# Current Commercial Cases

**2008**

ISBN 978-1-920569-36-5

## A SURVEY OF THE CURRENT CASE LAW

**written by**

Mark Stranex BA (Natal) Hons LLB (Cape Town)
Advocate of the High Court of South Africa

The Law Publisher CC
CK92/26137/23

# Contents

**Index** ..... **4**

CITIBANK NA v THANDROYEN FRUIT WHOLESALERS CC 8
COHEN v LENCH .. 10
KOUMANTARAKIS GROUP CC v MYSTIC RIVER INVESTMENT 45 (PTY) LTD 11
FUEL RETAILERS ASSOCIATION OF SOUTHERN AFRICA v DIRECTOR-GENERAL: ENVIRONMENTAL MANAGEMENT 13
HANGKLIP ENVIRONMENTAL ACTION GROUP v MEC FOR AGRICULTURE, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE15
BARNETT v MINISTER OF LAND AFFAIRS .... 16
AGRICO MASJINERIE (EDMS) BPK v SWIERS 18
CONSTANTARAS v BCE FOODSERVICE EQUIPMENT (PTY) LTD 19
ALTON COACH AFRICA CC v DATCENTRE MOTORS (PTY) LTD 20
KUDU GRANITE HOLDINGS LTD v CATERNA LTD21
MINISTER OF SOCIAL DEVELOPMENT v PHOENIX CASH & CARRY – PMB CC 22
BOWRING N.O. v VREDEDORP PROPERTIES CC .. 23
OWNER OF THE SNOW CRYSTAL v TRANSNET LTD 24
ASSURED FREIGHT SERVICES (PTY) LTD v COMAIR LTD 25
SMITH v PORRITT 26
QUINTESSENCE OPPORTUNITIES LTD v BLRT INVESTMENTS LTD 27
BLRT INVESTMENTS LTD v GRAND PARADE INVESTMENTS LTD 27
MTN SERVICE PROVIDER (PTY) LTD v AFRO CALL (PTY) LTD 29
SA BREWERIES LTD v SHOPRITE HOLDINGS LTD ... 30
LACO PARTS (PTY) LTD v TURNERS SHIPPING (PTY) LTD 32
NATIONWIDE AIRLINES (PTY) LTD v ROEDIGER . 33
MERRY HILL (PTY) LTD v ENGELBRECHT .... 34
VAN NIEKERK v FAVEL ... 35
STALWO (PTY) LTD v WARY HOLDINGS (PTY) LTD36
TETRA MOBILE RADIO (PTY) LTD v MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF WORKS 38
MOGUDI v FEZI .... 39
McGREGOR v CITY OF JOHANNESBURG 40
MEEPO v KOTZE . 41
PHUMELELA GAMING AND LEISURE LTD v GRÜNDLINGH 43
WALLACE v 1662 G&D PROPERTY INVESTMENTS CC 44
MUTUAL & FEDERAL INSURANCE CO LTD v DA COSTA 45
THEKWENI PROPERTIES (PTY) LTD v PICARDI HOTELS LTD 46
WESTERN FLYER MANUFACTURING (PTY) LTD v DEWRANCE 47
AIRPORT COLD STORAGE (PTY) LTD v EBRAHIM .. 48
MITTAL STEEL SOUTH AFRICA LTD v PIPECHEM CC 50
ELEY v LYNN & MAIN INC 51
MENQA v MARKOM ... 52
FIR & ASH INVESTMENTS (PTY) LTD v CRONJE 53
JUST NAMES PROPERTIES 11 CC v FOURIE 55
LE ROUX v VIANA N.O. .... 56
LEGH v NUNGU TRADING 353 (PTY) LTD 58
NEDCOR BANK LTD v RUNDLE .... 59
THRUPP INVESTMENT HOLDINGS (PTY) LTD v GOLDRICK 60
RAMDIN v PILLAY 61
ALLIANZ INSURANCE v RHI REFRACTORIES AFRICA (PTY) LTD 62
SHEA v LEGATOR MCKENNA INC 63
BE BOP A LULA MANUFACTURING & PRINTING CC v KINGTEX MARKETING (PTY) LTD 64
THE OLYMPIC COUNTESS ..... 66
FORTIS BANK (NEDERLAND) NV v ORIENT DENIZCILIK TURIZM SANAYI VE TICARET SA 66
DE VILLIERS v McKAY N.O. ... 69
MILLENNIUM WASTE MANAGEMENT (PTY) LTD v CHAIRPERSON OF THE TENDER BOARD : LIMPOPO PROVINCE 70
FAIROAKS INVESTMENT HOLDINGS (PTY) LTD v OLIVER 71
FRASER v VILJOEN .... 72
MERCURIUS MOTORS v LOPEZ .. 73
WIGHTMAN v HEADFOUR (PTY) LTD 74
QUALIDENTAL LABORATORIES (PTY) LTD v HERITAGE WESTERN CAPE 75
CARIBBEAN ESTATES (PTY) LTD v SEETHAL N.O. . 76
FIRSTRAND BANK LTD v SONI .... 77
KHABISI N.O. v AQUARELLA INVESTMENT 83 (PTY) LTD 78
LINVESTMENT CC v HAMMERSLEY 79
NAUDÉ v TERBLANCHE ... 80
BARNARD v CARL GREAVES BROKERS (PTY) LTD 81
KLAAS v SUMMERS .. 83
BID INDUSTRIAL HOLDINGS (PTY) LTD v STRANG . 84
GARDENER'S GRAPEVINE CC v FLOWCRETE PRECAST CC 85
BOTHA N.O. v DEETLEFS 86

FRANK v PREMIER HANGERS CC 87
CECIL NURSE (PTY) LTD v NKOLA ... 88
HIRT & CARTER (PTY) LTD v MANSFIELD ... 89
MAHADEO v DIAL DIRECT INSURANCE LTD 90
NEDCOR BANK LTD v SDR INVESTMENT HOLDINGS CO (PTY) LTD 91
NEDBANK LTD v MATEMAN .. 93
NEDBANK LTD v STRINGER ... 93
CAPESPAN (PTY) LTD v ANY NAME 451 (PTY) LTD 94
VAN STADEN N.O. v FIRSTRAND LTD 95
DU PREEZ v ZWIEGERS ... 96
EX PARTE KELLY 97
FIRSTRAND BANK LTD v NATIONAL LOTTERIES BOARD 98
PESTANA v NEDBANK LTD .... 99
JOINT STOCK COMPANY VARVARINSKOYE v ABSA BANK LTD 100
MILOC FINANCIAL SOLUTIONS (PTY) LTD v LOGISTIC TECHNOLOGIES (PTY) LTD 101
TRANSNET LTD v OWNER OF MV SNOW CRYSTAL 103
SWART v JANSE VAN RENSBURG 104
UNIVERSITY OF KWAZULU-NATAL v GOGA 105
BROWN v YEBBA CC . 106
EX PARTE NEW SEASONS AUTO HOLDINGS (PTY) LTD 107
SCHWARTZ NO v PIKE .... 108
PROPHITIUS v CAMPBELL .... 109
PS BOOKSELLERS (PTY) LTD v HARRISON . 110
VAN RENSBURG N.O. v NELSON MANDELA METROPOLITAN MUNICIPALITY 111
KOUMANTARAKIS GROUP CC v MYSTIC RIVER INVESTMENT 45 (PTY) LTD 112
JOHANNESBURG METROPOLITAN MUNICIPALITY v GAUTENG DEVELOPMENT TRIBUNAL 114
WATSON N.O. v SHAW N.O. ... 115
NAIDOO v SANBONANI EXPRESS FREIGHT ... 116
GOUNDER v TOP SPEC INVESTMENTS (PTY) LTD .. 117
BISNATH N.O. v ABSA BANK LTD 118
APCO AFRICA (PTY) LTD v APCO WORLDWIDE INC 119
HUGHES v JOHN DORY TRUCKING (PTY) LTD ..... 120
OVATION PRESERVATION PENSION FUND v EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD 121
POINT 2 POINT SAME DAY EXPRESS CC v STEWART 123
BLAKE v CASSIM 124
STANDARD BANK OF SOUTH AFRICA LTD v D FLORENTINO CONSTRUCTION CC 125
CITY OF CAPE TOWN v HELDERBERG PARK DEVELOPMENT (PTY) LTD 126
TALJAARD v T L BOTHA PROPERTIES ... 128
KUNGWINI LOCAL MUNICIPALITY v SILVER LAKES HOME OWNERS ASSOCIATION 129
HOLTZHAUSEN v ABSA BANK LTD .. 131
SASRIA LTD v SLABBERT BURGER TRANSPORT (PTY) LTD 132
HOLLELY v AUTO & GENERAL INSURANCE COMPANY LTD 133
STREET POLE ADS DURBAN (PTY) LTD v ETHEKWINI MUNICIPALITY 134
DIGITAL HORIZONS (PTY) LTD v SA BROADCASTING CORPORATION 136
MOHAMMED ABDULMOHSIN AL-KHARAFI & SONS v PEMA N.O. 137

# Index


Agency
fiduciary duty of bank as agent and creditor 91
Articles of Association
powers of directors 107
Attorney
money held in trust 96
trust account, disbursement of funds 96

Bank
ownership of account funds 100
reversing credit 99, 131
set off of funds in account 100
Betting
regulation of bookmakers 43
Building lien
mortgage bond holder's rights 125
Building plans
approved by local authority 110
Building regulations
subject to National Heritage Resources Act 75

Cession
and set off 137
knowledge of 95
of rentals, in securitatem debiti 46
pactum de non cedendo 94
substitution of ceded asset 95
Cheque
offered in full and final settlement 64
personal liability of signatory 19
Close Corporation
cheque signed on behalf of, personal liability 19
member representing in litigation 50
member's power to represent 83
reckless trading 48
representation of by member 83
right of access to court 50
Close corporation
authority of member 123
liquidation of under s69 20
member as agent of 123
power to bind 123
valuation of member's interest 108
Companies
Article 54 27
just and equitable winding up 81
security for costs 29
special resolution 27
Turquand Rule 27
unfairly prejudicial conduct 81
Company
derivative action 21
director, locus standi to apply for winding up 120
just and equitable winding up 119
winding up 119
winding up, general meeting must authorise 107
winding up, just and equitable ground 120
winding up, resolution of directors 107
Compromise
full and final settlement, cheque offered 64
Constitution
executability of property 77
property rights and 78
right of access to court 50
right to civil trial 84
right to housing 77
right to information, failed tender 38
socio-economic factors and 13
Contract
arbitration clause, extent of 106
breach of, notice requirement 10
breach, pre-estimate of damages 104
cession of rights 134
compromise, what constitutes 64
contrary to statute 128
damages, genuine pre-estimate of 104
discretion to be exercised arbitrio boni viri 11, 112
exemption clause 73
failure to read terms and conditions 73
interpretation of 134
mistake, effect of 32
multiple contracts, reciprocity 69
non-variation clause 69
non-variation clause, effect of 88
notice of breach, requirements for 34, 35
offer and acceptance 85
organ of state as party 103
penal provisions 104
public policy and 8
reciprocity of performance 69, 101
required to be in writing 55
severability of provisions 8
specific performance 33
sub-contract and 134
supervening impossibility 103
suspensive condition 71
tacit term 53
time for performance 77
void ab initio 32
void due to lapsing of suspensive condition 71
Creditor and debtor
appropriation of payment of debt 101
consent to magistrates' court jurisdiction 93
National Credit Act, court's jurisdiction 93
spouses married in community of property 117
waiver of creditor's rights 77

Creditors
of company, assessment of claims 30
Curator
acting without letter of curatorship 63
Curatorship
court's powers ordering 121

Debt
meaning of, illiquid claim 20
Debtor and creditor
consent to judgment, enforceability of 8
creditor entitled to sell debtor's assets 91
mortgagee's duty to account on resale of mortgaged p 118
Delict
attorney's trust account 96
claim distinguished from contract 131
money held in trust 96
Directors
power to wind up company 107
Doctrine of notice
servitude, registration of 23
successive sales 23
Donation
defence of, burden of proof 39

Economic loss
liability for 96
misstatement leading to 131
Employment
joint employers 105
specific performance 33
Enrichment
remedy if contract void ab initio 32
Environment
socio-economic factors to be taken into account 13
Estate agent
commission due from franchisor 106
fidelity fund certificate, mandate performed without 128
Evidence
absolution from the instance 131
insurer required to prove basis of repudiation 45
Expert
determination by 30

Financial institution
curatorship 121
Fixed assets
valuation of 30
Fixed deposit
ceded as security, substituted 95
Fixed property
agricultural, definition of 36
sale of, suspensive condition not included 36

Gambing
definition of 98
savings account at low interest 98
Garnishee order
effect of 99
Guarantee
property guarantee 112, 124

Husband and wife
agreement not subject to Matrimonial Property Act 117
spouses married in community of property 117

Illegality
contract contrary to statute 128
provisions of contract and public policy 8
Insolvency
applicability of Insolvency Act to company 58
assets, vesting of on liquidation 58
cession and set off 137
confirmation of liquidation and distribution account 59
counterclaim against company in liquidation 87
disputed disposition 47
executory contract 87
filing of claim against insolvent estate 60
interrogation, valid issue of subpoena 26
liquidator's right to cede 94
locus standi of creditor 47
ordinary course of business 137
pactum de non cedendo 94
preference, bank setting off claim 100
seizure of books and documents 56
sequestration, costs of 97
subpoena, valid issue of 26
Insurance
exemption clause, applicability of 62
indemnity arising fromstrike, riot and public disorder er 132
materiality, test for 133
misrepresentation, test for materiality 90
non-disclosure by insured 45, 133
non-disclosure, test for materiality 90
previous claim 133
previous claims, materiality of 90
repudiation by insurer 45
warranty by insured 45
Insurance policy
cession of as security 95
Intention to transfer
money tranferred from bank account 99
property tranferred from innocent purchaser 109
Interdict
balance of convenience 136
Interpretation
eiusdem generis rule 132
ordinary meaning of words 132

Jurisdiction
magistrates' court jurisdiction 93

of court over foreign defendant 84
peregrinus company, derivative action 21
whole cause of action arising 85

Land
agricultural, definition of 36
compliance with Alienation of Land Act 36
municipal land 16
sale of, suspensive condition not included 36
State land distinguished from municipal land 16
Landlord and tenant
damage to premises 53
eviction, procedures to be followed 18
Lien
builder's lien, holding keys of premises 74
rights of substitution 125
salvage, requirements for establishing 116
Liquidation
of close corporation under s69 20
of company by resolution 107
of company, just and equitable ground 81
Loan
donation raised as defence 39
Local authority
integrated development plan 114
municipality and development tribunal 114
property rates 129
rates clearance certificate 76
Lottery
stake, meaning of 98

Medical scheme
broker's fees 115
Minerals
prospecting rights 41
Money
in bank account, right to 99
Mortgage
builder's lien and 125
cession of rentals clause 46
mortgagee not obliged to collect rentals 118
rentals, cession of under bond 118
sale in execution, resale thereafter at profit 118
Mortgage bond
time for performance by debtor 77
waiver of creditor's rights 77
Municipality
regulation of property use 40

Negligence
attorney disbursing funds 96

Owner
rights of against lien holder 116
Ownership
abstract and causal theories of transfer 63
money deposited for investment 61
qui prior rule 109
restrictions on under National Heritage Resources Ac 75
transfer - abstract system 109

Pactum de non cedendo
when upheld 94
Partnership
termination, effect of 86
Payment
bank transferring funds 99
meaning of 99
Possession
detentio and intention as elements of 74
Prescription
agent failing to pay money due to third party 25
confirmation of liquidation and distribution account 59
creditor exercising reasonable care 25
delay, filing of claim against insolvent estate 60
deposit of money, demand for repayment 61
interruption, claim against insolvent estate 59
owner's claim for eviction 16
when debt arises, continuing wrong 16
Property
building contravening building approval 111
constitutional right to 78
demolition order against offendign buildings 111
development tribunal, power of 114
eviction of unlawful occupiers 16
guarantee for transfer, form of 124
municipal regulation 40
property rates 129
prospecting rights and owner's rights 41
rates, subdivided property 76
regulation of use of residence 40
rezoning of land 114
sale in execution, title to property 52
sale of, compliance with Alienation of Land Act 72
sale of fixed property - innocent purchaser 109
sale of land by instalments 34, 35
servitude, relocation of 79
subdivision of agricultural land 80
subdivision of land 76
subject to National Heritage Resources Act 75
successive sales 23
title deed restrictions 111
title deed, restrictive condition 110
transfer of ownership, invalid underlying sale 63
unlawful occupation of 18
zoning of land, utilisation of land 15

Rectification
not competent when statute contravened 19
Rei vindicatio
remedy if contract void ab initio 32
Res judicata

creditor's claim in insolvency 26
Restraint of trade
customer connections and 89

Sale
doctrine of notice 109
successive sales 109
Sale in execution
failure to comply with constitutional requirements 52
Sale of fixed property
authority of parties to 72
cancellation of, grounds for 104
compliance with s2(1) Alienation of Land Act 72
guarantees, acceptability of 112
Sale of land
breach of, notice requirement 10
by instalments, notice of breach 34, 35
guarantees, acceptability of 11, 124
in writing, requirement 55
required to be in writing 71
subdivision of agricultural land 80
Sequestration
attorney's fees 97
costs of 97
dividend for creditors 97
Service
domicilium address 10
Servitude
registration of, when claimable 23
servient tenement owner's right to amend 79
Set off
ordinary course of business 137
unliquidated counterclaim 87
Shareholder
locus standi in winding up application 81
Stakeholder
meaning of 61
Surety
amendment of deed of suretyship limiting liability 88
non-variation clause, effect of 88
Surety and principal
judgment debt 51
Suretyship
certificate of indebtedness 60
failing to identify principal debtor 44
principal debtor, not identified 44
proof of indebtedness 60

Tender
appeal against failed tender 38
defects in terms of reference for bid 22
failure to comply with requirements 70
irregularly awarded 136
remedy when tender already awarded 70
unfair procedures 136
Title deed
restrictive condition 110

Unjust enrichment
condictio ob turpem vel iniustam causam 128
requirements for 115
Unlawful competition
bookmaker using totalisator results 43

Valuation
of company 30
of member's interest 108

Winding up
company, just and equitable basis 119
just and equitable ground 120
Words and phrases
boundary wall 110
ordinary course of business 137
payment 98
retaining wall 110
unintended 62

# *CITIBANK NA v THANDROYEN FRUIT WHOLESALERS CC*

A JUDGMENT BY SCOTT JA (NUGENT JA, HEHER JA, MAYA JA and HANCKE AJA concurring) SUPREME COURT OF APPEAL 28 MAY 2007

2007 (6) SA 110 (A)

***Credit Transactions***

***While consent to judgment cannot be obtained based on agreement but assumes that the creditor has brought legal action against its debtor, a creditor may obtain judgment against its debtor based on an alternative cause of action to obtain judgment against the debtor. An agreement that a creditor may sell the debtor's property and thereupon reduce its claim against the debtor by a fixed amount is not contrary to public policy.***

## THE FACTS

In December 2003, Thandroyen Fruit Wholesalers CC and three of the other respondents concluded a settlement agreement with Citibank NA. In terms of the agreement, they acknowledged their liability to Citibank in the sum of R2 175 00. The bank was authorised to sell certain fixed property owned by the fourth and fifth respondents and, upon registration of transfer of the property into the name of the purchaser, the debt owing was to be reduced by R1 100 000. The respondents undertook to make periodic payments to the bank from 31 December 2003. Thandroyen and three other respondents undertook to sign a consent to judgment in respect of their liability to the bank, and the bank was entitled to take judgment based thereon in the event of default and upon notice.

The parties signed the consent to judgment in the sum of R2 175 000. Ten months later, the property was sold for R1 400 000. The indebtedness was reduced by R1 100 000 and the balance of R300 000 accrued to the bank.

The respondents made no periodic payments in terms of the agreement. In February 2005, the bank took judgment against them in terms of the consent to judgment. The judgment obtained was for payment of the full amount of R2 175 000, but in subsequent execution proceedings, this amount was reduced by R1 100 000.

Thandroyen brought an application for rescission of the judgment. The bank brought a counter-application for a variation of the amount of the judgment it had obtained and, in the event of rescission being granted, a fresh judgment in its favour in the sum of R1 049 960 which took into account the amount received from the sale of the property and two other payments.

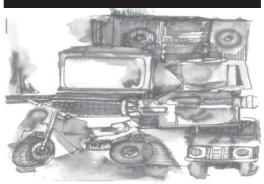
Rescission of judgment was granted and the counter-application was dismissed. The bank conceded that rescission was properly granted but appealed the dismissal of the counter-application.

