drawn from the known facts was that the actions of Burns showed a lack of genuine concern for the prosperity of Legacy, that the indebtedness of Legacy to Strut Ahead was incurred by Burns on behalf of Legacy, whilst conducting the affairs of the company in this manner, and Legacy's inability to pay this amount was prima facie caused by such conduct. The facts needed to properly investigate these issues lay within the exclusive knowledge of Burns. However, he had not given evidence in the matter and his failure to explain any of this evidence weighed heavily against him in assessing it. An evidential burden was consequently placed upon Burns to explain the evidence and rebut it. However, he had failed to do so.

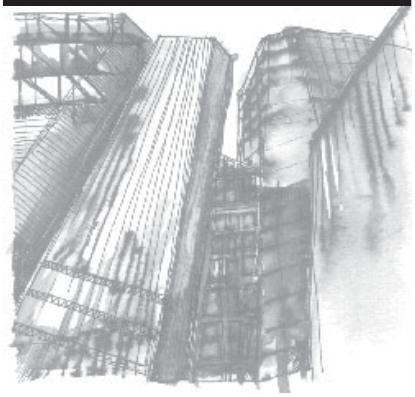
Burns was therefore personally liable for the debt to Strut Ahead in terms of section 424 of the Companies Act. The action succeeded.

AVENTURA LTD v JACKSON N.O.

A JUDGMENT BY NUGENT JA (HARMS JA, CONRADIE JA, LEWIS JA and MAYA AJA concurring)
SUPREME COURT OF APPEAL
15 SEPTEMBER 2007

2007 (5) SA 497 (A)

Property



A right of way over the property of a non-consenting owner, subject to the payment of appropriate compensation, may be asserted by the neighbouring owner, provided that it is shown that the right of way is necessary to provide access to a public road.

THE FACTS

Rondeklip Investment Trust owned property known as Portion 36 of the farm Hangklip No 305 in the division of Knysna. The property had no direct access to a public road. Access could only be achieved by passing over adjoining properties, one of which was owned by Aventura Ltd.

Aventura Ltd's property had been developed as a recreational resort situated alongside a national road. It had constructed on its property a private road leading from the national road to chalets built on the property.

Rondeklip claimed that it was entitled to a right of way over Aventura's property leading along the private road, diverting at a certain point toward another adjoining property, over which it enjoyed a servitude right of way, and then proceeding over that property until it reached Rondeklip's property.

The right of way Aventura claimed would require that it construct an extension of the private road consisting of a stretch of 30m from the existing private road to the adjoining property, and from there, the construction of a private road on the adjoining property. It intended to obtain the necessary permissions for the construction of the private road in terms of the Environment Conservation Act (no 73 of 1989) and the National Environmental Management Act (no 107 of 1998).

Aventura opposed the claim on the grounds that the permissions required in terms of this legislation were first required before it could assert any right to a right of way over its property.

THE DECISION

A right of way over the property of a non-consenting owner, subject to the payment of appropriate compensation, may be asserted by the neighbouring owner, provided that it is shown that the right of way is necessary to provide access to a public road. In this context 'necessity' does not entail that the owner secures the prior permissions necessary to construct the right of way from statutory bodies such as environmental bodies. 'Necessity' means only that the right of way must be the only reasonable means of gaining access to the landlocked property and not merely a convenient means of doing so.

It was true that a right of way could not be granted without the relevant permissions being obtained. However, a court granting an order that the owner has a right of way could make that order conditional upon the owner obtaining those permissions. This was a practical method of approaching the matter, since Rondeklip could not be expected to apply for permissions without first having established the right to the access route it claimed.

Rondeklip's claim was granted, subject to it obtaining the necessary permissions and paying reasonable compensation to Aventura.

MALAN v GREEN VALLEY FARM PORTION 7 HOLT HILL 434 CC

A JUDGMENT BY DHLODHLO
EASTERN CAPE PROVINCIAL DIVISION
25 JANUARY 2007

2007 (5) SA 114 (E)

An action for restoration of rights of possession must show that the rights affected amounted to dispossession and not merely an adjustment of conditions under which such possession was exercised.