## THE DECISION

Since rescission was properly granted, the bank's first alternative in its counter-application fell away and the second alternative remained. The question therefore was whether the bank was entitled to a fresh judgment in its favour in the sum of R1 049 960.

Thandroyen contended that the bank was not entitled to judgment as claimed because consent to judgment could not be claimed based on a settlement agreement but on a claim made by way of legal action. He contended that the bank had not shown that the terms of the agreement entitling it to consent to judgment based thereon were severable from the rest of the agreement and that in any event, the bank's alleged right to judgment was based on the terms of the settlement agreement.

These contentions however, failed to take into account the fact that in claiming judgment, the bank was relying on the fact that the provisions entitling it to judgment by consent were severable. The effect of the severable provisions was, in any event, only to prevent the bank from proceeding against the respondents by way of legal action instead of by applying for consent to judgment. The bank's counter-application, being based on the other terms of the agreement, was not affected by this restriction and it was entitled to judgment based thereon.



Thandroyen also contended that the other terms of the settlement agreement were unenforceable since they were contrary to public policy. This was because they entitled the bank to sell the property and reduce the claim by R1 100 000 regardless of the price for which the property was sold.

An agreement entitling a creditor to sell its debtor's property in satisfaction of a debt without recourse to a court is contrary to public policy. However, the agreement between the parties was not this, but an agreement in essence similar to the sale of the property to the bank. The bank took the risk of the property being sold for less than R1 100 000 but succeeded in selling it at a profit of R300 000. The agreement could not be characterised as one contrary to public policy.

The appeal succeeded.

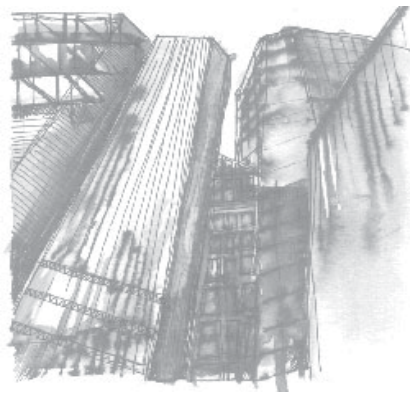
*The respondents' real complaint is that the Bank made a profit of R300 000. But, as pointed out by Innes CJ in Eastwood v Shepstone 1902 TS 294 at 302, when determining whether a contract is contrary to public policy or not: 'What we have to look to is the tendency of the proposed transaction, not its actually proved result.' (See also Sasfin (Pty) Ltd v Beukes ( supra ) at 8J - 9A.) In the present case the Bank could just as well have lost on the agreement had it been unable to sell the property for as much as R1 100 000. In that event the respondents would hardly have complained. In the Sasfin case Smalberger JA at 9B emphasised that no court should shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. By the same token, he warned, however, that the power to declare contracts contrary to public policy should be 'exercised sparingly and only in the clearest of cases'. The present is manifestly not such a case.*

# *COHEN v LENCH*

A JUDGMENT BY NUGENT JA (STREICHER JA, FARLAM JA, JAFTA JA and CACHALIA JA concurring)
SUPREME COURT OF APPEAL
29 MAY 2007

2007 (6) SA 132 (A)

***Property***



***Cancellation of a property sale agreement on the grounds that delivery of the guarantees for payment has not been timeously effected requires proof that notice of the alleged default was properly given. Service of a notice by delivery at the gate outside a complex within which the domicilium address is situated is insufficient delivery and will not provide grounds for the application of any remedy which is contingent upon service of such a notice.***

## THE FACTS

Cohen and his wife purchased a residential property from Lench and the second respondent for R1 675 000. The agreement provided that a deposit of R30 000 was to be paid upon conclusion. Payment of the balance was to be secured by a guarantee that was to be delivered to Lench's conveyancer by 5 January 2004. The agreement was subject to a suspensive condition that a loan to the Cohens of R1 300 000 be approved by a financial institution within ten days of conclusion of the agreement.

The agreement provided that if Cohen breached any term of the agreement and failed to remedy the breach within ten days of posting by pre-paid registered post, or by hand delivery, to the domicilium address of a written notice given by Lench calling upon Cohen to remedy such breach, then Lench would be entitled to cancel the agreement.

Cohen paid the deposit. He obtained a loan of R1 500 000 from the Standard Bank, which was to be secured by a mortgage bond, and paid Lench's conveyancer transfer duty and other fees. Lench's conveyancer informed the bank's conveyancer of the required form for the guarantee. By 5 January 2004, Cohen had not delivered the guarantee. As at this date, Lench's conveyancer was not yet in a position to proceed with transfer. The usual procedure was for the bond conveyancer to issue the guarantee once the transferring conveyancer was in such a position.

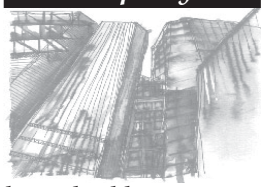
On 5 January 2004, Lench addressed a letter to Cohen in which he notified him that the guarantee had not been delivered as required by the agreement, and that if this breach was not remedied within ten days, the agreement would be cancelled. He delivered this letter to Cohen's domicilium address by attaching it to a gate at the entrance of the townhouse complex where Cohen lived. In his letter, Lench gave as his reason for proceeding in this manner the fact that he was engaged in negotiations for the purchase of another property, to which he could not commit himself without being assured that the transfer of the property to Cohen was to take place.

Cohen denied having received the letter. He and his wife proceeded with their intention to take transfer of the property and made arrangements for payment of the balance required to make full payment of the purchase price.

Cohen brought an application for an order declaring that the agreement had not been lawfully cancelled and compelling Lench to comply with his contractual obligations.

## THE DECISION

The reasoning of the letter written by Lench on 5 January 2004 raised questions as to whether or not he had written the letter at all: if Lench had been concerned to secure the purchase of another property, then he would not have wished to cancel the agreement but enforce it. The events following the alleged delivery of the letter suggested that the Cohens had not received the letter: every indication of all of the parties, including Lench's conveyancer, was to the effect that the transfer of the property was proceeding. Had the Cohens received the letter, they would have taken steps to accelerate the delivery of the guarantee, rather than be content with the arrangements they thought were in place for its delivery in the normal course of the transfer of property.



The question remained whether, even if the Cohens had not received the letter, its delivery to a domicilium address was sufficient to enable application of the breach provision. The method of delivery however, was not sufficient. The domicilium address had indicated a unit number in the townhouse complex where the Cohens resided. The letter had been attached to the gate at the perimeter of the complex. This was not the domicilium address and could not be considered the domicilium address merely because the gate was locked and prevented entry into the townhouse complex.

The application succeeded.

## *KOUMANTARAKIS GROUP CC v MYSTIC RIVER INVESTMENT 45 (PTY) LTD*

A JUDGMENT BY MADONDO J
DURBAN AND COAST LOCAL DIVISION
23 FEBRUARY 2007

2007 (6) SA 404 (D)

***A provision in an agreement that guarantees acceptable to one of the parties are to be delivered confers a discretion on that party in determining the acceptability of the guarantees and that discretion must be exercised as a reasonable man and in accordance with the intention of the parties to the agreement.***

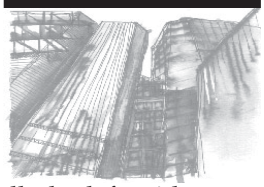
### THE FACTS

The Koumantarakis Group CC bought Erf 301, Portion 16, Springfield Park from Mystic River Investment 45 (Pty) Ltd for R12m. Clause 3.2 of the agreement provided that the price was to be paid by a deposit of R1m secured by a bank guarantee acceptable to the first respondent and payable on transfer, to be lodged within three days of fulfilment of a suspensive condition, and by a similar guarantee for the balance payable on transfer and to be lodged within 45 working days of the deposit being lodged.

Koumantarakis requested Mystic to indicate the form of guarantee which would be acceptable to it. Upon receiving no response, Koumantarakis obtained a guarantee from the Standard Bank in its usual form. Paragraph 4 of the bank guarantee provided that should any new or previously undisclosed fact emerge which may prejudice the bank's security or any circumstances arise to prevent or unduly delay registration of transfer, it reserved the right to withdraw from the guarantee by giving written notice to that effect.

Mystic stated that the guarantee was unacceptable because it entitled the bank to withdraw. It stated that a guarantee acceptable to it was one which expressly provided that it was to expire one year from date of issue and was irrevocable. It notified Koumantarakis that a guarantee in that form was required within seven working days, failing which it would be considered to be in breach of the agreement. After Koumantarakis refused to deliver a guarantee in the form required by Mystic, Mystic cancelled the agreement.

Citing the evidence of a conveyancer with extensive experience in property transactions, to the effect that the guarantee it provided was a long-standing and general practice of



financial institutions and generally accepted as a form of guarantee in property transactions, Koumantarakis contested Mystic's right to cancel the agreement. It brought an application for an order preventing transfer of the property to anyone other than itself.

## THE DECISION

Clause 3.2 conferred a discretionary power on Mystic in regard to the acceptability of the bank guarantee. That power had to be exercised reasonably in accordance with the standard of a reasonable man. The question was whether or not Mystic had exercised its power in this manner. The onus was on Koumantarakis to show that it had not.

In determining what a reasonable exercise of its discretion would be, the most important indication of this is the intention of the parties, as evidenced in the agreement. The reservation of the right to withdraw incorporated in the guarantee prima facie rendered the guarantee vulnerable to revocation without breach by Mystic of any of its obligations. It meant that circumstances which were not of Mystic's own making might arise to prevent or delay the registration of the transaction. In that event, Mystic would have no control over such circumstances. Mystic was therefore exposed to a real risk of having no security at all. In the event of the bank revoking the guarantee the first respondent would virtually be left without any substitute for security. It therefore could not be said that the revocable bank guarantee furnished as security afforded Mystic the security it required.

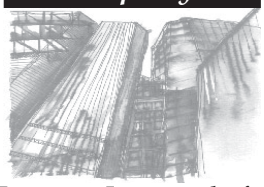
Mystic gave due consideration to the acceptability of the bank guarantee Koumantarakis had furnished as security, and it had exercised an honest judgment in respect thereof. As was evident from the terms of the agreement, Mystic's intention when it insisted that the provision be incorporated into the agreement was to be certain about security. A reasonable man in the mercantile world would not have accepted the bank guarantee in its form to his detriment.

The application was dismissed.

*In my opinion the commercial rationality of the decision taken by the first respondent must also be objectively considered in deciding whether or not the first respondent acted reasonably and honestly in the circumstances of this case. The decision of the first respondent must be measured against the standard of a reasonable man in the mercantile world. The question this Court must ask itself is whether the decision of the first respondent, viewed objectively, could be said to have been commercially irrational. The guarantee must be acceptable to a reasonable man.*

*...*

*The first respondent could not, in the circumstances of this case, have reasonably been expected to accept a revocable bank guarantee to its detriment. Therefore, its decision cannot be said to have been commercially irrational.*



# *FUEL RETAILERS ASSOCIATION OF SOUTHERN AFRICA v DIRECTOR-GENERAL: ENVIRONMENTAL MANAGEMENT*

A JUDGMENT BY NGCOBO J (MOSENKE DCJ, MADALLA J, MOKGORO J,, NKABINDE J, O'REGAN J, SACHS J, SKWEYIYA J, VAN DER WESTHUIZEN J and NAVSA AJ concurring)
CONSTITUTIONAL COURT
7 JUNE 2007

2007 (6) SA 4 (CC)

***A department of State which is obliged to consider socio-economic factors as an integral part of its environmental responsibility must assess such factors itself when determining whether or not to grant permission for activity that will impact the environment and must not delegate the assessment of such factors to another organ of State.***

## THE FACTS

The Department of Agriculture, Conservation and Environment, Mpumalanga province granted the Inama Family Trust permission to construct a filling station on a property in White River, Mpumalanga. This was done in terms of section 22(1) of the Environment Conservation Act (no 73 of 1989).

Permission was granted following an application made by the trust supported by an environmental impact report known as a scoping report. This report dealt with relevant socio-economic factors, the presence of an aquifer in the property and included an evaluation of the impact of the proposed filling station, and identified certain areas of concern and proposed recommendations to address these concerns. The Fuel Retailers Association of Southern Africa objected to the construction of the proposed filling station on a number of grounds, one being that the quality of the water in the aquifer might be contaminated. Its consultants submitted an evaluation report which criticised the consideration of alternatives to the development and pointed out that demand and activity alternatives were not investigated. The report also pointed out that there were interested persons who had not had the opportunity to express their views on a proposed filling station that might affect them. The Department referred both reports to the Department of Water Affairs and Forestry for comment, and it accepted the scoping report.

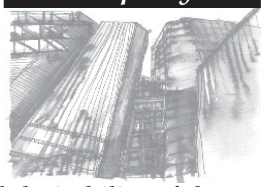
When the Department gave its permission, it imposed the condition that necessary approvals had to be obtained from other government departments such as Water Affairs and Forestry. Its record of decision set out 'key factors' which noted that the property had been rezoned from 'special' to 'Business 1' and that all identified and perceived impacts were satisfactorily dealt with in the scoping report. The rezoning approval was given by the local authority acting within the authority given in the Town-planning and Townships Ordinance, 1986. The Department took the view that because it had considered requirements of need and desirability of the filling station at that point, those factors did not have to be reconsidered when the Department took its decision to grant permission for the construction of the filling station.

The Fuel Retailers Association challenged the decision. It contended that when making its decision, the Department had been obliged to consider the socio-economic impact of constructing the proposed filling station. Having failed to consider the need, desirability and sustainability of the filling station, there were grounds for setting aside the decision it had made.

## THE DECISION

The first question to be determined was the nature and scope of the obligation to consider the social, economic and environmental impact of a proposed development. The second question for determination was whether the environmental authorities complied with that obligation.

Section 24 of the Constitution provides that everyone had the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future



generations, through reasonable legislative and other measures. The section explicitly recognises the obligation to promote justifiable 'economic and social development'.

The National Environmental Management Act (no 107 of 1998) imposes the obligation on environmental authorities to consider socio-economic factors as an integral part of its environmental responsibility. This obligation entails consideration of the impact of the proposed development on socio-economic conditions which are to be determined in the light of the concept of sustainable development and the principle of integration of socio-economic development and the protection of the environment. The fact that these are interlinked means that socio-economic conditions have an impact on the environment. A proposed filling station may affect the sustainability of existing filling stations with consequences for the job security of the employees of those filling stations. Furthermore, if the proposed filling station leads to the closure of some or all of the existing filling stations, this has consequences for the environment since filling stations have a limited end use and underground fuel tanks and other infrastructure may have to be removed and land rehabilitated.

The Department however, did not meet its obligations in terms of this Act. They did not consider the need and desirability of the filling station but relied on the fact that the property was rezoned for the construction of a filling station, that a motivation for need and desirability would have been submitted for the purposes of rezoning, and that the town-planning authorities must have considered the motivation prior to approving the rezoning scheme. Having left the consideration of this vital aspect of their environmental obligation entirely to the local authority, the Department unlawfully delegated its duties and failed to properly discharge its statutory duty.

The Department's decision was therefore set aside and the matter remitted to it for reconsideration.

*The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from s 24 (b) (iii) which provides that the environment will be protected by securing 'ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.*

# *HANGKLIP ENVIRONMENTAL ACTION GROUP v MEC FOR AGRICULTURE, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE*

*Property*

A JUDGMENT BY THRING J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
15 JUNE 2007

2007 (6) SA 65 (C)

***The zoning of property in terms of section 14(1) of the Land Use Planning Ordinance (no 15 of 1985) may take place only after the utilisation of the land has been determined.***

## THE FACTS

In May 2001, the owner of land situated near Pringle Bay, Hangklip, applied to the Overberg District Municipality for a zoning certificate in terms of section 14(1) of the Land Use Planning Ordinance (no 15 of 1985). Until then, the land had not been zoned and had not been used for any particular purpose. The municipality zoned the property for agricultural use.

The Hangklip Environmental Action Group appealed against this decision to the MEC for Agriculture, Environmental Affairs and Development Planning. Because the municipality's decision had been based on certain special conditions in the owner's holding title and not by conditions imposed by the Administrator in terms of applicable Scheme Regulations, the MEC conducted his own investigation into the application, then dismissed the appeal.

The Hangklip Action Group brought an application reviewing the appeal and declaring that no valid zoning determination had taken place in terms of the Land Use Planning Ordinance.

## THE DECISION

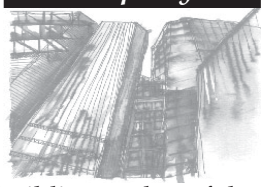
Section 14(1) of the Ordinance provides that all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned. This included the land in question in this case. The section therefore envisaged a process whereby the local authority would determine the utilisation of the land, and then zone it accordingly. The zoning process is a separate and distinct process and it may require the exercise of a discretion by the local authority, but the second decision cannot be validly arrived at unless the first step, the determination of the utilisation of the land as at the relevant date, has first been properly taken.

In the present case, the land was not being used at all, and in consequence, no particular zoning could logically be said to be in accordance with its utilisation. The only avenue open to the administrative body would be for it to decline to determine the utilisation of the land, with the result that there could be no deemed zoning under section 14(1) nor a 'granted' zoning under section 14(3). This applied as much to the local authority as it did to the MEC which substituted its own decision on appeal.

The MEC should have upheld the appeal. The dismissal of the appeal was accordingly set aside and the appeal upheld.

# *BARNETT v MINISTER OF LAND AFFAIRS*





A JUDGMENT BY BRAND JA
(HOWIE P, JAFTA JA, MAYA JA
and COMBRINCK JA concurring)
SUPREME COURT OF APPEAL
6 SEPTEMBER 2007

2007 (6) SA 313 (A)

***Prescription of a debt which constitutes a 'continuing wrong' begins to run from the time when the wrong ceases and not from the time when the wrong first took place. Land falling within a municipal jurisdiction is not exempt from the provisions of Decree No. 9 (Environmental Conservation) of 1992.***

## THE FACTS

In April 1994, Barnett and the other 15 appellants obtained occupancy of sites situated on the Transkei Wild Coast, 13km north of Port St Johns and within one kilometre of the coastline. Some of them later built cottages on the land.

In order to obtain rights of occupation, they approached the chief of the local tribe, accompanied by a bottle of brandy, and obtained his approval. The chief then arranged for their meeting with the Tribal Authority which approved their request upon payment of R200. The Tribal Authority issued a receipt and a fishing site licence application form which recommended that permission be granted to conduct a fishing business at the proposed site. The Tribal Authority directed Barnett and the other appellants to take these documents to the magistrate at Lusikisiki. They attended the building housing the offices of the magistrate but instead of meeting with the magistrate, met with an official of the Department of Agriculture whose office was in the same building. That official accompanied them to the sites they wished to obtain where he confirmed the situation of the sites by reference to various landmarks and physical features.

The chief then asked members of the local community whether they had any objection to the allocation of the sites to Barnett and the other appellants. After no objections had been raised, approval of the acquisition of the sites were signified by the commencement of festivities involving the supply of beer, brandy and food. Thereafter, they paid a local tax of R20 per annum to the Receiver of Revenue at Lusikisiki, whose office was also in the same building as that of the magistrate.

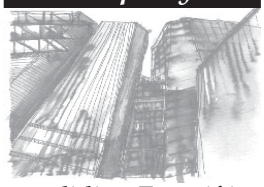
In December 2000, the government issued summons against Barnett and the other appellants claiming their eviction from the sites and the demolition and removal of all structures built on them. It based its action on the provisions of Decree No. 9 (Environmental Conservation) of 1992, and on the common law ground that the defendants were in unlawful possession of State land. The Decree declared all State land within one kilometre of the coastline a coastal conservation area, within which no development could take place without the authority of a permit.

## THE DECISION

Barnett contended that the State's claim had become prescribed, having been brought more than three years after the date on which the government became aware of the occupation of the sites.

The government's claim, being that of an owner for restoration of rights, could be considered a 'debt' as provided for in the Prescription Act (no 68 of 1969) and would therefore be subject to the limitation provisions of that Act. However, the 'debt' created by the contravention of Decree constituted a continuing wrong and was not a single, completed, wrongful act. This was clearly the case in respect of the ongoing occupation of the sites and, even if the building operations had constituted a single act which was now past, the existence of the structures was part and parcel of the defendant's continuing unlawful occupation of the sites and could not be distinguished from that.

Barnett also contended that the land in question was municipal land and therefore did not fall



within the terms of the Decree upon which the State depended. However, the exemption accorded to municipal land was not an exemption that applied to land falling within a municipal jurisdiction, but to land owned by a municipality. The land in question clearly was not owned by a municipality. In any event, the land in question was not land falling within a municipal jurisdiction. There was no basis upon which it could be said to fall within a municipal jurisdiction.