THE FACTS

Malan's property was situated alongside the property of Green Valley Farm Portion 7 Holt Hill 434 CC. It enjoyed a right of way over the latter property, which enabled access to a national road.

For reasons of security, Green Valley Farm proposed to install electric fencing around its property as well as a gate restricting access over the road constituting the right of way. It proposed to give Malan access through the gate by means of a remote control and a touch pad operated by code. Malan objected to this, but Green Valley Farm nevertheless proceeded with the construction of the gate. It offered Malan the access devices to ensure he continued to enjoy use of the road.

Malan brought an urgent application for an order restoring to him free and undisturbed use of the road. Green Valley Farm contended that by providing him with remote control units, keys and the code to the touch pad, and by displaying its contact numbers at the first gate, Malan and all his visitors would be able to access the road and in this way, Malan would enjoy free and undisturbed possession, use and enjoyment of the right of way.

THE DECISION

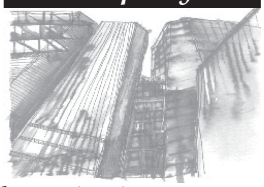
The question to be answered was whether the measures introduced by Green Valley Farm to offset the apparent dispossession of Malan's right to the free and unhindered use of the access road were sufficient to enable Malan to continue to exercise his right to the free and unhindered use of the road.

It was doubtful whether it could be said Malan had been dispossessed, as opposed to him having chosen not to enjoy access to the road in question. Malan knew the code that gave access through the gates, and has used it successfully in order to gain entry. Given that, it could not be said that Malan had been dispossessed, but had chosen not to have access to the road in question. Malan had not produced proof on a balance of probabilities that he was wrongfully deprived of possession, and in fact had shown that he was not in fact deprived of possession.

In any event, it could be expected of Malan as a neighbour, that he should have accepted the security concerns of Green Valley Farm and that they necessitated some change to the conditions of entry he had hitherto experienced.

The application was dismissed.

JOLES EIENDOM (PTY) LTD v KRUGER



A JUDGMENT BY GRIESEL J
(TRAVERSO DJP and NDITA J concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
1 MARCH 2007

2007 (5) SA 222 (C)

A common use passage to which an owner has servitudinal rights includes the right to access the passage as well as the right to use it for any other lawful purpose.

THE FACTS

Joles Eiendom (Pty) Ltd owned erf 548 and Kruger owned erf 3765, both situated in Stellenbosch and neighbouring onto each other. A common passage formed their boundary and in 1929, it was registered as a servitude in the title deeds of each property. In terms of the servitude, each party had a reciprocal right of common use of the passage.

In 1966, the owner of erf 548 built a wall along his western boundary. The effect of this was to prevent access to the common passage from his own property, and to close off a small rectangular section of his property so that it became part of erf 3765. In 1968, Kruger constructed a wall along the eastern boundary of his property. The effect of this was to extend the passage by more than four metres.

In 2001, Joles took transfer of erf 548. It then constructed a door in the wall the previous owner had built, thereby regaining access to the common passage from that property. Up until that point, owners of erf 548 had used the common passage for storage of crates, bottles and bicycles, and for disposal of sewerage from that property through a pipe to a main sewerage pipe running under the common passage.

Kruger contended that the servitude in favour of erf 548 had become lost by extinctive prescription, and that the passage including its extension had become his property by acquisitive prescription, he having had uninterrupted possession of the passage since 1967. He brought an action for an order asserting his rights.

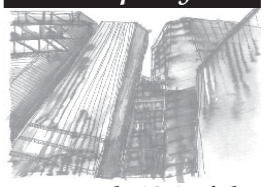
THE DECISION

The servitude entitled the owners to 'common use' of the passage. This meant that the passage could be used by both owners for any lawful purpose, having regard to the nature and situation thereof, and provided that the servitude was exercised reasonably. In addition to the right of footpath, other permissible uses of the passage included urban servitudes, such as the right to pass off one's rainwater onto the ground of another.

The servitude had been used by owners of erf 548 for such purposes. The fact that they had not used it as a footpath did not mean that they had not exercised their right of servitude, since the servitude entitled them to use of it in a broader manner than this.

As far as the claim based on acquisitive prescription was concerned, it was clear that Kruger had used the extended passage as if he was the owner from the date it was constructed, ie 1968. Kruger was therefore entitled to assert rights of ownership in regard to this area.

KMATT PROPERTIES (PTY) LTD v SANDTON SQUARE PORTION 8 (PTY) LTD



A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL
DIVISION
8 DECEMBER 2006

2007 (5) SA 475 (W)

A purchaser of a sectional title unit is not entitled to registration of a condition of title by which the right to the exclusive use of such parts of the common property is conferred upon it if on a proper interpretation of the sale agreement, section 27A of the Sectional Titles Act (no 95 of 1986) applies to the provision of exclusive use and enjoyment of rights in respect of the common property.

THE FACTS

In February 2003, Kmatt Properties (Pty) Ltd purchased a sectional title unit from the Sandton Square Portion 8 (Pty) Ltd in terms of a written agreement of sale. The unit comprised section no. 19-7 on the 19th floor of the building known as Michelangelo Towers, an undivided share in the common property and the exclusive use of, inter alia , parking bays 14 and 15 on parking level 1.

In terms of section 27(1)(a) of the Sectional Titles Act (no 95 of 1986), if parts of the common property are delineated on a sectional plan in terms of section 5(3)(f), the developer may when making application for the opening of a sectional title register and the registration of the sectional title plan, impose a condition by which the right to the exclusive use of such parts of the common property is conferred upon the owner of one or more sections. In terms of section 27(1)(b) a developer shall cede the right to the exclusive use of parts of the common property to the owner or owners of units in the scheme by the registration of a unilateral notarial deed in their favour.

In terms of section 27A, a developer or a body corporate may make rules which confer rights of exclusive use and enjoyment of parts of the common property upon members of the body corporate.

Areas of exclusive use were defined in clause 18 of the schedule to the agreement as 'parking bays as marked on annexure B hereto which has been initialled by the parties for identification purposes'. In terms of clause 4 of annexure A1 of the agreement, Kmatt was entitled to the exclusive use, occupation and enjoyment of the parking bays, described in paragraph 18.1 of the schedule subject to the rights of representatives of the body corporate or of the developer of reasonable access thereto. Sub-clause 5 recorded that if permitted by law the exclusive use rights would be allocated in terms of the rules

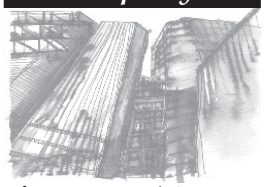
Kmatt contended that in terms of the agreement, upon the opening of the sectional title register, Sandton Square was obliged to reserve the exclusive use of the parking bays for it in the manner contemplated in section 27(1). Sandton Square contended that it would comply with its obligations in terms of the agreement if the exclusive use of the parking bays was reserved to Kmatt in the manner contemplated in section 27A of the Act.

Kmatt brought an application for an order compelling Sandton Square to reserve the exclusive use of the parking bays in the manner contemplated in section 27(1).

THE DECISION

Kmatt contended that clause 18.1 of the schedule and clause 4.1 of annexure A1 thereto recorded that the exclusive rights furnished in terms of clauses 18.1 and 18.2 of the schedule were not subject to the provisions of sub-clause 5 as recorded in annexure A1. It based this submission on the grounds that neither clause 18.1 nor clause 18.2, in contradistinction to clause 18.3, contained any reference to the provisions of annexure A1.

However, this overlooked the fact that clause 4.1 provided expressly that Kmatt would be entitled to the exclusive use of the parking bays described in paragraph 18.1 of the schedule subject to the rights of representatives of the body



corporate or of the developer of reasonable access thereto. Although clause 18.1 of the schedule contains no reference to the provisions of annexure A1 it was clear that the exclusive use of the parking bays referred to in clause 18.1 was in fact referred to in clause 4.1 of annexure A1 as an 'exclusive use' right.

It was therefore clear that the exclusive use rights were to be reserved for Kmatt in terms of the provisions of section 27A of the Act and not section 27(1) of the Act.

The application was dismissed.