Barnett also contended that the State had consented to the acquisition of the land when the Tribal Authority gave its approval. The history of the method by which Barnett obtained occupation of the land indicated that the consent given then was of no validity. Even if it could be inferred that the magistrate gave tacit consent, he was not empowered to do so as Barnett was not domiciled in the area and the sites were not within residential zones.

Barnett's final contention as that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) applied. However, this Act applies to the eviction of people from their homes. The holiday cottages erected at the sites were visited occasionally, over weekends and holidays, and were not the permanent places of residence of Barnett and the other appellants. As such, they could not be considered their homes and the Act did not apply to them.

The appeal failed.

*The defence that the sites fell within the excluded category of municipal land was in turn based on a twofold hypothesis. Firstly, it assumed that the expression 'municipal land' must, in the context of s 39(1) be understood to refer to land falling under municipal jurisdiction as opposed to land owned by a municipality. The second assumption was that the sites were indeed subject to the jurisdiction of some unknown municipality. The first assumption is, in my view, unfounded. The meaning of the expression contended for by the defendants is clearly not the natural one. When the Decree refers to 'State land' it patently means land owned by the State. That much was conceded by the defendants. Why, it may then, in my view, rightfully be asked, would the meaning of the same expression change without warning when it refers to a municipality instead of the State? What s 39(1) plainly sought to exclude from the ambit of its operation - admittedly in a somewhat circuitous way - was land not owned by the State. In the process it referred, inter alia , to 'privately-owned land' and 'municipal land'. In this context the latter expression must, in my view, be understood to mean land owned by a municipality.*

# *AGRICO MASJINERIE (EDMS) BPK v SWIERS*



JUDGMENT BY HEHER JA (CAMERON JA, BRAND JA, VAN HEERDEN JA AND THERON AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2007

2007 CLR 371 (A)

***A person who has lost occupation of premises should obtain restoration of occupation by following the procedures provided for in section 14 of the Extension of Security of Tenure Act (no 62 of 1997).***

## THE FACTS

Swiers occupied an informal dwelling on a farm owned by Agrico Masjinerie (Edms) Bpk. In 1995, she was informed by the farm manager that if she moved from the farm voluntarily, she would receive R25 000. In October 1996, she moved from the farm but did not receive the compensation referred to by the farm manager. In 2001, she returned to the farm and re-erected her dwelling.

Negotiations between Agrico and Swiers took place in order to resolve their respective rights. However, these proved to be unsuccessful and in 2002, Agrico brought an application to evict Swiers from the farm. It alleged that alternative accommodation was available to her and that the existing dwelling was unsanitary, unhygienic and dangerous.

Agrico contended that Swiers had vacated the farm, whether freely and willingly or not, and was entitled to institute proceedings for restoration of her rights under section 14 of the Extension of Security of Tenure Act (no 62 of 1997). Prior to instituting such proceedings, any re-occupation of the farm would amount to a resort to self-help and be unlawful.

## THE DECISION

The Extension of Security of Tenure Act was enacted in order to provide protection for occupiers of land. This protection could arguably extend to those who have unilaterally abandoned occupation without knowledge of their rights. The procedures for restoration of such lost rights are provided for in the Act and should be followed by those wishing to secure restoration of them.

Section 14 of the Act provides for these procedures which empowers a court to determine the extent of the occupation claimed by those seeking restoration of their rights of occupation. Swiers was therefore obliged to follow these procedures and not simply retake occupation of the property as she had. Such action amounted to taking occupation without right in law to do so.

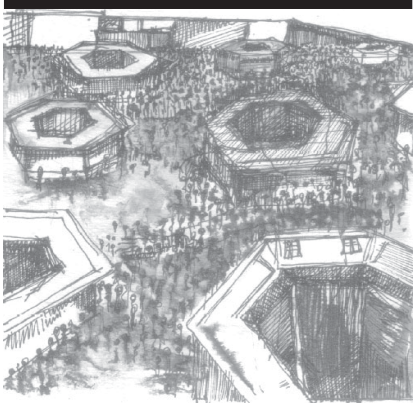
Eviction from the property was however, not the appropriate ensuing order since the final determination of Swier's right of occupation had yet to be made. Swiers was accordingly ordered to institute proceedings in terms of section 14 of the Act.

# *CONSTANTARAS v BCE FOODSERVICE EQUIPMENT (PTY) LTD*

A JUDGMENT BY HEHER JA (FARLAM JA, BRAND JA, JAFTA JA and HANCKE AJA concurring) SUPREME COURT OF APPEAL 1 JUNE 2007

2007 (6) SA 338 (A)

***Corporations***



***It is no defence to a claim based on section 23(2) of the Close Corporations Act (no 69 of 1984) to contend that the document upon which the claim is based should be rectified to reflect the common intention of the parties.***

## THE FACTS

BCE Foodservice Equipment (Pty) Ltd received two cheques for R65 229,25 drawn in its favour by Cater-Mart (Pty) Ltd 2000/001852/07. The cheques were signed by Constantaras without any indication that he did so in a representative capacity. The cheques were dishonoured when presented.

BCE contended that Constantaras was personally liable for the amounts of the cheques because he had failed to indicate that he signed on behalf of a close corporation, Cater-Mart CC, alternatively, should he have signed on behalf of the close corporation, Constantaras was liable in terms of section 23(2) of the Close Corporations Act (no 69 of 1984). The section provides that if any member of a close corporation or any person on behalf of a corporation issues a cheque without its name and registration number appearing thereon, he shall be liable to the holder thereof for the amount of the cheque.

BCE brought an action against Constantaras for payment of the amounts of the cheques. Constantaras defended the action on the grounds that he signed the cheques on behalf of Cater-Mart CC, alternatively that the cheque should be rectified by the correct citation of the corporation as required by section 23(2).

BCE excepted to the defence on the grounds that rectification would circumvent the provisions of section 23(2).

## THE DECISION

BCE relied on the provisions of the statute. If those provisions properly interpreted did not allow a defence of rectification then BCE's claim should stand.

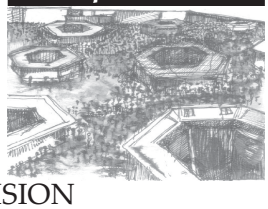
The language of the statute is peremptory. A failure to comply constitutes an offence whether or not anyone has seen the document in question or has been misled by it. The personal liability imposed on those who contravene the terms of the statute depends on the same default as does the offence. The section therefore creates liability which arises independently of any contractual relationship between the holder of the document and the issuer of it. The fact that the issuer of the document is unaware of the failure to comply with the statute is irrelevant.

It follows that rectification, which requires proof of the common intention of the parties to a contractual instrument, cannot provide a defence against a holder of a cheque who relies on section 23(2).

The exception was upheld.

# *ALTON COACH AFRICA CC v DATCENTRE MOTORS (PTY) LTD*





A JUDGMENT BY NDLOVU J
DURBAN AND COAST LOCAL DIVISION
22 DECEMBER 2006

2007 (6) SA 154 (D)

***An application for liquidation of a close corporation in terms of section 69(1)(a) of the Close Corporations Act (no 69 of 1984) may not be brought on the basis of an alleged debt which is an illiquid claim for damages.***

## THE FACTS

In May 2004, Alton Coach Africa CC placed two orders for the supply of thirty Nissan CB31 bus chassis with Datcentre Motors (Pty) Ltd at a price of R410 000 per unit. The chassis were ordered for ultimate delivery to Washesha Bus Company (Pty) Ltd but Washesha rejected them before delivery on the grounds that they were of inferior quality.

Datcentre treated the rejection of the chassis as a repudiation by Alton and cancelled the contract. It notified Alton of damages it had suffered, a sum of R1 118 910 being loss of profits. Alton denied that it had acted as principal in the contract for the supply of the chassis but as agent for Washesha.

Datcentre issued a notice to Alton in terms of section 69(1)(a) of the Close Corporations Act (no 69 of 1984). Alton received the notice on 14 June 2005. Datcentre applied for a bond of security from the Master of the High Court on 28 June 2005, its intention being to proceed with an application for the liquidation of Alton.

Alton brought an application against Datcentre interdicting it from proceeding with the application for liquidation pending the determination of a court as to whether there was a bona fide dispute between the parties as to the existence of the alleged debt of R1 118 910, and whether the debt was due and payable.

## THE DECISION

Section 69 of the Close Corporations Act applies to a corporation unable to pay its debts. The reference in that section to a debt due by the corporation is a reference to a debt which is then due and payable. The question therefore was whether the debt claimed by Datcentre to be due to it was in fact due and payable.

Datcentre claimed that the debt was a liquidated amount of money, and therefore due and payable. However, the amount claimed was not capable of prompt ascertainment. The determination of Datcentre's alleged loss of profits required consideration not only of the costs of sale but also an array of associated costs such as costs of transportation of the chassis to the bus body builder. The claim was therefore not easily determinable and not a claim for a liquidated amount sounding in money, but an illiquid claim for damages.

The application for a bond of security from the Master before the expiry of the three-week period referred to in section 69 also meant that the application for liquidation was incompetent.

Alton's application succeeded.

# *KUDU GRANITE HOLDINGS LTD v CATERNA LTD*



A JUDGMENT BY SNYDERS J
WITWATERSRAND LOCAL
DIVISION
3 DECEMBER 2004

2007 (6) SA 615 (W)

***Jurisdiction founding a derivative action may be established merely by the attachment of a debt owed to the party controlling the board of directors against which the complaint is made, in circumstances where the wronged company is a peregrinus of the court and the party bringing the action is an incola.***

## THE FACTS

Kudu Granite Holdings Ltd was a 49% shareholder in the second respondent. Caterna Ltd was in control of the board of directors of the second respondent.

Kudu alleged that the second respondent was not enforcing a claim it had against Caterna in circumstances that amounted to a fraud on the minority shareholder, entitling it to a derivative action against Caterna.

Caterna and the second respondent were peregrini of the court. In order to found jurisdiction Kudu obtained a court order entitling it to attach a debt due to Caterna, which it did. Caterna contended that the attachment was not effective in establishing jurisdiction because the party entitled to enforce the claim against it was a peregrinus, ie the second respondent. Unlike an incola plaintiff which can found jurisdiction by attachment alone, the second respondent, as a peregrine plaintiff, had also to demonstrate that some other basis for jurisdiction existed.

## THE DECISION

A derivative action may be brought by a shareholder in circumstances permitted in our law. When the minority shareholder institutes a derivative action, it is not merely putting on the cloak of the company, but is also pursuing its own interests. In so doing, the minority shareholder does not forsake its peculiar identity and characteristics and fully adopt those of the company.

It was therefore possible in this case, to take into account the fact that Kudu was an incola of the court and the enforcement of the second respondent's rights by derivative action could be considered enforcement of Kudu's rights in this respect.

The court therefore had jurisdiction in the matter.

# *MINISTER OF SOCIAL DEVELOPMENT v PHOENIX CASH & CARRY – PMB CC*

A JUDGMENT BY HEHER JA (SCOTT JA, CLOETE JA, CACHALIA JA AND THERON AJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2007

2007 CLR 316 (A)

***Contract***

***The terms of reference of an invitation to bid may contain defects which render the selection of a successful tenderer itself defective and liable to be set aside.***

## THE FACTS

In 2003 and 2004, Phoenix Cash and Carry - Pmb CC supplied food hampers to poor families in terms of a contract concluded with the Minister of Social Development. In 2005, the Minister's department issued an invitation to bid for the same contract to supply food hampers to poor families.

The Department published terms of reference for the bid, one of which provided that the Department reserved the right to obtain proof that the successful tenderer could supply the hampers at the price tendered, and that it would have the financial resources readily available, and be able to prove that it did in the form of audited financial statements and statements or letters from its bank. The Department also specified a points system under which the tenderer with the lowest pricing would obtain 90 points, tenderers situated within the province of supply would obtain 5 points, and those with historically disadvantaged backgrounds would obtain 5 points.

Phoenix submitted a bid, accompanied by a supporting letter from its bank and from its auditors, and its suppliers. Its price for the hampers was R180.70-R187.00. Competing tenderers quoted a price of R269.10-R299.69.

Phoenix's bid failed. Having qualified for 100 points under the points system, it requested reasons for the Department having failed to award the tender to it. The Department stated that it had considered all bids and in its discretion, awarded the tender to other parties. Phoenix applied for an order setting aside the decision to award the tender to them.

## THE DECISION

On a plain reading of the terms of reference for the bid, it was clear that the Department's requirements were that the tenderer was to have the financial resources to perform the contract, and show proof that it had such resources. Although it was also clear that the intention was to attract bids from parties without a financial history, the requirements put in the terms of reference could be complied with only by those with a financial history, and the committee which determined the successful tenderer ensured compliance with those requirements.

As a result of these defects in the tender process, the requirements of the terms of reference and the application thereof resulted in a failure to discriminate properly between competing tenders. The decision to award the tender to the other parties was therefore incorrectly made.

An order setting aside the decision was made.

# *BOWRING N.O. v VREDEDORP PROPERTIES CC*



A JUDGMENT BY BRAND JA (STREICHER JA, HEHER JA, VAN HEERDEN JA AND MAYA JA concurring)
SUPREME COURT OF APPEAL
31 MAY 2007

2007 CLR 335 (A)

***A claim by a person based on the doctrine of notice in the context of successive sales may be directed at the ultimate purchaser.***

## THE FACTS

In 1994, Vrededorp Properties purchased two properties from Stand 160 Selby (Pty) Ltd for R1,27m. The properties adjoined each other and were described as erf 358 Selby and the subdivided portion of the railway siding on the east side of that erf. The sale agreement provided that the seller would, prior to transfer, subdivide the property so as to create the two properties referred to in the agreement. Prior to transfer however, the parties concluded an amended agreement in terms of which erf 358 would be transferred to Vrededorp immediately for R1,22m, and the subdivided portion of the railway siding would be transferred to it at a later stage.

Erf 358 was then transferred to Vrededorp. However, the railway siding on the east side of the erf was not transferred to it prior to Stand 160 being placed in liquidation.

In 1997, the liquidator of Stand 160 sold the railway siding to Investec Bank, the sale agreement providing that the portion of it yet to be subdivided was to be transferred to Vrededorp and did not form part of the agreement of sale. The agreement provided that the seller would attend to subdivision at its own cost and that Vredendorp would establish a right of way over the remaining portion in order to give access to erf 358.

In 1998, Investec sold the entire property to the FLB Trust. No reference was made to the obligation to subdivide the portion of the railway siding, but the purchaser was aware of Vredendorp's rights in relation to the property.

Vrededorp brought an action for an order that the Trust subdivide the railway siding and transfer the subdivided portion to it; and register a servitude right of way in favour of Vrededorp over the remainder of the property.

## THE DECISION

Vredendorp could have no claim for the registration of a servitude right of way in its favour based on the doctrine of notice if it did not own the subdivided portion of the railway siding. It did not own this property, but could establish its claim to the property by applying the doctrine of notice in the context of successive sales.

On the facts of the case, such an application of the doctrine of notice could be sustained against the FLB Trust since the Trust had known of Vrededorp's right to the property when it concluded the sale agreement with Investec. The Trust however, contended that Vrededorp's claim should have been directed at Investec and not itself as second purchaser in the sequence of agreements that had taken place.

It was true that a claim against the Trust, with which Vredendorp had not concluded any contract, was in conflict with the idea of contractual privity. However, this was an anomaly which should not deny Vredendorp its right to claim transfer of the property directly against the Trust. Such an anomaly exists in the context of a claim for registration of an unregistered servitude and could be extended against the second purchaser in the case of the application of the doctrine of notice in successive sales, this being an equitable remedy.

The Trust also contended that Vredendorp should have joined Investec as a defendant. However, no prejudice could be shown to result from it not having done so.

The Trust was therefore obliged to do all things necessary to transfer into the name of Vredendorp the subdivided portion of the railway siding.

# *OWNER OF THE SNOW CRYSTAL v TRANSNET LTD*

*Contract*

A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
9 NOVEMBER 2006

2007 CLR 275 (C)

***A concluded contract will be inferred from the fact that parties' intentions indicate that both parties intended to contract according to clear and determinable terms. Any supervening impossibility of performance will not constitute a defence to a claim arising from breach of contract if the impossibility is self-induced.***

## THE FACTS

In March 2002, the agents of the owner of the *Snow Crystal* entered into negotiations with Transnet Ltd for the dry docking of the *Snow Crystal* towards the end of that year. The parties agreed on the dry docking for the period 1-14 December 2002. In June 2002, the owner's agent submitted an application for the use of the dry dock for that period, and the booking was accepted by Transnet Ltd.

The application was submitted in terms of regulation 61 of the Harbour Regulations. The regulations provided that the dock master may give preference to a ship which arrives in a damaged or leaking condition or to a ship which requires the dry dock for a period not exceeding 72 hours. They also provided that no ship would have an absolute right of use of the dry dock either in turn or at any other time. Regulation 61(10) provided that if a ship failed to leave the dry dock upon expiration of the period agreed upon, the ship could be removed at the expense of the owner if the dry dock was required by another ship.

On 29 November 2002, Transnet notified the *Snow Crystal's* agents that the dry dock was occupied by another ship, the *Gulf Fleet 29*, and the dry dock would only become available on 6 December. This date was later revised to 10 December. On 8 December, the agents were notified that, due to rain, the *Gulf Fleet 29* would only undock on 10 December. The owners of the *Snow Crystal* then cancelled the booking for the dry dock, and claimed damages for breach of contract.

Transnet defended the claim on the grounds that no binding contract had been concluded, alternatively, if it had, performance of the contract had become impossible through no fault of its own.

## THE DECISION

There was no evidence that Transnet did not expect the *Snow Crystal* to use the dry dock in the period 1-14 December 2002. Although Transnet contended that these dates were not inflexible, its own attitude had been that the booking form carried legal significance with concomitant legal obligations.

The essential question was whether or not the parties reached an agreement. The only aspect that could undermine the existence of an agreement in the present circumstances was whether there was flexibility in respect of the dates for the dry docking. The booking indicated that the parties expected the dry dock to be available for the *Snow Crystal* for the period 1-14 December 2002, even if there was to be some flexibility. The regulations, in particular regulation 61(10), indicated that this flexibility had its limits, and that the parties did not intend that Transnet would be entitled to extend the date of dry docking for the period that it had. A contract for the dry docking of the *Snow Crystal* for the period 1-14 December 2002 had been proven.

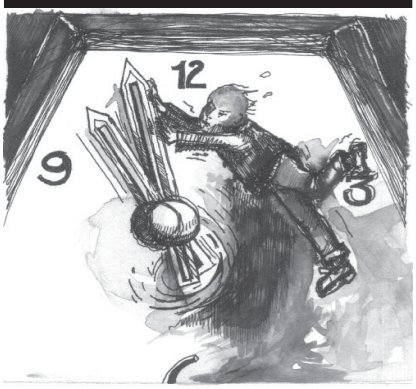
As far as the defence of impossibility of performance was concerned, it appeared that there was no reason why Transnet could not have invoked its powers under regulation 61(10) and required the removal of the Gulf Fleet 29. The fact that Transnet accommodated the Gulf Fleet 29, or felt compelled to do so, meant that its failure to act under this regulation amounted to self-induced impossibility of performance. It was not entitled to rely on this in answer to *Snow Crystal's* claim.

# *ASSURED FREIGHT SERVICES (PTY) LTD v COMAIR LTD*

A JUDGMENT BY HOWIE P (STREICHER JA, BRAND JA, COMBRINCK AJA AND SNYDERS AJA concurring)
SUPREME COURT OF APPEAL
22 MARCH 2007

2007 CLR 329 (A)

***Prescription***




***A creditor will not be deemed to have knowledge of the facts from which a debt arises if it exercises reasonable care in regard to those facts.***

## THE FACTS

In February 2001, Assured Freight Services Ltd invoiced Comair Ltd for R6 515 864,85 for VAT on the importation of an aircraft from the United States of America. Assured attended to the importation of the aircraft for Comair and submitted a pro forma bill of entry in order to clear the aircraft through customs.

Comair paid Assured's invoice and claimed a VAT refund from the South African Revenue Service in the amount of the invoice. It received the VAT refund in May 2001.

In September 2004, SARS informed Comair that it had not received the VAT payment from Assured. It claimed the unpaid VAT from Comair. Comair paid this, then brought an application against Assured for repayment of the VAT it had paid to it in 2001.

Assured defended the application on the grounds that prescription in respect of the debt had run since Comair's claim for repayment took place more than three years after it had paid Assured.