SOUTH AFRICAN NATIONAL PARKS v WEYER-HENDERSON

A JUDGMENT BY JONES J
SOUTH EASTERN CAPE LOCAL DIVISION
12 DECEMBER 2006

2007 (3) SA 109 (SECLD)

The extent of servitudinal rights may be determined outside of title deed conditions and may be determined in the deed of submission preparatory to an arbitration award by which such rights were originally conferred.

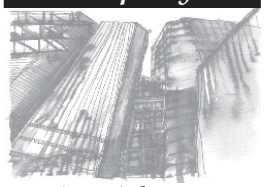
THE FACTS

Weyer-Henderson owned property neighbouring on property owned by South African National Parks. In 1919, both parties' predecessors in title referred an issue to arbitration. This was the amount of compensation payable to the Weyer-Henderson property's owner as a result of the construction of a dam wall on that property. The deed of submission to arbitration recorded that the owner would have the right to water and graze his stock down to the water's edge from any land belonging to him.

The amount awarded was £26 757 and it was provided that the owner would be allowed to have free grazing on the east side of the Sundays river, up to the water's edge, and watering rights for his stock in the lake on the property. The award was made an order of court and the provision became a condition of title recorded in the title deeds of the properties.

As a result of silting up in the dam, the height of the dam wall had to be raised to maintain the storage capacity of the dam. Because this would affect neighbouring properties, a Water Court application was made to allow further servitudinal rights of water storage and to determine the amount of compensation payable to the neighbouring properties. The judgment of this court was delivered in 1950 and it determined compensation in the sum of £39,764, which included compensation for loss of grazing rights in the sum of £1000.

Weyer-Henderson grazed his stock on both the east and west sides of the Sundays river. SA National Parks contended that he was not entitled to graze his stock over this area but his rights were confined to the east side of the river. It also contended that the determination of compensation by the Water Court had replaced Weyer-Henderson's servitudinal rights which were lost at that point. It brought an action for ejectment of Weyer-Henderson from its property.



THE DECISION

The extent of the servitudinal rights was not to be determined from the terms of the arbitration award because that award had been limited to fixing the amount of compensation payable. Its terms of reference were given in the deed of submission which had not restricted watering and grazing rights to one side of the river. The extent of the servitudinal rights were to be determined with reference to this deed, and it was clear that it did not restrict such rights to the east side of the river.

As far as the Water Court's determination of compensation was concerned, there was no indication in its judgment that the amount of £1 000 for loss of grazing was for a permanent and total loss of all grazing rights, and that Weyer-Henderson would no longer be entitled to graze anywhere on SA National Parks' land after he was paid. That issue was not before the court and was not considered by the court. The reduction in grazing rights was also a partial reduction, not a total reduction, and accordingly the compensation determined could not have related to a complete loss of servitudinal rights by Weyer-Henderson.

It appeared, in any event, that the fact that Weyer-Henderson had continued to graze his stock on the property of SA National Parks over the years, acquisitive prescription applied, and he had acquired the right to do so in this manner.

The action was dismissed.

The deed of submission was lodged with the Registrar of Deeds together with the award, the order of Court, and the other documents necessary for the registration of title to immovable property. As a matter of common sense the arbitrator's award must, in a case such as this, be read with and is subject to the deed of submission to arbitration. The deed of submission is the source document which sets out the issues between the parties, gives the arbitrators their powers, and binds the parties to the award. The award can only be given its proper meaning in the light of the context of the deed of submission. Otherwise, it may not make sense. This is particularly so in this case where there is uncertainty about the extent of the rights which flow from the deed of submission and the award. Reading them together dispels any doubt about the extent of the grazing rights. The deed of submission stated categorically that the defendant was to enjoy full grazing rights down to water's edge over the land taken, or to be taken over by the board, which included portions of his land both to the east and the west of the middle of the river and the entire hatched area. This was the right which was specifically made part of the framework for the award of compensation. If the passage from the award quoted above in para [6] means something else, which it may be thought to do if viewed in isolation, it is either a misdescription or a poorly worded and ambiguous description.