## THE DECISION

Prescription only begins to run when the creditor has knowledge of the facts from which the debt arises. Comair did not know about the misappropriated sum until September 2004. However, Assured contended that Comair could have known that this had taken place because a VAT refund cannot be claimed unless the documentation supporting such a refund is held by the party claiming the refund. In this case, this was the bill of entry and receipt of payment of the VAT.

However, the reasonable care referred to in the Prescription Act by which a creditor is deemed to have knowledge of the facts from which the debt arises could not be equated with its duties under the VAT legislation. It had entrusted Assured with the task of securing clearance of the aircraft through customs and was entitled to assume that everything necessary for this had been done, including the payment of VAT. The exercise of reasonable care by Comair would not have revealed that Assured had failed to pay the VAT.

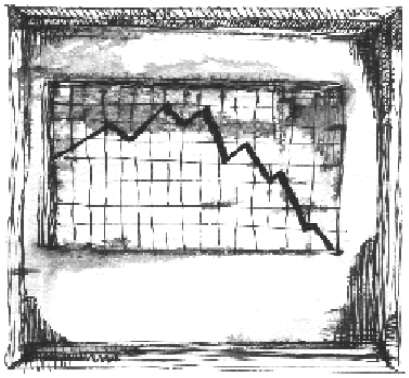
Prescription did not apply to Comair's claim for payment.

# *SMITH v PORRITT*

A JUDGMENT BY SCOTT JA (STREICHER JA, BRAND JA, PONNAN JA AND COMBRINCK JA concurring)
SUPREME COURT OF APPEAL
23 MARCH 2007

2007 CLR 362 (A)

***Insolvency***



***The claim of a creditor which has successfully applied for the liquidation of a company or sequestration of a person may be challenged in the ensuing winding up process provided that a plea of res judicata could not be raised against that claim. Subpoenas directed at showing that the creditor's claim is invalid may be validly issued in order to demonstrate this fact.***

## THE FACTS

On 4 February 2004, a final order of liquidation was given against EBN Trading (Pty) Ltd and on the same date, a final order sequestrating the Awethu Trust was given against it.

Porritt, a creditor of EBN, secured the issue of a subpoena directing Smith, a superintendent in the SA Police Service, to attend a meeting of creditors of the company. Synergy Management (Pty) Ltd, a creditor of Awethu, and secured the issue of a subpoena in similar terms in respect of a meeting of creditors of Awethu. The subpoenas were issued by the Master of the High Court in terms of section 414(2) of the Companies Act (no 61 of 1973) and section 64 of the Insolvency Act (no 24 of 1936) and required that Smith produce at the meeting books, records or documents relating to the claim proved by the applicant in the liquidation and sequestration proceedings, PSC Guaranteed Growth Ltd.

Smith objected to the issue of the subpoenas and brought an application to set them aside. He contended that the documents required to be produced were privileged documents and that the issue of the subpoenas amounted to an abuse of process in that they were issued with the ulterior motive of prematurely obtaining information relevant to ongoing criminal investigations involving Porritt and others.

Porritt opposed the application on the grounds that PSC's true debtor had been Synergy and not EBN and Awethu, and that the documents would show this to be the case.

## THE DECISION

Porritt's allegation provided an obvious case for the production of the documents specified in the subpoenas. The question was whether or not the validity of PSC's claims against EBN and Awethu had already been decided in the liquidation and sequestration applications with the result that the production of the documents could not assist Porritt.

A liquidator or trustee is privy to the insolvent or company in liquidation, and may be bound by any judgment given against them. A plea of res judicata may therefore be raised against a party seeking to enforce rights already enforced by any such judgment, but the prerequisites for a plea of res judicata must be demonstrated. In the present case, they could not be demonstrated, because the basis upon which the final orders of liquidation and sequestration were given was that PSC had sufficiently established its locus standi to bring those applications, ie that it was a creditor of both. This did not involve a final determination of its claim. The subpoenas, being directed at an investigation of this claim, were therefore validly issued. The liquidator and trustee would be entitled to reject PSC's claim were they determined to be without merit.

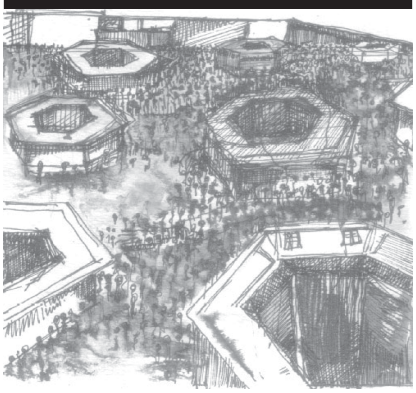
The application failed.

# *QUINTESSENCE OPPORTUNITIES LTD v BLRT INVESTMENTS LTD BLRT INVESTMENTS LTD v GRAND PARADE INVESTMENTS LTD*

A JUDGMENT BY BLIGNAULT J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
17 APRIL 2007

2007 (6) SA 523 (C)

*Companies*



***The Turquand Rule cannot be invoked when the party claiming that the Rule applies knew that the person acting for the company concerned was acting beyond his actual authority. In applying section 199 of the Companies Act (no 61 of 1973) to votes cast for a special resolution, sub-section 1 should be regarded as expressing the dominant intention of the legislature and in preference to an interpretation of sub-section 5 which would contradict sub-section 1.***

## THE FACTS

On 23 November 2006, a voting pool agreement was concluded by shareholders in Grand Parade Investments Ltd. They included Quintessence Opportunities Ltd and BLRT Investments Ltd, the latter being represented by Mr Norman Daniels purporting to act on behalf of BLRT. The parties to the voting pool agreement pooled their shares in Grand Parade for the purposes of voting at general meetings of Grand Parade. It was agreed that the pooled shares would be voted in accordance with a decision taken at a prior meeting of the pool members.

At this meeting Daniels questioned whether or not he was authorised to conclude the voting pool agreement and was assured by a director of Quintessence that the voting pool agreement dealt with concerns which directors of BLRT had previously been raised in regard to it. The director also told Daniels that he was authorised to sign the voting pool agreement on behalf of BLRT Investments because a round robin resolution had been previously approved by the directors of BLRT Investments.

On 13 December 2006, members of the voting pool resolved to vote in favour of certain resolutions including a special resolution (no. 8) that Grand Parade's Articles of Association be replaced by a new set of Articles. Daniels attended the meeting but abstained from voting on behalf of BLRT. The resolution was carried by a majority of 75,09% of the votes cast for an against it. The majority would have been 74,31% if calculated on the basis of those members of the company present and entitled to vote.

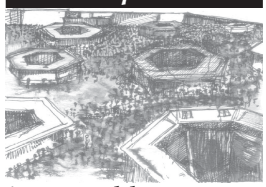
On 16 December 2006, BLRT held its annual general meeting. A new board of directors took the view that the company was not bound by the voting pool agreement as Daniels had not been authorised to conclude the agreement on its behalf. The new board mandated Mr Shaun Rai, one of the directors, to attend Grand Parade's annual general meeting and exercise BLRT's voting rights at that meeting. Upon receiving notice of this, Quintessence obtained an ex parte order interdicting BLRT from voting at the annual general meeting.

On 18 December 2006 at the annual general meeting of Grand Parade Investments Ltd that company's Articles of Association were replaced by a new set of Articles. This took place by means of the passing of special resolution no. 8. The vote was given by the pool members excluding BLRT.

BLRT brought an application for an order declaring that it was not bound by the voting pool agreement and an order declaring that the special resolution (no. 8) be set aside. It contended that Daniels had not been authorised to conclude the voting pool agreement on its behalf. Quintessence contended that as the resolution was passed by a majority exceeding three fourths of the number of members of the company entitled to vote, BLRT's vote would have made no difference to the outcome.

## THE DECISION

Quintessence contended that although Daniels might not have had actual authority to act for BLRT, the Turquand rule applied, the rule which, as stated in Halsbury's Laws of England 2 ed vol 5 para 698, holds that persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.



However, in the present case, it was not open to Quintessence to invoke the Turquand rule. In the present case, the party relying upon the rule (Quintessence) knew that the person in question (Daniels) was acting beyond his actual authority, alternatively the circumstances were such as to put the company on enquiry to investigate and confirm his authority.

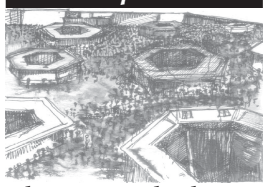
Even if one assumed that the fact that Daniels was the chairman of BLRT and that he attended the meetings of the voting pool members' representatives would have been sufficient to trigger the operation of the rule, the rule could not be invoked by Quintessence in circumstances where Adams, its own representative, wrongly assured Daniels that he had sufficient authority because of the fact that the round robin resolution had been approved by the directors of BLRT. Consequently, BLRT was not bound by the voting pool agreement, and was not precluded from raising the lack of Daniels' authority. The interdict depriving BLRT of its voting rights should not have been granted and was to be set aside.

As far as Quintessence's second contention was concerned, this depended on the proper interpretation of section 199(1) of the Companies Act (no 61 of 1973) which provides that a special resolution shall be passed by not less than three-fourths of the number of members of the company entitled to vote at the meeting. Section 199(5) provides that when a poll is demanded regard shall be had, in computing the majority on the poll, to the number of votes cast for and against the resolution.

There is an apparent contradiction between the two sub-sections. The first would allow abstentions in the calculation whereas the second, read in isolation, would mean that the votes of those members who are present but abstain from voting, are not taken into account. Based on analysis of the historical development of the subsections, it appeared that the provisions of section 199(1) were more of a dominant character than those of section 199(5). Section 199(1) purports to define the criteria for the requisite majority in clear language and without any qualification, whereas section 199(5) has a more adjunctive character.

One should therefore interpret section on the basis that sub-section 1, rather than sub-section 5, gives effect to the dominant intention of the legislature. It followed that if BLRT had been permitted to exercise its own voting rights at the annual general meeting of Grand Parade, special resolution no. 8 would not have been passed with the requisite three-fourths majority.

*It seems to me first that the provisions of s 199(1) may fairly be described as being of a more dominant character than those of s 199(5). Section 199(1), like its predecessors and its counterparts in England, purports to define the criteria for the requisite majority in clear language and without any qualification.*
*[55] A second inference is that s 199(5), like its predecessors and its counterparts in England, has a more adjunctive character. The predecessors and counterparts have always purported to perform what can be described as a clarificatory function in regard to the application of the majority criteria in the event of a poll.*



# *MTN SERVICE PROVIDER (PTY) LTD v AFRO CALL (PTY) LTD*

A JUDGMENT BY BRAND JA (COMBRINCK JA and KGOMO AJA concurring)
SUPREME COURT OF APPEAL
12 SEPTEMBER 2007

2007 (6) SA 620 (A)

***In exercising its discretion whether or not to order that a party provide security for costs in terms of section 13 of the Companies Act (no 61 of 1973) a court must take into account only relevant considerations, and avoid the exercise of its discretion based on wrong legal principles.***

## THE FACTS

Afro Call (Pty) Ltd brought an action against MTN Service Provider (Pty) Ltd claiming damages exceeding R4m for breach of contract. MTN counterclaimed for payment exceeding R15m.

After the close of pleadings, MTN called on Afro Call to disclose its financial statements. For the period ending 30 April 2004, these showed that Afro Call made a gross profit of R950 014,51, that its liabilities exceeded its assets by an amount of R605 257.33 and that during the last two months of that period, Afro's business ran at a substantial loss.

MTN called upon Afro Call to furnish security for costs of the action of R400 000. It also invited Afro Call to provide its most recent audited financial statements and its management account for the succeeding period. Afro Call denied that it was obliged to furnish security for costs and did not provide any updated financial statements.

MTN brought an application for security for costs in terms of section 13 of the Companies Act (no 61 of 1973). The application failed. MTN appealed.

## THE DECISION

In the absence of any answer by Afro Call to MTN's allegation that Afro Call would be unable to meet any costs order made against it, it had to be accepted that Afro Call would not be in such a position. The question then was whether a court should exercise its discretion in favour of Afro Call and deny MTN security for costs in the circumstances of the case.

In accordance with *Giddey N.O. v J C Barnard and Partners* 2007 (5) SA 525 (CC), an appellate court my overturn the exercise of a lower court's discretion, if that court took into account irrelevant considerations, or based the exercise of its discretion on wrong legal principles.

The lower court had been influenced by the fact that Afro Call had made a profit of R950 014,51. This however, had to be measured against the fact that the company was in fact insolvent and, despite the fact that it was a trading company, failed to show in later financial statements that this position had changed. Furthermore, in the exercise of its discretion under section 13 of the Companies Act, there is no reason why a court should order security only in an exceptional case, as had been stated by the lower court.

Afro Call had offered no evidence to show that if ordered to give security for costs it would not be able to proceed with the action. The lower court had therefore misdirected itself in taking this into account. It exercised its discretion against MTN's application for no substantial reason. Its ultimate conclusion could not be justified.

Afro Call was ordered to provide security for costs of the action.

# *SA BREWERIES LTD v SHOPRITE HOLDINGS LTD*

A JUDGMENT BY SCOTT JA (LEWIS JA, VAN HEERDEN JA, MALAN AJA and KGOMO AJA concurring)
SUPREME COURT OF APPEAL
14 SEPTEMBER 2007

2008 (1) SA 203 (A)

**Contract**

***A determination made by an expert will be construed liberally and with a view to upholding its validity. A call-back provision in terms of which parties who have appointed an expert to determine matters of dispute between them may refer back to the expert to determine additional areas of dispute, need not be expressly invoked by the parties in order to determine such additional areas.***

## THE FACTS

SA Breweries Ltd sold to Shoprite Holdings Ltd the entire issued share capital of two companies, as well as all of its claims against the two companies. The agreement provided that as at 31 October 1997, the ordinary shareholders' funds in the companies and the ceded claims would amount to R540m. Closing date accounts would be prepared as at that date and, if it was determined that the shareholder's funds and ceded claims were less than R540m, SA Breweries would be obliged to fund the shortfall by way of a cash loan which would form part of the claims being acquired by Shoprite.

Any dispute between the parties in relation to the determination of any of these amounts was to be referred for determination to accountants who were to determine the dispute acting as experts and not as arbitrators and whose decision was to be final and binding on the parties save for any manifest error in calculation. A call-back provision entitled the parties to refer the expert's determination back to the expert in the event that additional areas of dispute arose.

In the course of the preparation of the closing date accounts, disputes arose between the parties. The disputes were identified in specific issues and then presented to the accountant nominated to determine such disputes. In March 2000, the accountant delivered the determination. Shoprite disputed the determination. It contended that the accountant had failed properly to determine the disputes between the parties in relation to trade creditors and fixed assets, and had failed to produce a determination which was capable of implementation.

The dispute between the parties in relation to trade creditors arose from the fact that the agreement provided that a reconciliation had to be effected, as at 31 October 1997, of the amounts owing to creditors of the two companies. Shoprite contended that a simple reconciliation of amounts owing to creditors as reflected in 30-day ageing on their statements with the amounts owing to them as recorded in the companies' own records was sufficient. SA Breweries contended that the reconciliation required that creditors' statements be examined in more detail in order to distinguish mere timing differences in amounts owing from differences which would indicate unsubstantiated claims.

The dispute between the parties in relation to the fixed assets arose from the fact that there were substantial differences between the assets as recorded in the fixed asset register and those recorded in the general ledger of the companies. Shoprite contended that to rectify this, a single adjustment needed to be made involving a write-off of assets in the 1995 fiscal year. The expert determined that an exercise identifying the assets needed to be completed, following which the fixed assets of the companies could be properly determined.

Shoprite brought an application for an order declaring the accountant to have failed properly to determine the disputes referred to him and directing him, or an internationally recognised firm of accountants selected by agreement, to determine the disputes in question. SA Breweries appealed the grant of the order.

THE DECISION

When formulating the questions to be put to the expert, the parties anticipated that the answers might not resolve the dispute relating to trade creditors and that there were likely to be other areas of dispute requiring determination arising from the answers given by the expert. Shoprite's objection to the determination was that it lacked certainty and finality because it provided no clear answer to a question that was inherent in those that were formulated in the referral letter, ie precisely how the time differences were to be determined in the event of its simple 30-day cut-off proposal not being accepted by the expert. If the determination had to provide answers to all possible areas of dispute regarding the nature and amount of adjustments to be made in respect of trade creditors before the call-back provision could be invoked, that provision would serve no purpose. However, the parties clearly anticipated that further areas of dispute regarding the issue of trade creditors could arise from the determination. In the absence of the expert being required to answer follow-up questions as envisaged in the call-back provision he could not be held to have failed to fulfil his mandate to determine properly the dispute referred to him, nor could his determination be impugned on the ground of such a failure.

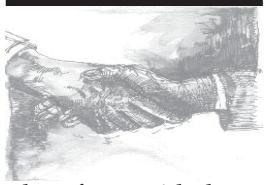
As far as the dispute regarding the fixed assets was concerned, the essence of Shoprite's objection to the expert's determination was that it required the execution of an onerous exercise. However, this was not a valid objection to the determination. A court will be slow to find non-compliance with the substantive requirements of a valid determination and will construe a determination liberally and in accordance with the dictates of common sense, and will not examine the determination with a meticulous eye in an endeavour to find some fault. The expert had not been asked to specify a particular procedure that had to be followed but to give an answer to the less precise question of what steps had to be taken. The answer he gave was that the steps to be taken were those necessary to identify assets that were missing and had been either acquired or scrapped after the write-off in 1995. This answer was addressed to experienced accountants in the employ of the company and Shoprite and they were told exactly what they had to look for. In these circumstances, the determination could not be considered invalid on the grounds that it lacked directions as to how to go about tracing the missing assets.

The appeal was upheld.

*The construction placed on the call-back provision by the court a quo strikes me as overtechnical and one that could not have been what the parties intended. It follows that in the absence of the expert being required to answer follow-up questions as envisaged in the call-back provision he cannot, in my view, be held to have failed to fulfil his mandate to determine properly the dispute referred to him; nor, I think, can his F determination be impugned on the ground of such a failure.*

# *LACO PARTS (PTY) LTD v TURNERS SHIPPING (PTY) LTD*





A JUDGMENT BY
BORUCHOWITZ J
(MALAN J and WEINER AJ
concurring)
WITWATERSRAND LOCAL
DIVISION
15 MAY 2007

2008 (1) SA 279 (W)

***A claim for restoration of performance made under a contract which is void ab initio must be based on enrichment or the rei vindicatio and not on restitution.***

## THE FACTS

Turners Shipping (Pty) Ltd offered to sell certain clutch parts to Laco Parts (Pty) Ltd. Turners held the clutch parts in a bond store because it was attending to the clearing and forwarding of them for Self-Fit Seco (Pty) Ltd. That company had been placed in liquidation and the liquidator had authorised Turners to sell the parts.

The parties negotiated on the price and quantities. They reached consensus on the price, but not on quantities. Laco considered the quantity to be that reflected in certain invoices raised by the suppliers of the parts and Turners considered the quantity to be that reflected in bills of entry reflecting the balance of the shipment held in the bond store.

Turners delivered the parts it considered were those agreed upon. Laco refused to pay the purchase price until full delivery, as understood by it, was made. Turners brought an action for payment.

Turners' action was based on the allegation that the parties had concluded a partly oral and partly written contract, and that Laco was in default in not having paid the purchase price. Its alternative basis was that if the parties did not reach consensus regarding the subject-matter of the sale, then the sale was void ab initio and it was entitled to restitution of the delivered parts or payment of their value.

## THE DECISION

The parties had not concluded any contract since they had not reached consensus on an essential term, ie the item sold. The contract was therefore void ab initio.

A contract which is void ab initio does not provide a basis for an order of restitution. Restitution follows upon a voidable contract being declared void, but this is not an appropriate remedy in the case of a contract which is void ab initio. Turners' claim for restitution was therefore not supported by its own contentions.

The remedy which is supported by a determination that a contact is void ab initio is an enrichment action or the rei vindicatio. The latter depends on proof that the claimant is the owner of the claimed item. In the present case, it was clear that Turners was not the owner of the goods.

In determining what remedy was appropriate in the circumstances, it was important to distinguish between mutual mistake and common mistake. Mutual mistake is what took place between Turners and Laco: each of them had differing conceptions of the nature of the item sold. Common mistake is different in that both parties have the same conception which in fact is an error. Common mistake provides a ground for restitution, but since mutual mistake results in no contract having been formed, this form of remedy is not appropriate in this case.

The only alternative basis for Turners' action was a claim based on enrichment. The requirements for this however, had not been demonstrated, in particular the nature and extent of Turners' impoverishment.

Turners' action not having been proven, absolution from the instance was ordered.

# *NATIONWIDE AIRLINES (PTY) LTD v ROEDIGER*



A JUDGMENT BY HORN J
WITWATERSRAND LOCAL
DIVISION
2 NOVEMBER 2006

2008 (1) SA 293 (W)

***A court may in certain circumstances order specific performance of an employment contract.***

## THE FACTS

Roediger was employed as a pilot of aircraft with Nationwide Airlines (Pty) Ltd. From January 2002, he flew the B767 aircraft for Nationwide and in April 2004, he concluded an agreement with Nationwide with a view to becoming a captain of the B767. The agreement provided that Nationwide would advance Roediger a loan of R175 000 in order to enable him to complete the training necessary to qualify him as a captain of the B767. The agreement also provided that upon completion, Nationwide would be obliged to offer employment to Roediger. Upon being so employed, should Roediger wish to terminate his employment, he would be obliged to give three months notice of termination of service.

The B767 is a sophisticated aircraft, requiring particular expertise by its captain.

On 3 October 2005, Roediger gave notice of termination of his employment. Nationwide contended that the date of termination was 31 January 2006. Roediger contended that the date of termination was 3 November 2005. This dispute was decided in favour of Nationwide.

The issue for decision was whether or not Nationwide could enforce specific performance so as to require Roediger to remain in its employment until 31 Janaury 2006.

## THE DECISION

The general rule is that a party may enforce performance of a contract. A court however, may exercise its discretion to award damages in lieu of performance, and this has been held to apply particularly in the case of performance of the employment contract. However, this will not be applied universally and without regard to the circumstances of the case.

In the present circumstances, Roediger was highly qualified, and therefore Nationwide was particularly dependent on him. There was no apparent inequity in obliging him to adhere to his contract. The only party who would be prejudiced if he did not perform properly was Nationwide. The nature and circumstances of the parties' agreement, the particular relationship between them and the nature and type of service rendered by the first respondent, led to the conclusion that Nationwide should be entitled to specific performance of the contract.

It was also clear that Nationwide stood to suffer significant damages resulting from cancelled flights and loss of goodwill. Nationwide was therefore entitled to an order that Roediger remain in employment until 31 January 2006.

# *MERRY HILL (PTY) LTD v ENGELBRECHT*



A JUDGMENT BY BRAND JA (CAMERON JA, LEWIS JA, MAYA JA and THERON AJA concurring)
SUPREME COURT OF APPEAL
24 MAY 2007

2007 CLR 414 (A)

***A notice of breach given in terms of section 19(2) of the Alienation of Land Act (no 68 of 1981) need not state which of the alternative remedies the seller intends taking as a result of the purchaser's breach of contract.***

## THE FACTS

Merry Hill (Pty) Ltd sold two properties to Engelbrecht under an instalment sale agreement. The agreement was subject to the Alienation of Land Act (no 68 of 1981).

Clause 9 of the agreement provided that in the event of the purchaser failing to fulfil on due date any of his obligations under the contract, and the seller having demanded rectification of the breach by written demand, as set out in section 19 of the Act, the seller would be entitled either to claim immediate payment of the balance of the purchase price and other charges, or to cancel the agreement and claim payment of all arrear instalments and retain payments already made.

Engelbrecht paid some of the instalments but then fell into arrears. In August 2005, Merry Hill's attorney addressed a letter to him. It demanded payment of R22 534 within 32 days. It stated that should payment not be made within that period, Merry Hill would be entitled to claim immediate payment of the full balance of the purchase price and other charges, or would be entitled to cancel the contract. Subsequently, Merry Hill's attorney addressed a letter to Engelbrecht in which notice of cancellation of the contract was given.

Engelbrecht contended that the first letter sent to him did not properly comply with section 19 of the Act because it did not indicate which of the two alternative remedies provided for in clause 9 it intended to exercise, and failed to state the steps Merry Hill intended taking if the breach of contract was not rectified. He brought an application to interdict Merry Hill from transferring the properties to other purchasers.

Section 19(2) of the Act provides that a notice of breach of contract must contain, inter alia, an indication of the steps the seller intends to take if the alleged breach of contract is not rectified within a 30-day notice period.

## THE DECISION

The purpose of Chapter 2 of the Act is to afford protection to purchasers of land by instalments. The purpose of section 19 is to afford protection to purchasers, who by reason of their own default, exposed themselves to claims by sellers. The stricter interpretation of this section is that a seller wishing to exercise its rights in terms of it, must choose which of the alternative remedies referred to therein it wishes to pursue.

The stricter interpretation would require a seller wishing to cancel the sale to decide upon that remedy prior to the thirty-day notice period referred to in section 19(2). The effect of this interpretation is to place on the seller the obligation of making this election even though the subsection does not require the seller to have given a notice of cancellation but only a notice of the purchaser's default. This interpretation however, had to be one that could be drawn by necessary implication from the wording of the section. No such necessary implication could be drawn from it. The purpose of the notice was to warn the purchaser of the possible effects of his default and this purpose would be sufficiently served by delivering to the purchaser a letter indicating the alternative remedies available to the seller.

As far as the contention that the letter actually sent failed to state the steps the seller intended to take if the default was not remedied was concerned, the

requirements of the section were peremptory. Even so, not every deviation from literal compliance them would be fatal. The question remained whether, in spite of the defects, there was substantial compliance with its requirements. The letter did comply with these requirements, if not in form then in substance.

The application was dismissed.

# *VAN NIEKERK v FAVEL*

A JUDGMENT BY HURT AJA (SCOTT JA, NAVSA JA, CLOETE JA and KGOMO AJA concurring) SUPREME COURT OF APPEAL 27 SEPTEMBER 2007

2007 CLR 426 (A)

***A notice in terms of section 19(2)(c) of the Alienation of Land Act (no 68 of 1981) must not state the seller's remedies in general terms but must state that the seller intends to seek the remedies referred to in section 19(1).***

## THE FACTS

Favel sold certain fixed property to Van Niekerk. The sale was subject to the Alienation of Land Act (no 68 of 1981). Four years after Van Niekerk had taken occupation of the property, Favel's attorney addressed a letter to him alleging that he was in breach of various obligations under their contract and demanding that the breaches be remedied within 30 days failing which Favel would exercise such rights as he might have in terms of the contract. The following month, the attorney addressed a letter to him cancelling the contract and claiming forfeiture of the payments made by Van Niekerk in terms of the contract.

Favel applied for the eviction of Van Niekerk from the property.

Van Niekerk contended that the first letter failed to meet the requirements of section 19(2)(c) of the Act. The subsection provides that a notice of breach of contract must contain an indication of the steps the seller intends to take if the alleged breach of contract is not rectified.

## THE DECISION

What is intended in section 19 is that the purchaser must understand the extent of his jeopardy by a reading of the letter alone, and without recourse either to the Act or the contract itself or to legal advice. Whether or not the letter refers to the seller's rights as stated in the contract, the purchaser must receive notice of the seller's intention to seek the remedies referred to in section 19(1).

In the present case, the mere reference to the relevant clause of the contract and the warning that Favel would exercise such rights as he might have in terms of the contract could indicate an intention on the part of Favel to do no more than sue for the outstanding instalments or rates. The letter therefore failed to achieve the very purpose of section 19(2)(c)—to warn Van Niekerk, not only that the continuing breach would not be tolerated but that Favel intended to take one or more of the steps referred to in section 19(1).

It followed that the letter did not comply with section 19(2)(c). The application for eviction failed.

# *STALWO (PTY) LTD v WARY HOLDINGS (PTY) LTD*

*Contract*

A JUDGMENT BY MAYA JA
(FARLAM JA, LEWIS JA, JAFTA JA AND PONNAN JA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2007

2007 CLR 449 (A)

***An agreement for the sale of fixed property which does not expressly include a tacit suspensive condition does not fail to comply with the Alienation of Land Act (no 68 of 1981). Land which was originally classified as agricultural land but which subsequently fell within the jurisdiction of a municipality does not retain its status as agricultural land by virtue of the proviso contained in the definition of agricultural land in the Subdivision of Agricultural Land Act (no 70 of 1970).***

## THE FACTS

Wary Holdings (Pty) Ltd placed an advertisement for the sale of plots for light industrial use. As a result, it and Stalwo (Pty) Ltd concluded an agreement of sale in terms of which Wary sold four plots of a proposed subdivision of the land to Stalwo for R550 000. At that stage, the property had not been subdivided. The land then fell under the jurisdiction of the Nelson Mandela Metropolitan Municipality (the NMMM). Prior to the establishment of this municipality, the land fell under the jurisdiction of a transitional council.

The land was then zoned as agricultural land, but Wary had lodged an application for its subdivision and rezoning from agricultural land to industrial land with the local authority. That body approved the application and added conditions relating to the provision of services for the land and improvements to it. These attracted costs. Wary therefore sought to increase the price of the property. Stalwo resisted this and brought an application for an order declaring the agreement to be valid and binding between the parties.

Wary defended the application on the grounds that the agreement failed to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981) in that it did not include the suspensive condition that the property was to be subdivided, and on the grounds that the agreement was in contravention of section 3(a) and section 3(e)(i) of the Subdivision of Agricultural Land Act (no 70 of 1970) which prohibits the subdivision of agricultural land and the sale of a portion of agricultural land, without the written permission of the Minister of Agriculture.

## THE DECISION

Stalwo contended that the suspensive condition was included in the agreement as a tacit condition, since both parties were aware of the need for subdivision and had referred to it in the description of the property. This contention had to be accepted. There was no dispute between the parties that this was their common intention. The tacit condition could then be read into the agreement as it stood and become an integrated part of the agreement. The agreement therefore complied with section 2(1) of the Alienation of Land Act.

As far as the Subdivision of Agricultural Land Act was concerned, its definition of 'agricultural land' excluded land situated in the area of jurisdiction of a municipal council. Wary contended however, that the fact that the land was earlier subject to the jurisdiction of a transitional council rendered the written permission of the Minister of Agriculture necessary because of a proviso in the definition of 'agricultural land' that land situated in the area of jurisdiction of a transitional council which immediately prior to the first election of the members of such transitional council was classified as agricultural land, was to remain classified as such.

However, the concept of 'agricultural land' as used in the Act, is not fixed and immutable. It changes with the expansion of local authorities and the creation of new ones. The proviso is properly construed as a temporary measure, taking into account the effect of the Transition Act (no 209 of 1993), which would establish municipalities for rural areas for the first time, and this would include transitional councils

within the meaning of 'municipal council' envisaged in the definition of 'agricultural land'. It followed that once the transitional council was disestablished and the land fell within the jurisdiction of the municipality, it ceased to be agricultural land within the meaning of the Agricultural Land Act. The agreement of sale was therefore not affected by the proviso.

The agreement of sale was therefore valid and binding between the parties. The application was granted.

*To find that the tacit term contended for by the appellant exists, it seems to me that once such intention is established, it matters not whether it was expressly agreed or necessarily imported that the agreement would be suspended pending approval of the subdivision application. This view finds support in* Wilkins v Voges, *where Nienaber JA said:'*A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms – reading, as it were, between the lines – or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances. *Either way, a tacit term, once found to exist, is simply read or blended into the contract: as such it is "contained" in the written deed. Not being an adjunct to but an integrated part of the contract, a tacit term does not in my opinion fall foul of either the clause in question or the [Alienation of Land ] Act.'*

# *TETRA MOBILE RADIO (PTY) LTD v MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF WORKS*

*Contract*

A JUDGMENT BY MTHIYANE JA (HOWIE P, LEWIS JA, HEHER JA AND VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2007

2007 CLR 463 (A)

***An appellant against a failed tender bid is entitled to documents and information relating to the successful tenderer's bid in circumstances where fairness demands that such information be furnished in order to facilitate an appeal.***

## THE FACTS

Tetra Mobile Radio (Pty) Ltd submitted a tender to the Department of Works for the maintenance of repeater networks. Tetra had been awarded the contract for this work in previous years. The Central Procurement Committee awarded the contract to Infotrunk (Pty) Ltd.

Tetra noted an appeal against the award to the Appeals Tribunal. The Procurement Committee gave its reasons for the award to that body. Tetra however, contended that these merely indicated the points allocated, the basic method of allocating points and the fact that the third respondent had received the highest points. It contended that it was entitled to further documents and information, and it listed fourteen items it required in this respect. The Head of the Department of Works submitted an adjudication report in which it gave some of the documents and information required. However, it refused to furnish any information on the details of the tenders as this was considered to be confidential information belonging to each tenderer.

Tetra applied for an order directing the respondent to give the information it had requested.

## THE DECISION

Section 20 of the KwaZulu Natal Procurement Act (no 3 of 2001) provides for the appeal procedures that may be applied by a party whose tender has been unsuccessful. The section provides that the Procurement Committee is obliged to give reasons for its decisions. However, it makes no provision for the furnishing of documents and information. This did not however, mean that the obligation to provide such material did not rest on the Committee, because compliance with the provisions of the Act required the exercise of fairness and transparency.

The appeal provided for in the section was in essence a review. To properly review a decision of the Procurement Committee, Tetra would need to know what documents and information was submitted by Infotrunk.

Section 20 provided a basis for concluding that the Appeals Tribunal must have before it the same information that was before the Procurement Committee in order to provide a fair hearing to the aggrieved party. That party must also have at least that information to enable it to formulate its grounds of appeal. This section, read with section 217 of the Constitution, contemplates a fair system entitling an appellant to access to information necessary to formulate its appeal properly. Tetra was entitled to this information.

The order was granted.

# *MOGUDI v FEZI*



A JUDGMENT BY VAN ZYL J
(FOURIE JA and GOLIATH J concurring)
CAPE OF GOOD HOPE PROVINCIAL DIVISION
28 AUGUST 2007

2007 CLR 437 (C)

***The burden of proof in alleging that a non-gratuitous transaction was effected between two parties, and not a donation, remains on the party alleging that transaction.***

## THE FACTS

Mogudi undertook to assume liability for Fezi's financial obligations to Absa Bank in respect of her purchase of a motor vehicle. He did so after negotiating with the bank which required that he sign a deed of suretyship in its favour and pay off the arrears then owing to it by Fezi.

Mogudi alleged that when doing so, he concluded an agreement with Fezi to the effect that he would become the owner of the motor vehicle if Fezi was unable to reimburse him in due course. Fezi signed a note in which she stated she transferred ownership of the motor vehicle to Mogudi. Fezi however, alleged that she had signed this note because Modudi had wanted evidence that would secure his wife's co-operation. Fezi alleged that Mogudi had advanced sums in payment to the bank out of generosity and because she performed domestic services for him.

Mogudi alleged that he was the owner of the motor vehicle. He brought an action for delivery of the motor vehicle and for payment of R164 259 being the amount he had spent in settling Fezi's financial obligations toward the bank.

## THE DECISION

Since it was clear the bank was the owner of the vehicle, the only issue was whether Modudi made a loan or a donation to Fezi.

When the defence that a donation was made is raised, the burden of proving that the transaction was something other than this rests on the plaintiff. Mogudi's evidence was insufficient to discharge this burden and did not establish a prima facie case that he had advanced a loan to Fezi. His undertaking to assume her financial obligations arose from their personal relationship and there had never been any suggestion that he was making a loan.

As far as the signed note was concerned, this was not intended to serve as proof of a loan and was used as a ploy to secure Mogudi's wife's suretyship.

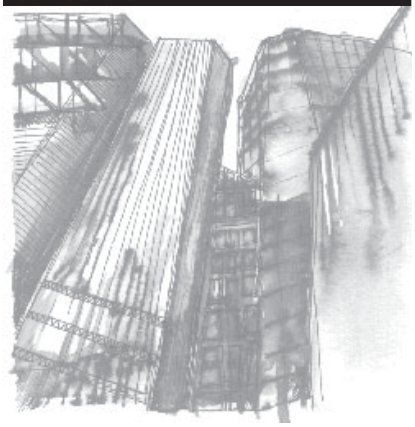
The action was dismissed.

# *McGREGOR v CITY OF JOHANNESBURG*

A JUDGMENT BY THERON AJA (HOWIE P, CLOETE JA, LEWIS JA and SNYDERS AJA concurring) SUPREME COURT OF APPEAL 28 MARCH 2007

2008 (1) SA 308 (A)

***Property***



***A municipal regulation governing the use to which residential property may be put which is repealed, subject to the continuation of the lawfulness of anything done under the repealed law, may be applied to regulate such use upon termination of the period during which the property owner was entitled to so use the property.***

## THE FACTS

The Eastern Metropolitan Local Council approved an application by Corpcom Outdoor (Pty) Ltd to erect an advertising sign on McGregor's residential property. The approval was to operate for the period 1 July 1999 to 30 June 2002, and was granted in terms of by-laws promulgated in 1995, the Signs and Advertising Hoardings: By-laws.

The 1995 by-laws were repealed by by-laws promulgated by the same local council in 1999, and these later by-laws were themselves repealed by the Advertising Signs and Hoarding By-laws for the City of Johannesburg promulgated in 2001. Both the 1999 by-laws and the 2001 by-laws provided that anything done in terms of any provision of the by-laws repealed would be deemed to have been done under the corresponding provisions of the later by-law, and the repeal would not affect the validity of anything done under the by-laws so repealed.

In terms of clause 5(26) of the 2001 by-laws, the display of advertising signage on property zoned residential was declared to be unlawful. No similar provision is to be found in the 1995 or the 1999 by-laws. Clause 4(3) provided that any sign which did not comply with the provisions of the by-laws and which was lawfully displayed on the day immediately preceding the date of commencement of the by-laws would be exempt from the requirements of the by-laws if, in the opinion of the Council, the sign was properly maintained and was not altered, moved or re-erected.

The City of Johannesburg obtained an order interdicting McGregor from displaying the advertising sign. McGregor appealed.

## THE DECISION

The issue in dispute was whether the 2001 by-laws extended the scope of McGregor's right to display the sign beyond the time limit of the original approval.

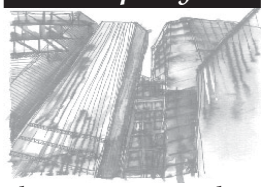
The effect of clause 4(3) was to preserve existing rights even if those rights were inconsistent with the 2001 by-laws. Clause 4(3) exempts a sign that was lawfully displayed immediately before the 2001 by-laws came into operation from the requirements of such by-laws to the extent necessary to preserve the right already granted. By exempting the sign from the requirements of the 2001 by-laws, clause 4(3) does preserves the validity of any approval previously granted in terms of repealed by-laws, but this is the extent of the exemption. The exemption does not extend the original approval.

In the present case, McGregor and Corpcom were exempted from the requirement of obtaining the City's approval to erect and display the sign. The City could not have granted this approval after 30 November 2001 because of clause 5(26). It followed that the sign was lawfully displayed until the period for which approval was granted for its display expired. After 30 June 2002, the continued display of the sign was unlawful.

The appeal was dismissed.

# *MEEPO v KOTZE*





A JUDGMENT BY LACOCK J and OLIVIER J
NORTHERN CAPE PROVINCIAL DIVISION
29 JUNE 2007

2008 (1) SA 104 (NC)

***The Mineral and Petroleum Resources Development Act (no 28 of 2002) intends to provide for a rational balance between the rights of a holder of a prospecting right and the property rights of a landowner, as well as the fundamental right to have the environment protected. It is therefore a precondition for the exercise of prospecting rights that the holder of such rights notify and consult with a land owner in regard to their exercise as provided for in section 5(4) of that Act.***

## THE FACTS

Kotze was the owner of the Remainder of the farm Lanyon Vale No 376. In 2004, Meepo applied, in terms of the Mineral and Petroleum Resources Development Act (no 28 of 2002) for a prospecting right to prospect for diamonds on the farm. The application was approved in January 2005. A second prospecting right was granted to Meepo by a regional manager in the Department of Minerals and Energy in July 2005, replacing the first prospecting right and this was duly registered in the Mineral and Petroleum Titles Registration Office.

Kotze objected to the granting of the first prospecting right, and he appealed to the Director General against the granting of the right. He was not aware of the granting of the second prospecting right and did not appeal that.

Meepo attempted to gain access to the farm for the purpose of exercising his prospecting right for diamonds but Kotze denied him access. Meepo then brought an application for an order declaring that he was entitled to immediate access to the farm and entitled to carry on prospecting activities on the farm.

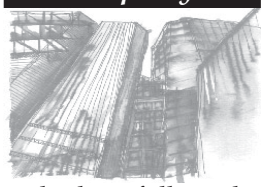
Kotze counter-applied for an order that the grant of the prospecting right be reviewed and set aside and that an application for a prospecting right he had made in 2001 under earlier governing legislation be processed as a pending application under the Act.