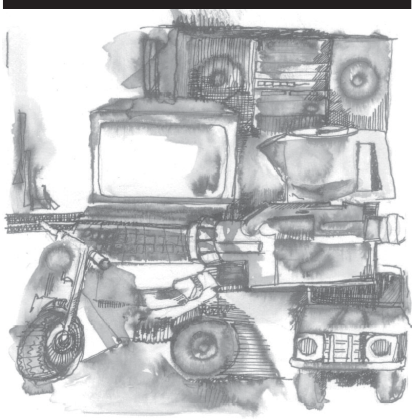
This is therefore not a case where it is possible to determine the extent of the grazing rights exclusively from a study of the words used in the arbitration award and the title deeds.

SDR INVESTMENT HOLDINGS CO (PTY) LTD v NEDCOR BANK LTD

A JUDGMENT BY YEKISO J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
25 JANUARY 2007

2007 (4) SA 190 (C)

Credit Transactions



A creditor which concludes a settlement agreement with a debtor in terms of which the creditor is entitled to sell the debtor's assets in settlement of the debt incurs the obligations of an agent to principal and must act so as to protect its interests and those of the debtor.

THE FACTS

Nedcor Bank Ltd brought liquidation proceedings against SDR Investment Holdings Co (Pty) Ltd and associated companies. Its claim against the companies amounted to R12 778 225,14.

In November 2001, the parties concluded a settlement agreement. In terms thereof, the liquidation proceedings would be postponed sine die. SDR and the other companies acknowledged that they were indebted to Nedcor in the amount claimed plus interest thereon. Nedcor undertook not to levy execution on its claim on condition that by 6 December 2001, the companies would sell some or all of their assets in order to liquidate their indebtedness to Nedcor. If the companies failed to do so, Nedcor was empowered to sell the assets by 14 January 2002, subject to certain reserve prices. Should Nedcor be unsuccessful in selling the assets in terms thereof, it was empowered to sell them by public auction without reserve on such terms and conditions as it might deem appropriate.

Neither party succeeded in selling the assets, including certain farms, one of which was known as Zorgvliet. A sale by public auction was therefore arranged and advertised to take place on 12 March 2002. In terms of the conditions of sale, the final bid would be followed by a 14-day confirmation period during which any person would have an opportunity to improve on the highest bid, and the highest bidder would then be afforded an opportunity to match any such subsequent offer.

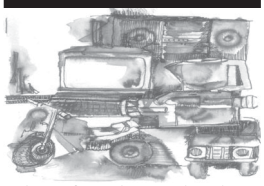
On 18 February 2002, Nedcor secured an offer for the purchase of the farms and other assets, the offer price being R20m. SDR refused to accept the offer on the grounds that the price was inadequate. In the proceeding weeks, it entered into negotiations with other interested parties who stated they were prepared to offer a bank guarantee for the settlement of Nedcor's claim while they considered the purchase of the assets.

Nedcor refused to postpone the sale by public auction. On 8 March 2002, SDR informed Nedcor of a signed offer to purchase the farm Zorgvliet for R18m, the offeror being Bunkers Hills Investments (Pty) Ltd. A condition of the sale was that the sale by public auction be cancelled or postponed. The 10% deposit would be paid to Nedcor by 11 March 2002. A bank guarantee for the balance of the purchase price was to be provided within seven days of demand by SDR.

At the public auction, the companies' three farms and other assets were sold for R31m. Bunkers Hills then indicated that it wished to improve on the price, but Nedcor had already confirmed the sale.

SDR contended that in selling the three farms as a unit, Nedcor exceeded its authority, alternatively that in refusing to either cancel or postpone the auction in the light of the Bunkers Hills sales agreement, and in failing to auction the three farms separately, and in failing to keep the sale open during the 14-day confirmation period, Nedcor failed to take SDR's best interests into account. It contended that in the process of executing its mandate, Nedcor breached its fiduciary duty toward SDR with the result that SDR suffered damages through having lost the chance to sell the assets at higher prices.

It brought an action for damages.



THE DECISION

The agreement conferred authority on Nedcor to sell SDR and the other companies' assets, the purpose being to liquidate their indebtedness to the bank. The relationship between SDR and Nedcor was therefore one of principal and agent. Accordingly, when Nedcor sold the assets, it did so as the agent and on its authority to conclude a contractual relationship between the owners of the assets and the prospective purchaser. It did not sell the assets simply as execution creditor.