## THE DECISION

Section 5(4) of the Act provides that no person may prospect for or conduct mining operations on any area without (a) an approved environmental management programme or approved environmental management plan, (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, (c) notifying and consulting with the landowner or lawful occupier of the land in question.

Meepo contended that these provisions were of a general nature and, since he had complied with the more particular requirements of sections 10 and 16, the provisions of section 5(4) were not an impediment to him exercising his prospecting rights. However, the Act contains the fundamental principles fundamental to a legislative approach to the development and regulatory regime of the mineral and petroleum resources of the country. Its provisions should be interpreted with due regard to the constitutional rights, norms and values the legislature sought to advance in the Act.

It was the intention of the legislature to make provision in the Act for a rational balance between the rights of a holder of a prospecting right and the property rights of a landowner, as well as the fundamental right to have the environment protected. The provisions of the Act should be interpreted with due regard to these values and norms. The granting of a prospective right necessarily results in serious inroads being made on the property rights of a land owner. The legislature therefore attempted to alleviate these consequences by providing for due consultations between a land owner and the holder of a prospecting right. The sections of the Act providing for consultations between the holder of a prospecting right and a land



owner should therefore be widely construed.

It followed that after the granting of a prospecting right and before the commencement of prospecting activities on any land which is the subject of such prospecting right, proper notice of the intention to enter the land for purposes of prospecting should be given to the land owner, followed by a consultative process. Meepo had not followed this procedure and accordingly, the application he brought was premature and had to fail.

As far as the counter-application was concerned, the grant of the prospecting rights in July 2005 was given by a person to whom such power could not be delegated in terms of the Act. It was therefore done ultra vires and was ineffective.

*Viewed from the perspective of an applicant for a prospecting right, the question is: When do the rights and privileges pertaining to a prospecting right vest in him or her as holder of that right? The word 'holder' in relation to a prospecting right is defined in the Act as 'the person to whom such right has been granted or such person's successor in title'. In our view it cannot be said that Meepo acquired any rights as holder of a prospecting right at the time of approval of the aforesaid recommendations and before any terms or conditions in respect of the prospecting right, as well as the period of its validity, had been determined. These were only determined and communicated to Meepo at the execution of the aforesaid notarial deeds on 24 March 2005 and 1 July 2005 respectively. In our view the legal nature of the Act in terms whereof a prospecting right is granted to an applicant, is a contractual one whereby the minister, as the representative of the State as custodian of the mineral resources of the Republic of South Africa, consensually agrees to grant to an applicant a limited real right to prospect for a mineral or minerals on specified land for a specified period and subject to such conditions as may be determined or agreed upon.*

# *PHUMELELA GAMING AND LEISURE LTD v GRÜNDLINGH*

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

2007 (6) SA 350 (CC)

***Competition***

***A bookmaker is entitled to offer and accept exotic bets which depend on the agreement that the payout will be determined according to a formula which applies the results announced by a totalisator betting system. Such practice is not unlawful competition.***

## THE FACTS

Gründlingh and the other appellants were licensed bookmakers in terms of the Gauteng Gambling Act (no 4 of 1995). As such, they were authorised to accept 'fixed odds bets' on sporting events. A 'fixed odds bet' was defined in the Act as a bet taken by a licensed bookmaker on one or more event where odds were agreed upon when such bet was laid, but excluding a totalisator bet.

A totalisator bet was not defined, but a 'totalisator' was defined as a system of betting on a sporting event in which the aggregate amount staked on such event was divided amongst those making winning bets on that event is divided amongst those persons who have made winning bets in proportion to the amounts staked.

Gründlingh began offering and accepting 'exotic bets'. These were bets in which the dividend per rand paid on a bet would be the same as the dividend per rand paid on Phumelela Gaming and Leisure Ltd's tote. Phumulela held a license to operate a totalisator. It objected to the bookmakers' offering and accepting exotic bets, contending that they were prevented from doing so by the defining limitations of 'fixed odds bet' which excluded the bookmakers from offering and accepting totalisator bets.

Phumelela sought an interdict preventing Gründlingh from offering and accepting exotic bets.

## THE DECISION

The exotic bets were not totalisator bets as referred to in the Act. Gründlingh and the other bookmakers did not maintain a pool of bets in the same way as the totalisator did and they were at risk as far as the potential payout was concerned. The question was however, whether the exotic bets fell within the definition of a 'fixed odds bet', this being the only bets the bookmakers were entitled to take.

Fixed odds bets involved an agreement on the odds when the bet was laid. In the case of exotic bets however, the odds were not known when the bet was laid. The odds are however determined later, after it is known what money was wagered on the particular event. They are determined according to a known formula and it may therefore be said that the agreement is that the payout will be made according to this formula. The definition of 'fixed odds bets' is ambiguous to the extent that it does not specify whether such an agreement would be considered the kind of agreement envisaged. However, it was permissible to interpret the definition as including such an agreement.

Gründlingh was not in breach of the Act.

Phumelela also argued that the use of exotic bets amounted to unlawful competition in that it used the dividend results announced by it to determine the payout and depended on the operation of its totalisator and its acknowledged reliability. However, changes in the legislation governing betting showed that such use of dividend results was not always considered unacceptable practice. Legislation had at one stage prohibited such use, but for a short period only, and historically, the practice had been condoned and acted upon by bookmakers. No legislative prohibition on the practice existed at the time Phumelela brought interdict proceedings and there was no reason to consider it contrary to public policy.

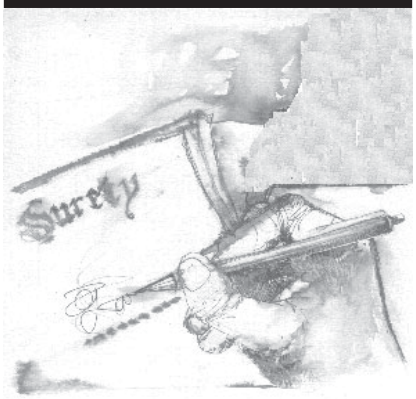
Phumulela's application was dismissed.

# *WALLACE v 1662 G&D PROPERTY INVESTMENTS CC*

A JUDGMENT BY LEVENBERG AJ
WITWATERSRAND LOCAL DIVISION
8 AUGUST 2007

2008 (1) SA 300 (W)

***Suretyship***




***A deed of suretyship which fails to identify the principal debtor, or provide a basis for identifying the principal debtor without recourse to inadmissible evidence, fails to comply with section 6 of the General Law Amendment Act (no 50 of 1956).***

## THE FACTS

G&D Property Investments CC executed two deeds of suretyship in favour of Wallace. They provided for the repayment on demand of all sums of money which 'the debtor' might owe. The debtor was not identified.

Wallace contended that it was an express, or implied, or tacit term of the suretyship agreement that the debtor was G.M. Wallace, his son.

G&D contended that the deeds of suretyship failed to comply with section 6 of the General Law Amendment Act (no 50 of 1956) in that they failed to record in writing the full terms of the suretyship agreement, and were accordingly invalid.

## THE DECISION

Unlike the case of *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) where the identity of the principal debtor, although not ascertained at the time the suretyship was concluded was thereafter ascertainable, in the present case, the identity of the debtor could not be ascertained except by leading inadmissible evidence. Such evidence consisted in evidence of what the parties' common intention was at the time they concluded the suretyship agreement.

The suretyship agreement itself gave no indication of the identity of the debtor. The evidence that Wallace would have to lead to indicate the identity of the debtor - elicited by such a question as 'Who is the debtor referred to in the suretyship?' - was precisely the kind of evidence which section 6 of the General Law Amendment Act excluded. Were a suretyship of this kind to be considered acceptable, it would have to be considered valid as against an unlimited number of potential debtors .

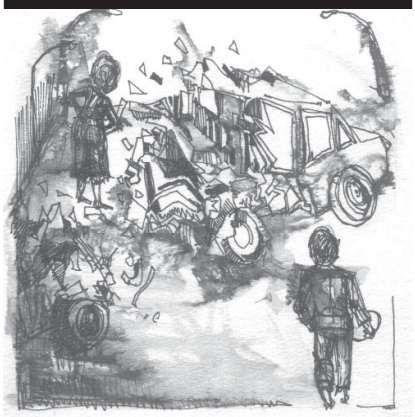
The deed of suretyship therefore did not comply with section 6 of the Act and was invalid.

# *MUTUAL & FEDERAL INSURANCE CO LTD v DA COSTA*

A JUDGMENT BY FARLAM JA
(LEWIS JA AND MLAMBO JA concurring)
SUPREME COURT OF APPEAL
6 JUNE 2007

2007 CLR 392 (A)

***Insurance***



***An insurer repudiating liability for a claim made by the insured must plead its right to repudiate and prove that a reasonable insurer in its position would have considered alleged omissions by the insured to be material to its decision to insure.***

## THE FACTS

From 1991, an agreement of insurance existed between Mutual & Federal Insurance Co Ltd and Da Costa in terms of which a number of Da Costa's vehicles were insured by Mutual & Federal. At various times, vehicles were added to or removed from the policy. In 1996, a 1991 model Mercedes Benz 230E was added to the policy after Da Costa acquired the vehicle in exchange for a Porsche. The vehicle was in fact a built-up vehicle, being a combination of a 1988 200 and a 1990 230 Mercedes Benz.

The vehicle was damaged in a collision. Mutual & Federal repudiated liability to indemnify on the ground that the description of the vehicle in the policy amounted to a warranty which had been breached, alternatively that the description of the vehicle was a misrepresentation or non-disclosure entitling it to repudiate liability.

## THE DECISION

Mutual & Federal did not raise the issue of a breached warranty as a defence in its plea but relied on denials of the allegations made by Da Costa. This did not entitle it to raise the defence of a breach of warranty. As far as the allegation of misrepresentation was concerned, there was no evidence that the facts it relied on in insuring the vehicle were material to its decision to insure. Mutual & Federal contended that such evidence was not necessary since the facts related to the year of manufacture of the vehicle.

While in some cases, a conceded or misstated fact will be considered to be material to the assumption of the risk without evidence being led, a court cannot assume that a misstatement as to the year of manufacture of a motor vehicle is material per se. The year of manufacture of the vehicle was not a fact which necessarily materially influenced Mutual & Federal's decision to insure.

# *THEKWENI PROPERTIES (PTY) LTD v PICARDI HOTELS LTD*

JUDGMENT BY LEVINSOHN DJP
DURBAN AND COAST LOCAL DIVISION
26 SEPTEMBER 2007

2007 CLR 403 (D)

**Cession**

***A cession of rentals clause in a mortgage bond which provides that the cession will only be acted upon without the consent of the mortgagor if it failed to comply with the terms of the bond does not prevent the mortgagor from bringing action for payment of rentals.***

## THE FACTS

Thekweni Properties (Pty) Ltd was the lessor of certain premises and Picardi Hotels Ltd the lessee. Thekweni passed a mortgage bond over the property in favour of Investec Bank Ltd.

The bond contained a cession of rentals and revenues clause. It provided that Thekweni ceded to the bank all of its rights in rentals obtained from letting the mortgaged property as additional security for the due repayment of amounts owing to the bank. A proviso provided that the cession would not be acted upon by the bank without the consent of Thekweni Properties unless it had failed to comply with any term or condition of the bond.

Thekweni Properties brought an action claiming R845 726,98 in arrear rentals. Picardi raised the special plea that Thekweni Properties did not have the locus standi to sue because it had ceded its right to rentals to Investec Bank.

## THE DECISION

Generally speaking, the consequences of a cession are that the cessionary alone has the necessary locus standi to sue for enforcement of the ceded debt. The question was whether, upon a proper interpretation of the cession, its consequences were to prevent Thekweni Properties from bringing the action against Picardi.

The cession intended to give the bank the right to sue for unpaid rentals. However, by introducing the proviso, the parties must have intended to vary this consequence, as the parties were aware that the property had been acquired for purposes of deriving a rental income from it. The right to collect and enforce payment of rentals remained vested in Thekweni Properties pending the fulfilment of the condition referred to in the proviso. This interpretation gave business efficacy to the agreement and was consistent with the parties' intention.

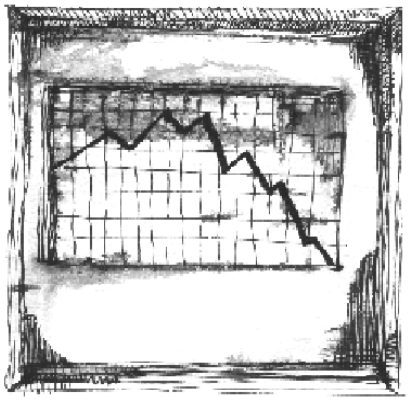
The special plea was dismissed.

# *WESTERN FLYER MANUFACTURING (PTY) LTD v DEWRANCE*

A JUDGMENT BY PISTOR AJ
BOPHUTATSWANA HIGH COURT
11 AUGUST 2005

2007 (6) SA 459 (B)

***Insolvency***



***An application to set aside a disposition should be brought with the authority of the liquidator. If a sale of assets under a disputed disposition has taken place by order of court, rescission of that order should take place in order to restore the proceeds of the sale.***

## THE FACTS

Durabuild (Pty) Ltd signed a deed of suretyship in favour of the North West Development Corporation (Pty) Ltd for a debt owed to NWDC by Comark Holdings (Pty) Ltd. Durabuild also passed a notarial bond over its movable assets in favour of NWDC and another company.

NWDC took possession of Durabuild's movable assets and brought about their sale by public auction. Durabuild was placed in liquidation.

Western Flyer Manufacturing (Pty) Ltd claimed that it was a creditor of Durabuild. It brought an application for an order that the suretyship and the notarial bond be set aside and the proceeds of the sale be paid to it. Prior to this, it had written a letter to Durabuild's liquidator in which it stated that it indemnified them in respect of the costs pursuant to the application.

The respondents raised a number of procedural objections to the application.

## THE DECISION

The respondents contended that Western Flyer had failed to provide the liquidators of Durabuild an indemnity in terms of section 32(1)(b) of the Insolvency Act (no 24 of 1936) and were therefore precluded with proceeding with the application.

Section 32(1)(b) provides that if a trustee fails to take proceedings to set aside an improper disposition, they may be taken by any creditor in the name of the trustee upon his indemnifying the trustee against all costs thereof . Western Flyer had not provided its indemnity timeously, but section 157(1) of the Act provides that nothing done under the Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court. This section could be applied in favour of Western Flyer so that its application could proceed.

The respondents contended that the application was not authorised by the liquidators of Durabuild and was brought without their authority.

Western Flyer had no answer to this contention. Its own papers indicated that it brought the application in its own name and the relief it sought included an order that it was authorised to bring the application in its own name.

In any event, an order that the proceeds of the sale be paid to Western Flyer required an application for rescission of the judgment that ordered the sale. Western Flyer had not brought such an application and was accordingly not entitled to the order it sought.

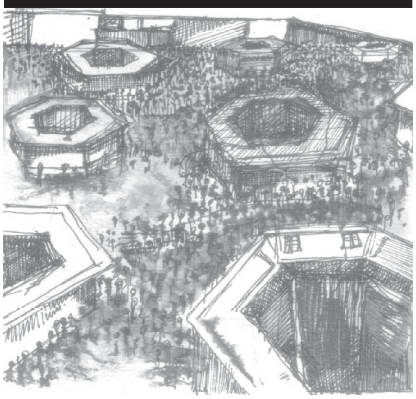
The application was dismissed.

# *AIRPORT COLD STORAGE (PTY) LTD v EBRAHIM*

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
22 MAY 2007

2008 (2) SA 303 (C)

***Corporations***



***The cumulative effect of a close corporation not keeping proper accounting records, the absence of an accounting officer and trading in insolvent circumstances may constitute grounds for declaring the members of the corporation personally responsible for the debts of the corporation.***

## THE FACTS

Sunset Beach Trading 232 CC was incorporated as a shelf corporation in June 2004. In January 2005, Ebrahim became the sole member of the corporation. No formal substitution of accounting officer took place. In that month, Sunset took over the business of a business previously run by Ebrahim, Zaki Meat.

Zaki Meat was then indebted to Airport Cold Storage (Pty) Ltd in the sum of R600 000 being money owed for goods sold and delivered. Airport accepted Sunset as substituted debtor. Ebrahim was then involved in the running of a number of businesses and the contact details of some were used by Sunset on its invoices and orders. Sunset kept no conventional books of account but recorded debtors on commercially available invoice books on which was stamped the details of the corporation's trading name and its VAT number. The corporation's business was conducted largely on a cash basis, only ten percent of its revenue being credited to its bank account. Sunset submitted no VAT returns and failed to pay any VAT. It employed a number of people but kept no PAYE records and issued no pay slips.

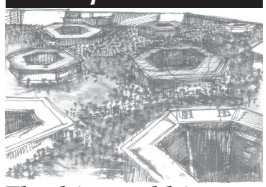
During the course of 2005, Sunset ordered goods from Airport Cold Storage. By June 2005, Sunset owed Airport Cold Storage approximately R250 000. Airport Cold Storage demanded payment of this amount from Sunset, and then brought a liquidation application against the corporation. In September 2005, Sunset was finally liquidated.

Airport Cold Storage brought an application against Ebrahim and his father in terms of sections 63(h), 64 and 65 of the Close Corporations Act to declare them personally liable for the debts of Sunset.

## THE DECISION

Section 56 of the Act requires a close corporation to keep such accounting records as are necessary fairly to present the state of affairs and business of the corporation and to explain the transactions and financial position of the business of the corporation. This section was to be interpreted in a purposive manner, and in applying it in the present case this meant determining whether the records kept did fairly present the state of affairs of Sunset. The records kept by the corporation were however essentially only the invoice books which recorded deliveries to customers and payments received. This did not constitute compliance with the Act. The records kept by Sunset were merely vouchers from which accounting records should have been compiled and did not fairly present the state of affairs of the corporation.

Sunset had not appointed an alternative accounting officer from the time that Ebrahim became the corporation's sole member. It had taken over Zaki Meat's debt in order to defraud creditors of that corporation and had facilitated the continued operation of its insolvent business. It had also traded in insolvent circumstances itself and incurred debts at a time when its members knew that it was insolvent. All of these facts pointed to the conclusion that Sunset Beach was liable for whatever amount was outstanding at the date of liquidation, irrespective of whether the original debt was incurred by itself or by Zaki Meat and the business of Sunset Beach was carried on recklessly.



Airport Cold Storage was therefore entitled to a declaratory order in terms of section 65 of the Act to the effect that Sunset Beach was deemed not to be a juristic person but, in respect of its claim, a venture of Ebrahim and his father personally. It followed that they should be held liable jointly and severally to Airport Cold Storage for whatever amounts Sunset Beach owed it at the date of liquidation.

*Given the precarious financial position of Sunset Beach right from the outset, and given the highly competitive nature of the market in which they operated, the decision of the defendants to continue trading and to incur further debts in order to try and 'trade out of its debt' justifies an inference, according to the plaintiff, that the business of Sunset Beach was being carried on recklessly.*

*See in this regard Ozinsky NO v Lloyd and Others 1992 (3) SA 396 (C) at 414G - H, quoted with approval in Philotex (Pty) Ltd and Others v Snyman and Others; Braitex (Pty) Ltd and Others v Snyman and Others 1998 (2) SA 138 (SCA) at 145.*

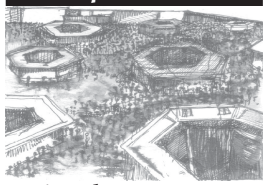
*The defendants presented a counter-argument, based on a dictum from an unreported English judgment quoted in Palmer's Company Law 24 ed (1987) at 1463 which, in turn, was quoted with approval by Goldstone JA in Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (In Liquidation) 1993 (1) SA 493 (A) at 504A - C. and which reads as follows:*

*In my judgment, there is nothing wrong in the fact that directors incur credit at a time when, to their knowledge, the company is not able to meet all its liabilities as they fall due.*

*As rightly pointed out by Adv Van Helden on behalf of the plaintiff, however, this statement was specifically disapproved by the Supreme Court of Appeal in the Philotex case supra, at 148B - E and no longer constitutes good law. I am accordingly unable to accept the argument presented on behalf of the defendants that there was any realistic prospect of trading themselves out of the debt trap into which they had landed themselves. The evidence shows on a balance of probabilities that, as a result of the debt burden voluntarily assumed by it, Sunset Beach was incapable of trading profitably and of meeting its financial commitments to its major supplier as and when they fell due. In my view, the conduct of the defendants in these circumstances was nothing short of reckless.*

# *MITTAL STEEL SOUTH AFRICA LTD v PIPECHEM CC*

*Corporations*



A JUDGMENT BY DONEN AJ
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
16 OCTOBER 2007

2008 (1) SA 640 (C)

***A close corporation may be represented by a member in litigation if this ensures that the close corporation will enjoy the right of access to the court.***

## THE FACTS

Mittal Steel South Africa Ltd brought an action against Pipechem CC for payment of R194 639,87. Pipechem entered an appearance to defend and stated that it would be represented in the litigation by Mr GA Crabbia, a member of the close corporation.