The agreement conferred on Nedcor a discretion. The exercise of its discretion entailed not only protecting the bank's interests, but also in protecting SDR's interests. Its exercise could not entail the bank breaching its fiduciary duty as agent toward SDR as principal.

The bank had in fact breached its fiduciary duty toward SDR. The Bunkers Hills sale represented a real and not merely a speculative chance that it would have resulted in SDR discharging its obligations toward the bank, and also in retaining the other farms owned by the associated companies.

The bank was therefore liable to SDR and its associated companies in such damages as they were able to prove.

The role of the first defendant is as stipulated in the authority given to it and this is, among other things, 'om die voormelde bates of enige gedeelte daarvan te bemark en te verkoop'. The agreement authorises the first defendant to, initially, market and sell the asset subject to reserve and, should this eventuality not occur, to sell the assets by public auction without reserve. The phrase 'bates of enige gedeelte daarvan' in my view connotes/contemplates a sale of assets and, if the proceeds realised out of sale of such an asset or assets are insufficient to liquidate the debt, to proceed in the realisation of a further asset or assets. This it does on behalf of the plaintiffs who did not succeed to dispose of the assets when they were afforded an opportunity to do so in terms of clause 4.2 of the agreement. Thus, the authority conferred on the first defendant derives from the agreement itself, with the plaintiffs being the source of such authority. I can conceive of no other interpretation that could be accorded to clause 4.3 of the agreement than an authority to dispose of someone else's assets, and that authority necessarily F implies a relationship of a principal and an agent.

STEENKAMP N.O. v THE PROVINCIAL TENDER BOARD OF THE EASTERN CAPE

A JUDGMENT BY MOSENEKE DCJ (MADALA J, MOKGORO J, NKABINDE J, SACHS J, SKWEYIYA J, VAN DER WESTHUIZEN J and YACOOB J concurring, LANGA CJ and O'REGAN J dissenting)
CONSTITUTIONAL COURT
28 SEPTEMBER 2006

2007 (3) SA 121 (CC)

Contract

Nothing in the overall constitutional and legislative scheme for the award of tenders explicitly or by implication contemplates that an improper but honest exercise of the discretion of the tender board must attract a delictual right of action in favour of a disappointed tenderer.

THE FACTS

Balraz Technologies (Pty) Ltd submitted to the Provincial Tender Board of the Eastern Cape a tender for the provision of an automated cash provision system for social pensions. The tender was accepted, and in due course the Eastern Cape Province placed an order with Balraz.

Thereafter, the award of the tender was set aside by the Ciskei High Court, upon application by an unsuccessful tenderer.

Balraz alleged that following the award, in order to provide the services, it had incurred expenses amounting to R4,35m, most of this being consultants' and directors' salaries.

After Balraz had been placed in liquidation, its liquidator, Steenkamp, claimed damages being the expenses so incurred. The claim alleged that the award of tender was made negligently, the Board having failed to take reasonable care in the evaluation and investigation of tenders by disregarding the recommendations of two technical evaluation committees.

Balraz brought an action against the Board for the payment of damages, being the expenses incurred in initiating the provision of services.

THE DECISION

The pivotal question was whether a successful tenderer whose tender award is subsequently set aside by a court on review, may claim damages from the tender board for out-of-pocket expenses incurred in reliance on the award. The answer to this rests on a determination of whether, on a conspectus of all relevant facts and considerations, public policy and public interest favours holding the conduct unlawful and susceptible to a remedy in damages.

The Constitution envisages that decisions on procurement should reside in a body the operative statute creates. The statute confers on the tender board the exclusive power to procure goods and services for the provincial government and requires that the power must be exercised within the framework of principles set out in the guidelines. The statute confers independence on the tender board and immunises its decisions and operations from external interference. Nothing in the overall constitutional and legislative scheme explicitly or by implication contemplates that an improper but honest exercise of the discretion of the tender board must attract a delictual right of action in favour of a disappointed tenderer.

In any event, after the tender award to Balraz had been set aside, Balraz could have tendered again when new tenders were called for. It did not do so because it had been placed in liquidation. Furthermore, once Balraz was notified of the award of the tender to it, it should have acted prudently in the expenditure incurred on directors' and consultants' salaries.

There is no justification to develop the common law to embrace a narrow claim for damages based on out-of-pocket expenses in favour of an initially successful tenderer where the award is subsequently set aside by the court and the tenderer retains the right to participate in the subsequent tender process.

The Board owed no duty of care to Balraz. The claim against it was accordingly dismissed.

VAN NIEUWKERK v McCRAE

A JUDGMENT BY GOLDBLATT J
WITWATERSRAND LOCAL
DIVISION
29 SEPTEMBER 2006

2007 (5) SA 21 (W)

When a residential property within the area of jurisdiction of a local authority is sold with a building on it the purchaser is entitled to assume that the building has been erected in compliance with all statutory requirements and that it can be used to its full extent.

THE FACTS

In December 2003, McCrae sold to Van Nieuwkerk certain fixed property for R1,15m. McCrae had effected various alterations to the building on the property sold, without the approval of the local authority having been obtained in terms of section 4 of the National Building Regulations and Building Standards Act (no 103 of 1977). McCrae knew that he had not obtained such approval, as no plans had been submitted to the local authority or approved by it.

Subsequent to transfer having been registered McCrae attempted to have certain plans approved but these plans were not approved. Van Nieuwkerk had not been informed of the fact that no approved plans existed in relation to the alterations that had been effected to the property.

Van Nieuwkerk brought an action for damages against McCrae in which he alleged that McCrae was in breach of the contract of sale. He alleged that it was an implied, alternatively tacit term of the contract of sale that the improvements on the property had been lawfully erected, alternatively building plans and specifications had been drawn, submitted and approved by the local authority in writing as contemplated by the Act prior to erection thereof, alternatively the improvements on the property had been erected in compliance with building plans and specifications so approved by the local authority, alternatively Van Nieuwkerk would be entitled in law to use the improvements so purchased by it to their full extent. Van Nieuwkerk also alleged that McCrae had been aware of the failure to comply with the Act and had fraudulently concealed this fact from him at the time the contract of sale was concluded.

McCrae denied that the contract incorporated the implied or tacit terms alleged by Van Nieuwkerk. He relied on clause 16.1 of the contract, which stated that it constituted the sole and entire agreement between the parties and that no warrantees, representations, guarantees or other terms and conditions of whatsoever nature, not contained or recorded therein, would be of any force or effect.

McCrae also argued that because the sale was 'voetstoots', the property was sold with all its faults and that the failure to have had the alterations approved was a latent defect and that he accordingly had no obligation to disclose such defect and further that his failure to disclose this information was in the circumstances not fraudulent.

THE DECISION

When a residential property within the area of jurisdiction of a local authority is sold with a building on it the purchaser is entitled to assume that the building has been erected in compliance with all statutory requirements and that it can be used to its full extent. It is not necessary for this to be specifically set out in an agreement of sale. It is implied as a matter of law in any agreement of sale relating to such property.

Even if it was not implied as a matter of law, it was clear that when the parties entered into the agreement of sale it must have been their imputed intention that Van Nieuwkerk was buying a property with improvements thereon which could be used in their totality and which had been erected in accordance with section 4 of the Act, and that Van Nieuwkerk did not run the risk of having to demolish or rectify

such buildings in order to comply with the existing law. Accordingly, even if there was not an implied term, there was a tacit term of the agreement that the alterations had been effected in compliance with the Act.

As far as McCrae's reliance on clause 16.1 was concerned, terms implied by law in written contracts are as much part of the integrated contract as the express terms and are not excluded by a clause stating that the written contract constitutes the sole record of the agreement between the parties.

As far as his reliance on the 'voetstoots' clause was concerned, the term 'voetstoots' only excludes liabilities for latent defects of a physical nature in the merx and does not apply to the lack of certain qualities or characteristics which the parties have agreed the mercx should have.

Van Nieuwkerk was entitled to such damages as he could prove.