Mittal gave notice of a complaint that Pipechem had failed to comply with Uniform Rule 19(1) of the Rules of Court which provides that a notice of intention to defend must be delivered by a defendant personally or through his attorney. It contended that as Pipechem was a close corporation, the Rule required that it act through an attorney.

Pipechem contended that it was entitled to act through Crabbia who held a 80% interest in the close corporation.

## THE DECISION

Past judgments have denied a close corporation the right to be represented in litigation by a member. These were given prior to the promulgation of section 34 of the Constitution which 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.

Obtaining a default judgment against a defendant corporation simply because its alter ego, rather than an attorney, delivers a notice of intention to defend is tantamount to a denial of the right of access to court. Such a severe limitation upon the constitutional right of a corporation cannot be justified in relation to the convenience of the court and policy considerations. An injustice would arise should a default judgment flow from the failure of the defendant to deliver a notice of intention to defend through an attorney.

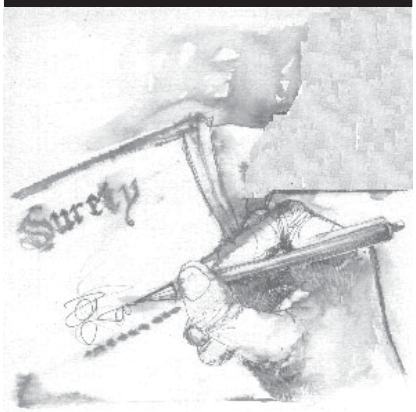
The effect of Mittal's notice of complaint was that it was seeking to deny Pipechem access to the court unless it acted through an attorney, despite the fact that Pipechem had notified Mittal and the court that it intended to defend and that it had a defence. Such a defence ought not to be suppressed even before the summary judgment stage of proceedings has been reached. The prejudice to Pipechem which would be caused by a default judgment remained incalculable. Pipechem's interest in the litigation, as well as the public interest in the expedition of the conclusion of any trial that may follow an unsuccessful summary judgment application, and the inconvenience to the court suggested by Mittal, could not reasonably and justifiably limit Pipechem's right of access.

# *ELEY v LYNN & MAIN INC*

A JUDGMENT BY MTHIYANE JA (LEWIS JA , PONNAN JA , HURT AJA and KGOMO AJA concurring)
SUPREME COURT OF APPEAL
22 NOVEMBER 2007

2008 (2) SA 151 (A)

## *Suretyship*




***A surety's obligations relate to the same debt as that incurred by the principal debtor which, if transformed by the taking of judgment against the principal debtor, relates to that judgment debt.***

## THE FACTS

In September 1994, Eley signed as surety for the debts of Help Seat It Southern Africa (Pty) Ltd in favour of Nedbank Ltd. After Eley abandoned participation in the corporation, the bank claimed payment of R157 685,55 from it, the debt arising from money advanced by way of an overdraft facility. Nedbank took judgment against the corporation for payment of this sum on 21 May 2001.

In March 2003, the bank ceded all its rights in book debts against the corporation to Lynn & Main Inc. Lynn & Main brought an action against Eley, summons being served on her domicilium address on 14 September 2005. The company took judgment against her on 18 October 2005 for payment of R157 685,55, interest and costs.

Eley contended that the claim against her prescribed three years after 21 May 2001. Lynn & Main contended that the claim prescribed in the same manner as it would prescribe against the principal debtor. The debt being a judgment debt, this would be thirty years after 21 May 2001.

## THE DECISION

The obligation of the principal debtor and the surety relates to the same debt. Therefore, if the principal debt is kept alive by a judgment, the surety's accessory obligation by common law continues to exist. This has been authoritatively stated in the case of *Jans v Nedcor Bank Ltd* 2003 (6) SA 646 (A). That judgment set out the fundamental principles applicable to suretyship contracts in general and could not be distinguished from the present case by confining its application to the effect of the interruption of the running of prescription against the principal debtor.

Eley also contended that the cession covered only book debts and not a judgment arising from a claim arising from an overdraft facility. Such a distinction however, was without foundation and the deed of suretyship covered the obligation arising from a judgment taken against the principal debtor.

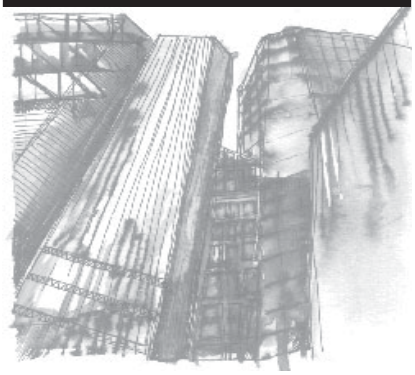
The appeal was dismissed.

# *MENQA v MARKOM*

JUDGMENT GIVEN IN THE SUPREME COURT OF APPEAL ON 30 NOVEMBER 2007 BY VAN HEERDEN JA (SCOTT JA, CLOETE JA, JAFTA JA AND KGOMO AJA concurring)

2008 CLR 28 (A)

***Property***



***A sale in execution which takes place pursuant to the issue of a warrant of execution given without judicial oversight as required by* Jaftha v Schoeman *2005 (2) SA 140 (CC) is null and void and may be set aside on that ground.***

## THE FACTS

In November 1999, a certain Mr Tromp obtained judgment against Markom for payment of R98 665.45 together with interest and costs. Four years later, a notice was served at certain fixed property owned by Markom, erf 23584 Maitland, situated at 17 Camden Street, Maitland, notifying of a sale in execution of the property. The warrant of execution had been signed by the clerk of the court. Markom applied urgently for an order staying the sale in execution pending an application for rescission of judgment. The order was granted, but by the time the order was served on the sheriff, the property had already been sold in execution to Menqa for R110 000.

Markom proceeded with his application for rescission. The application was dismissed. Markom applied for rescission of that judgment and this application was also dismissed. Markom appealed. Menqa took transfer of the property, paid the amount outstanding on the bond, and then sold the property to a certain Mr Roux.

Markom sought an order declaring null and void the sale in execution and all subsequent sales of the property.

## THE DECISION

Since judgment was handed down in the case of *Jaftha v Schoeman* 2005 (2) SA 140 (CC), judicial oversight is to be observed in the issue of a warrant of execution against immovable property. In the present case, the warrant of execution had been issued only by the clerk of the court. There had therefore been a failure to observe the requirements of the *Jaftha* judgment.

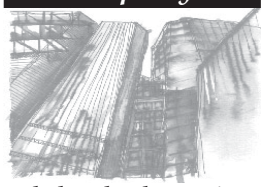
Section 70 of the Magistrates' Courts Act (no 32 of 1944) provides that a sale in execution shall not, in the case of immovable property, after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect. In the present case, Menqa was a purchaser in good faith and he had not been aware of any defect at the time of the sale in execution.

Section 70 however, did not assist Menqa because there had been a failure to comply the judicial oversight requirement of *Jaftha v Schoeman*. The warrant of execution was invalid as it was issued without judicial oversight, and the absence of this procedural safeguard imperilled Markom's constitutional rights under section 26(1). The sale in execution to Menqa was invalid for the same reason.

Markom was therefore entitled to an order declaring the sale in execution null and void, prohibiting transfer to Roux and suspending execution on the judgment obtained against him. He was not however, entitled to an order that he be registered as the owner of the property as his rights of ownership had to be established in future proceedings.

# *FIR & ASH INVESTMENTS (PTY) LTD v CRONJE*





A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
19 SEPTEMBER 2007

2008 (1) SA 556 (C)

***To demonstrate that a tacit term may be inferred that a tenant is absolved from liability for damage negligently caused to the leased premises, it must be shown that a disinterested bystander would have concluded that landlord and tenant would have agreed to such a term upon conclusion of the lease.***

## THE FACTS

Fir & Ash Investments (Pty) Ltd let certain commercial premises to Cronje. In terms of clause 3 of the lease, if the insurance premiums payable by Fir in respect of the building were increased as a result of Cronje's occupation, Fir would be entitled to increase the rent. In terms of clause 7.16, Cronje was obliged not to do or omit to do anything, or keep on the premises anything, or allow anything to be done on the premises which in terms of any fire insurance policy held by Fir could not be done or kept thereon, or which might render any policy void or voidable, and Cronje was to comply in all respects with the terms of any such policy. Fir was entitled to payment from Cronje of any additional premium. In terms of clause 7.20, Cronje was obliged to insure all shop fronts including plate glass at the premises against breakage or damage, with the interests of Fir noted under such insurance, with an insurance company approved by Fir. Clause 7.15 absolved Fir from liability for loss, damage or injury suffered by Cronje as a result of fire and provided that Cronje should take the necessary steps to insure its interest in the premises. Clause 7.2.1 obliged Cronje to maintain the property leased in the same condition as it was upon commencement of the lease.

While the lease was in force, a fire took place at the premises, allegedly caused by the negligence of Cronje's employees. Damages amounting to R306 000 resulted.

Fir's insurers sought to hold Cronje liable and brought an action against him in Fir's name by subrogation. Cronje defended the action on the grounds that it was a tacit term of the lease that Fir would insure the premises against fire and that both parties would enjoy the benefits of the insurance contract.

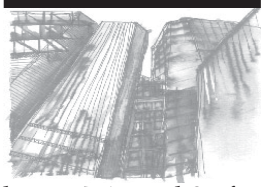
## THE DECISION

In the light of clause 7.2.1, Cronje's interest in the leased premises went beyond an interest in the stock or moveables kept at the premises, but extended to the building itself. His obligation to insure, as stated in clause 7.15, could therefore not be restricted to such items but included the property which had been damaged in the fire.

In the present case, it was significant that the lease did not provide that Firs would insure the premises. Cronje therefore could not depend on any express term obliging Firs to insure the premises as indicating that he would be absolved of any liability arising from damage caused to the premises. Cronje had to demonstrate that the tacit term contended for existed.

From the express terms of the lease, it was clear that the parties were aware of the importance of possible damaged to the premises and the need for insurance of the premises. The test for the existence of a tacit term is whether a disinterested bystander would infer that the parties intended such a term to subsist. However, in the light of these express terms, the probabilities were that a disinterested bystander would make no such inference in regard to the first tacit term, that Fir would insure the premises. Clauses 7.15 and 7.20 pointed in the opposite direction. No such tacit term could be inferred.

Even if such a tacit term could be inferred, the effect of it would be to make Cronje a co-insured, entitling him to the benefits of insurance even if he was responsible for loss and



disentitling the insurer from suing for recovery of such loss by subrogation. It would also entitle Cronje to claim damages should Fir not have insured the premises, a position which would be contrary to clauses 7.15 and 9 of the lease. Furthermore, it would be contrary to the common law position under which a tenant is liable for damage negligently caused to the leased premises.

Cronje's defence was rejected.

*In the absence of an express term in the present lease requiring the landlord to insure the premises against fire, the tenant is in effect trying to pull himself up by his own bootstraps by arguing, first, that a tacit duty to insure must be inferred and, once that is done, that a further tacit term should be inferred, to the effect that the insurance thus taken out by the landlord should enure to the mutual benefit of both landlord and tenant.*

*From the express terms of the present lease to which I have referred above, it is apparent that the parties were alive to various issues relating to insurance, yet they failed to provide for the obligation which the tenant now seeks to impose on the landlord. Had the officious bystander enquired of the parties at the time when the lease was concluded whether there was a contractual duty on the landlord to insure the premises against the risk of fire, I doubt whether the question would have elicited a prompt and unanimous answer from them. The landlord might have attempted to restrict any obligation to insure to the building itself. The landlord might also, with some justification, have referred to clauses 7.15 and 7.20.2, contending that it was up to the tenant to make his own arrangements regarding fire insurance. In these circumstances, the tenant falls down over the first hurdle.*

*Be that as it may, the second hurdle is even higher and more difficult to surmount. Even if a tacit term were to be inferred, imposing a duty on the landlord to insure the premises against fire, the effect of the second leg of the tacit term, if inferred, would be to make of the tenant a co-insured, thereby absolving him from all liability for damage caused by fire - even where such damage was caused by his own negligence. The tacit term would also preclude the landlord's insurer from recovering from the tenant by subrogation any loss caused by the tenant's fault. Such a tacit term would be in conflict with some of the express terms of the lease referred to above. It would give the tenant a right to claim damages, should the landlord commit a breach of such term by failing to insure the premises against fire or, having insured the premises, if it were to fail to repair the premises after a fire. This would clearly be contrary to the provisions of clause 7.15 and clause 9 quoted above. Moreover, the tacit term sought to be inferred would also be contrary to the express provisions of clause 7.2.1.*

# *JUST NAMES PROPERTIES 11 CC v FOURIE*



JUDGMENT BY MHLANTLA AJA (BRAND JA and HEHER JA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2007

2008 (1) SA 343 (A)

***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 by the offeror party 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. She did so after consulting with the estate agent arranging the sale, who telephoned Baldakis to report Fourie's concerns. The agent then took away the blank pages and they formed page 3 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

A distinction should be drawn between signing a contract in blank and thereafter authorising one's own representative to complete the terms, and signing a contract in blank and thereafter the completion of the terms by the other party to the contract. In the former case, there will normally be compliance with a statute requiring the contract to be in writing. In the latter case, there will not.

In the present case, to fall into the first category, Just Names had to contend that when Fourie signed the two blank pieces of paper, she was making a counter-offer on the basis of which the agent would be authorised to complete the terms of the sale. However, Baladakis remained the offeror throughout. A counter-offer could have arisen if Fourie had rejected the original offer as a whole or in part. But the mere request during the negotiations to modify a term did not amount to a counter-offer. The critical evidence in this regard was the telephone call which was made by the estate agent to Baladakis and his instruction to the agent to change the relevant clause.

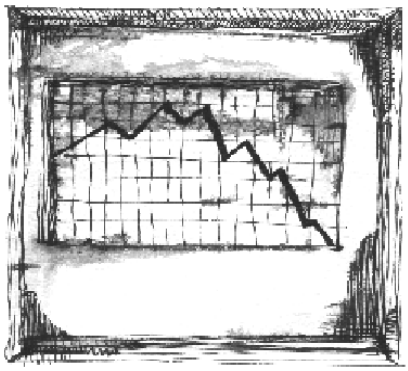
The contract therefore consisted in the written terms including the two blank pages which did not comply with section 2(1). Just Names could not enforce such an agreement. Its action failed.

# *LE ROUX v VIANA N.O.*

A JUDGMENT BY MLAMBO JA (NAVSA JA, NUGENT JA, JAFTA JA and KGOMO AJA concurring) SUPREME COURT OF APPEAL 30 NOVEMBER 2007

2008 (2) SA 173 (A)

***Insolvency***



***A liquidator is entitled to seize documents in terms of section 69(3) of the Insolvency Act (no 24 of 1936) in whatever form they may be, whether as data on a hard drive or otherwise, and may do so notwithstanding the fact that they are in the ownership and possession of a third party.***

## THE FACTS

Herlan Edmunds Engineering (Pty) Ltd and Herlan Investment Holdings Ltd were placed in liquidation. Le Roux, a former director of the companies resisted an application by the liquidators to obtain the records of the companies which were then on hard drives in the ownership and possession of Caspian Financial Services (Pty) Ltd and for which the liquidators had obtained a warrant. Caspian had been responsible for the administration of the financial affairs of the companies prior to their liquidation.

The liquidators contended that they were entitled to the records of the companies as it existed on the hard drives, in terms of section 69(3) of the Insolvency Act (no 24 of 1936). The section provides that if it appears to a magistrate to whom application is made for a warrant authorising the sheriff to attach, remove and hand over to the liquidators all books, documents and movables belonging to the companies in liquidation, that there are reasonable grounds for suspecting that such items belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of such items.

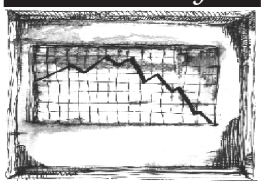
Le Roux contended that the section did not cover books and documents owned by a third party, and that in any event they were not in the form contemplated in the section and were therefore not susceptible to seizure in terms of that section.

## THE DECISION

The purpose of section 69(3) is to enable the seizure of property, books and documents relating to the insolvent estate wherever they may be. In the present case the object of the warrant obtained by the liquidators was the books and documents of the companies in liquidation on Caspian's hard drive. The warrant lists what was to be seized, ie financial, accounting and investment documents and records relating to the companies in liquidation. The objective of the warrant was therefore not the seizure of the hard drive.

The magistrate who issued the warrant was aware of the fact that the hard drive did not belong to the companies in liquidation and that it also contained information relating to innocent third parties: the warrant was framed so as to respect the confidentiality of the other information on the hard drive and did not permit the deputy sheriff to have access to it.

Properly construed, the reference to books and documents in section 69(3) has nothing to do with the form in which those books and documents are. The dictionary definition of a book, 'a set of records or accounts or the embodiment of a record of commercial transactions' and of a document 'a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record', fall within the contemplation of the section. They also fit in with the context within which the role and functions of a trustee are, in the scheme of the Insolvency Act. The books and documents stored on the hard drive and targeted by the warrant relate to the financial and business affairs of the companies in liquidation. Those



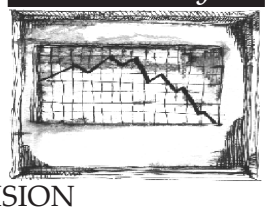
books and documents, irrespective of their form were clearly within the contemplation of section 69 and were susceptible to seizure under a warrant in terms of that section.

*The objective of s 69(3) contemplates nothing less than the seizure of property, books and documents relating to the insolvent estate wherever they may be. In this case the target of the warrant was the books and documents of the companies in liquidation contained on Caspian's hard drive. A reading of the warrant lists all that was to be seized consisting of financial, accounting and investment documents and records relating to the companies in liquidation. It is incorrect, as submitted on behalf of the appellants, that the objective of the warrant was the seizure of the hard drive. The magistrate was clearly alive to the fact that the hard drive did not belong to the companies in liquidation and that it also contained information relating to innocent third parties. Hence the warrant is couched in terms respecting the confidentiality of the other information on the hard drive and does not countenance the deputy sheriff having access to it.*

*Furthermore, properly construed the reference to books and documents in s 69(3) has nothing to do with the form in which those books and documents are. The Concise Oxford English Dictionary (10 ed, revised) defines a book as 'a set of records or accounts or the embodiment of a record of commercial transactions' and a document as 'a piece of written, printed or electronic matter that provides information or evidence or that serves as an official record'. That these definitions accord with what the section contemplates cannot be disputed. They also fit in with the context within which one must view the role and functions of a trustee in the scheme of the Insolvency Act. There is no dispute in this case that the books and documents stored on the hard drive and targeted by the warrant relate to the financial and business affairs of the companies in liquidation. That being the case, those books and documents, irrespective of the form they are in, are clearly within the contemplation of s 69 and are susceptible to seizure under a warrant in terms of that section. It can hardly be suggested, as counsel for the appellants submitted, that we should not take judicial notice of the technological advancements regarding electronic data creation, recording and storage because this was unheard of in 1936 when the Insolvency Act was passed.*

# *LEGH v NUNGU TRADING 353 (PTY) LTD*

*Insolvency*



A JUDGMENT BY PONNAN JA (HOWIE P, HEHER JA, PONNAN JA, MLAMBO JA and MALAN AJA concurring)
SUPREME COURT OF APPEAL
27 SEPTEMBER 2007

2008 (2) SA 1 (A)

***Section 20(1)(c) of the Insolvency Act (no 24 of 1936) does not apply to a company in liquidation and all assets held by the company are deemed to be in the custody and control of the Master until a liquidator is appointed.***

## THE FACTS

Rietfontein General Galvanisers (Pty) Ltd owned portion 40 (portion of portion 24) of the farm Rietfontein 63 IR Township. The property was neglected, to the point that it became a health hazard, and Ekurhuleni Metropolitan Municipality took steps to remedy this situation and to collect R134 473,22 unpaid charges relating to the property. It brought an action for payment of this sum, and took judgment against the company.

On notice to the company, the municipality applied for the sale in execution of the property. A year later, the sheriff attached the property and served notice on the company that the property would be sold in execution. The property was then sold to Nungu Trading 353 (Pty) Ltd for R100 and the usual procedures for registration of transfer of the property into Nungu's name then followed.

Legh, a shareholder in Rietfontein, brought an urgent application for the winding up of the company. Nungu intervened in the application and contended that it was entitled, in terms of section 20(1)(c) of the Insolvency Act (no 24 of 1936), to registration and transfer of the property into its name notwithstanding the provisional winding-up order being made final.

An order confirming the provisional winding up of Rietfontein and an order declaring that Nungu was entitled to registration and transfer of the property into its name was made. Legh appealed.

## THE DECISION

Section 20(1)(c) provides that the effect of the sequestration of the estate of an insolvent shall be that as soon as any sheriff whose duty it is to execute a judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs. The question was whether or not this section is rendered applicable to companies by section 339 of the Companies Act (no 61 of 1973).

Section 20(1)(a) provides that the effect of sequestration is to divest the insolvent of his estate and to vest it in the Master and then his trustee. On the other hand, the estate of a company in liquidation remains vested in the company. Section 20(1)(a) is therefore not applicable to a company, nor is section 20(1)(b). The intention therefore could not have been that section 20(1)(c) would be applicable to a company.

Section 361(1) of the Companies Act provides that in any winding-up by the court all the property of the company concerned shall be deemed to be in the custody and under the control of the Master until a provisional liquidator has been appointed and has assumed office. This too, means that section 20(1)(c) of the Insolvency Act does not apply to a company in liquidation. It is therefore incorrect to order the liquidation of a company and at the same time order that one of its assets be transferred to a third party. The order doing so was incorrectly given.

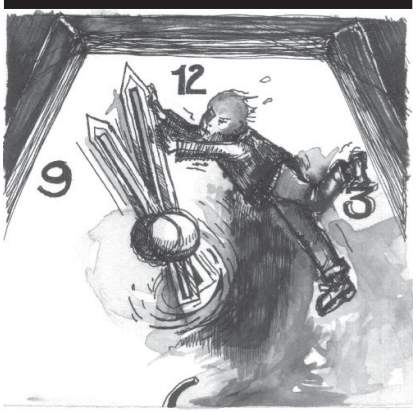
The order confirming the winding up of the company was confirmed and the order that Nungu was entitled to registration of transfer of the property was overruled.

# *NEDCOR BANK LTD v RUNDLE*

JUDGMENT BY COMBRINCK AJA (HARMS JA , PONNAN JA, MALAN AJA and CACHALIA AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2006

2008 (1) SA 415 (A)

## *Prescription*



***The Master's confirmation of a first and final liquidation and distribution account does not constitute the lifting of an impediment referred to in section 13 of the Prescription Act (no 68 of 1969) if that account is an interim account preceding a later final liquidation and distribution account.***

## THE FACTS

Nedcor Ltd lent money to Scientific Medical Systems (Pty) Ltd. On 12 December 1997, before the loan was fully repaid, Scientific was finally liquidated. In June 1998, Nedcor filed claims against the company in liquidation. The first liquidation and distribution account was confirmed by the Master of the High Court in August 2000 and Nedcor received dividends totalling R76 251,91. The Master confirmed the second and final liquidation and distribution account in November 2002.

Rundle had signed a deed of suretyship in favour of Nedcor in respect of the debts of Scientific. Nedcor claimed payment of the unpaid portion of its claim against Rundle. It issued summons against him for payment of R202 214,70. The summons was served on Rundle in October 2001.

Rundle contended that Nedcor's claim had become prescribed one year after August 2000, the date on which the Master confirmed the first liquidation and distribution account, and that the claim was incompetent for that reason.

## THE DECISION

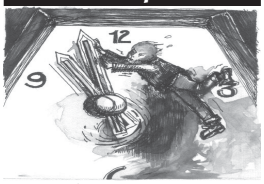
The question for decision was when the impediment on Nedcor's claim ceased to exist - on the date of confirmation of the first liquidation and distribution account or on the date of confirmation of the final liquidation and distribution account. In terms of section 13(1)(g) of the Prescription Act, the debt would prescribe one year after the relevant date.

In terms of this provision, prescription is interrupted if the debt is the object of a claim filed against a company in liquidation, and the period of prescription is completed one year after that impediment has ceased to exist. The question therefore was when Nedcor's claim ceased to be the object of a claim filed against Scientific in liquidation?

No event other than the confirmation of the liquidation and distribution account is relevant in this determination. The date of payment of dividends is irrelevant. In the present case, the first liquidation and distribution account was an interim account. The Master's confirmation of it could not render it a final account. The final account was the second one confirmed by the Master in November 2002. Since the impediment ceased to exist at this point, prescription began to run from then. Summons was served within one year of that date. Accordingly, the claim had not prescribed.

# *THRUPP INVESTMENT HOLDINGS (PTY) LTD v GOLDRICK*

*Prescription*



A JUDGMENT BY VAN OOSTEN J (GOLDBLATT J and MBHA J concurring)
WITWATERSRAND LOCAL DIVISION
13 MARCH 2007

2008 (2) SA 253 (W)

***Proof of indebtedness of a surety is not achieved by a certificate of indebtedness which may be issued in terms of the creditor's agreement with the principal debtor. A suretyship agreement must incorporate a provision for such a certificate if the creditor wishes to prove the surety's indebtedness in that manner. A creditor's claim is 'filed' within the meaning of section 13(1)(g) of the Prescription Act (no 68 of 1969) when it is admitted to proof in terms of section 44 of the Insolvency Act (no 24 of 1936).***

## THE FACTS

Thrupp Investment Holdings (Pty) Ltd leased certain premises to O'Briens Family Pub and Grill CC. The lease provided that prima facie proof of the lessee's indebtedness could be achieved by the issue of a certificate of indebtedness by a representative of Thrupp. Goldrick signed a deed of suretyship obliging him to meet any obligation of the lessee to Thrupp. The deed of suretyship did not contain a certificate of indebtedness clause.

Thrupp brought an action against Goldrick, after the lessee was placed in liquidation. The date of liquidation was 4 April 2001. Thrupp submitted its claim against the company in liquidation on 14 August 2001 and they were submitted to a general second meeting of creditors one year later. At the second meeting, they were rejected by the presiding officer. It sought to prove his indebtedness by means of a certificate of indebtedness. It also led evidence of the balance owing after offsetting payments made against rentals due under the lease.

Goldrick defended the action on the grounds that his indebtedness could not be proved by means of a certificate of indebtedness as the suretyship agreement did not provide for this. He also contended that prescription had run in respect of that part of the principal debt which was older than three years.

## THE DECISION

Thrupp contended that it could rely on the certificate of indebtedness clause provided for in the lease agreement, because its claim against Goldrick was predicated on its claim against the lessee, which could be proved in that manner. However, a certificate of balance is designed to facilitate proof of a liability and does not in itself establish liability. The certificate of balance proved the lessee's liability, but not that of the surety, Goldrick. The basis of any liability on the part of Goldrick lay in the suretyship agreement and not the lease.

The alternative evidence led by Thrupp however, established that Goldrick was liable to Thrupp for the unpaid rentals because this constituted prima facie evidence of his indebtedness and there was no evidence to contradict it.

As far as prescription was concerned, Thrupp contended that the running of prescription had been delayed from the time that it submitted its claim against the company in liquidation. Section 13(1)(g) of the Prescription Act (no 68 of 1969) provides that the completion of prescription is delayed if the debt is the object of a claim filed against a company in liquidation. The section requires that the claim be filed against the company in liquidation. This means that the creditor must prove its claim by affidavit and supporting documents which must be admitted to proof at a meeting of creditors.

Since Thrupp's claim documents were rejected by the presiding officer, its claim was not admitted to proof and consequently it did not submit its claim as provided for in section 13(1)(g). No delay in the running of prescription took place. Thrupp was entitled to only so much of the rental as was due in the three year period preceding institution of its claim.

# *RAMDIN v PILLAY*

**Prescription**

JUDGMENT BY LEVINSOHN DJP
DURBAN AND COAST LOCAL DIVISION
28 NOVEMBER 2007

2007 CLR 475 (D)

***A party which deposits money with another for the purpose of investment appoints that party its agent for that purpose. The depositing party's claim for repayment arises when demand for repayment is made.***

## THE FACTS

Between February 1997 and August 2000, Ramdin paid R940 000 into the trust account of a firm of attorneys. The firm's partners were Pillay and the two other defendants. The money was paid into the trust account for the purpose of investment on behalf of Ramdin.

In April 2002, Ramdin demanded repayment of the money. A portion was paid to him from the Attorneys' Fidelity Fund, but R590 000 remained outstanding. In March 2007, Ramdin issued summons for payment of this amount.

Pillay defended the action on the grounds that the claim had prescribed by the time summons was issued.

## THE DECISION

The defendants were not stakeholders as understood in our law. Having accepted the mandate to receive the money paid by Ramdin for the purpose of investment at his instruction, properly understood, they were agents. A stakeholder is one who holds money in circumstances where it is uncertain which of two parties will ultimately become entitled to receive what the stakeholder is holding. The identity of the creditor will only be established on the happening of an uncertain future event, the outcome of litigation or of a wager.

It followed that when the money was deposited into the attorneys' trust account, it became their property. When Ramdin demanded return of his money he effectively terminated the mandate given to them and called upon the defendants to pay back the funds deposited with them. Prescription began to run from that point.

Even assuming that the defendants were mere stakeholders, they would have been under an obligation to repay the money at that point.

Prescription had run in respect of the debt.

*It seems to me that during April 2002 when the plaintiff demanded return of his money he was effectively terminating the mandate and calling upon the defendants to pay back the funds deposited with them. Even assuming that I am wrong in holding that the defendants were not mere stakeholders, they would have been under an obligation to repay the money when payment was demanded.*

# *ALLIANZ INSURANCE v RHI REFRACTORIES AFRICA (PTY) LTD*

A JUDGMENT BY KGOMO AJA (HOWIE P, BRAND JA, LEWIS JA AND COMBRINCK JA concurring)
SUPREME COURT OF APPEAL
3 DECEMBER 2007

2007 CLR 520 (A)

***Insurance***

***An 'unitended' result is one which is planned and deliberately brought about, alternatively one which is foreseen and whose occurrence is brought about regardless of the consequences.***

## THE FACTS

Allianz Insurance insured RHI Refractories Africa (Pty) Ltd against the risk of physical loss or damage to property being construction works undertaken by RHI in terms of a construction contract. The work involved effecting an epoxy lining to various parts of an acid plant in order to protect the underlying concrete from acid erosion.

The insurance contract exempted Allianz from liability for 'the costs necessary to replace, repair or rectify any defect in design, plan or specification, materials or workmanship, but should unintended damage result or ensue from such a defect, this exclusion shall be limited to the additional costs of improvements to the original design, plan or specification.'

The epoxy lining applied by RHI failed, resulting in physical damage that had to be repaired. RHI claimed for the expenses incurred to repair this damage, amounting to R9m. Allianz contended that these expenses were covered by the exemption clause.

## THE DECISION

The essential question was whether the physical damage resulting from the failure of the epoxy lining constituted 'unintended damage' as contemplated by the exemption. Allianz contended that the physical damage was not unintended since it was not unforeseen or unexpected.

Allianz's contention could not be accepted. The ordinary meaning of 'intended', refers to consequences which are planned or intentionally brought about. Even if it was accepted that 'intended' had a broader meaning, something in addition to foreseeability would be required. It would require not only that the future event is foreseen but also that its occurrence would be brought about regardless of the consequences. Conversely, 'unintended' would mean that that future event was not foreseen and no steps would be taken to prevent its occurrence.

The exemption clause therefore did not apply.

# *SHEA v LEGATOR MCKENNA INC*

A JUDGMENT BY MOTALA AJ
DURBAN AND COAST LOCAL DIVISION
16 NOVEMBER 2007

2007 CLR 484 (D)

**Contract**

***Acts undertaken by a curator at a time when the curator does not have letters of curatorship are null and void and transactions concluded at such a time may be set aside.***

## THE FACTS

In February 2002, Shea was involved in a motor accident that left her unconscious for a month and immobile thereafter. In March 2002, the second defendant, an attorney in the firm Legator McKenna Inc, was appointed as curator bonis to administer and take control of her estate. Her estate included certain fixed property.

Later in March, the curator signed a sole mandate in favour of Wakefields Estate Agents to sell the fixed property for R550 000. In April 2002, the curator sold the property for R540 000. A week after the sale, the curator obtained a bond of security to enable him to put up security to the Master of the High Court in terms of section 77 of the Administration of Estates Act (no 66 of 1965). In June 2002, the curator received letters of curatorship from the Master of the High Court. The curator requested the consent of the Master to the sale of the property and this was given in July 2002. The property was then transferred into the name of the purchaser.

In March 2003, an order was granted declaring Shea to be incapable of managing her own affairs. She brought an action against Legator McKenna, the curator and the purchaser, claiming an order that the transfer of the property was invalid and setting aside the transfer, alternatively directing the transfer of the property to her against payment of R540 000.

## THE DECISION

Section 71(1) of the Administration of Estates Act provides that every person appointed curator as provided for in the Act, shall, before letters of tutorship or curatorship are granted or signed and sealed, when called upon by the Master to do so, find security to the satisfaction of the Master in an amount determined by the Master, for the proper performance of his functions. The intention of the Legislature in enacting section 71(1) of the Act was not to protect the interests of third parties, but to protect the interests of the de cujus. In consequence, measures intended for the protection of the de cujus, such as the need for the curator bonis to find security to the satisfaction of the Master as a necessary precursor to the issue of letters of curatorship, were intended by the Legislature to be of cardinal importance and acts in conflict therewith are not valid acts.

The purported acceptance of the offer to purchase by the curator, in circumstances where he was not in receipt of letters of authority in terms of section 71(1) of the Act, constituted conduct in direct prohibition of that provision. The agreement of sale purporting to have been concluded between the curator and the purchaser was therefore a nullity. It did not provide a valid underlying causa for the subsequent transfer in pursuance thereof into the name of the purchaser.

Although the transfer of ownership in our law did not depend on a valid underlying causa, as is required by a causal theory of transfer of ownership, the real agreement by which transfer of the property did take place was a power of attorney which itself referred to the underlying agreement of sale. This being an agreement affected by invalidity, the power of attorney provided no basis for the transfer of the property to the purchaser.

The agreement of sale was therefore null and void and the transfer of the property to the purchaser was set aside.

# *BE BOP A LULA MANUFACTURING & PRINTING CC v KINGTEX MARKETING (PTY) LTD*

*Contract*

A JUDGMENT BY MALAN AJA (HARMS ADP, NAVSA JA, LEWIS JA AND HURT AJA concurring) SUPREME COURT OF APPEAL 29 NOVEMBER 2007

2007 CLR 475 (A)

***A compromise may take place without express consensus between the parties. This may occur if one of the parties is reasonably entitled to assume from the words or conduct of the other that they were in agreement, despite the fact that there was no real agreement between the parties.***

## THE FACTS

Kingtex Marketing (Pty) Ltd supplied certain T-shirts to Be Bop A Lula Manufacturing & Printing CC, the total price payable being R229 846,07. After delivery, Be Bop alleged that a large proportion of the T-shirts were defective and that it did not consider itself obliged to pay the total price. It despatched a cheque to Kingtex for R107 196,89.

The words 'Full and Final Settlement of Account' were added to the face of the cheque. The cheque was then despatched to Kingtex under cover of two letters. The first stated that it was a 'credit request' in the sum of R122 649,18 arising from the fact that the various defects in the T-shirts had meant they could only be on-sold at a lower price and had had to be examined and repaired. The second letter stated that it was a 'final reconciliation' and a calculation was done showing how the sum of R107 196,89 was arrived at.

Kingtex's attorneys then addressed Be Bop. They stated that Kingtex did not accept Be Bop's position and that if Be Bop did not accept Kingtex's claim that the full amount was due and payable, the cheque it had sent should be countermanded. Should Be Bop do so, Kingtex would then proceed with action for payment of the full amount outstanding. Should no countermand be issued, the cheque would be paid into the attorneys' trust account pending the outcome of the dispute regarding the balance owing.

The cheque was in fact deposited to Kingtex's account on due date. When Be Bop received the letter from Kingtex's attorneys, it was too late to countermand the cheque. If it had not been too late, Be Bop would have done so.

Kingtex brought an action for payment of the balance owing. Be Bop defended the action on the grounds that the full amount was not payable as the T-shirts were defective, alternatively that the parties had concluded a compromise. The latter defence was that upon which Be Bop ultimately depended.

## THE DECISION

The words 'full and final settlement of account' was to be understood in the context of the letters and the background of the dispute between the parties in order to determine whether the words were intended to effect a compromise or to pay an admitted liability.

In the credit request Be Bop set out how the amount of the credit requested was composed, and asked for a credit in that amount. This constituted an offer that Kingtex could have accepted or rejected. Read with the final reconciliation, Be Bop again showed the amount due after taking the amount of the credit requested into consideration. In this context the words 'full and final settlement of account' on the cheque could only amount to an offer to Kingtex to settle the dispute by payment of that amount. Kingtex could have accepted or rejected the offer, but on acceptance the dispute between the parties would be compromised. The fact that Be Bop admitted liability in a certain amount did not prevent the proposal being construed as an offer of compromise.

It was clear from the letter sent by Kingtex's attorneys that Kingtex did construe these three documents in this manner. The fact that Be Bop tried to countermand the cheque was no indication that it tried to compromise the matter only after a refusal of its offer by Kingtex. It

could mean only that Be Bop would rely on its alternative complaint should the offer be rejected. The cheque accompanying the two letters formed part of the offer and it amounted to an invitation to deposit the cheque to indicate its acceptance.

By depositing the cheque and using the money so deposited for the payment of fees and expenses, Kingtex indicated that it had accepted the offer. Any conditions added to the deposit of the money were irrelevant and Be Bop acted reasonably in relying on the impression that Kingtex was accepting the offer of compromise and compromising its claim.

The action was dismissed.

*Although, generally, a contract is founded on consensus, contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement.*[1] *This is, as I will show, what happened in this case.*

*The words inscribed on the cheque, 'full and final settlement of account', must be construed in the context of the two letters and the background of the dispute between the parties to ascertain whether it was intended to effect a compromise or to pay an admitted liability.*[2] *In the Credit Request the appellant sets out exactly how the amount of the credit requested is composed asking for a credit in that amount. This is surely an offer that the respondent could have accepted or declined. Read with the Final Reconciliation, the appellant again shows the amount due after taking the amount of the credit requested into consideration. The two letters set out clearly the extent to which the appellant asserts that it is liable. In this context the words 'full and final settlement of account' on the cheque can only amount to an offer to the respondent to settle their dispute by payment of that amount which the latter could have accepted or declined, but on acceptance of which the dispute between the parties would be compromised.*

[1] RH Christie assisted by Victoria McFarlane *The Law of Contract in South Africa* 5ed (2006) 24 ff and see, in particular, *Sonap Petroleum SA (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) 238I–240B.

[2] *ABSA Bank Ltd v Van de Vyver NO* above para 16.

# *THE* OLYMPIC COUNTESS
## *FORTIS BANK (NEDERLAND) NV v ORIENT DENIZCILIK TURIZM SANAYI VE TICARET SA*

A JUDGMENT BY SCOTT JA (FARLAM JA, HEHER JA, COMBRINCK JA and HURT AJA concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2007

2008 (1) SA 376 (A)

***Shipping***

***Section 11(4)(c)(v) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) must be construed in the light of section 11(8). The rights of a claimant making a claim in terms of section 11(8) can be no greater than the rights of the party whose claim has been paid in terms thereof.***

### THE FACTS

In March 2003, Orient Denizcilik Turizm Sandayive Ticaret SA concluded an agreement with the owner of the *Olympic Countess*, Royal Olympic Cruise Lines Ltd, in terms of which it was appointed as port agent for Royal at Istanbul in respect of various ships including the *Olympic Countess*. In terms of the agreement, Orient undertook to pay certain of Royal's debts. It then paid three creditors who had rendered services to the ship and made a fourth payment to a party which had paid one of these creditors. The claims of all three creditors arose more than a year before proceedings were later brought to enforce them.

In January 2004, the *Olympic Countess* was arrested was arrested by a number of creditors in Durban, and was then sold in terms of section 9(1) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) and a fund was established. Fortis Bank (Nederland) NV submitted a claim in respect of a mortgage over the ship, ranking in terms of section 11(4)(d) of the Act.

Orient submitted a claim and contended that it ranked as a claim in terms of section 11(4)(c)(v). The effect of such a ranking would be to confer priority over the bank's claim. The bank disputed the ranking contended for by Orient. Orient applied for an order for payment from the fund in accordance with the priority conferred by section 11(4)(c)(v).

### THE DECISION

A claim under section 11(4)(c)(v) is a claim, arising not earlier than one year earlier than the date of commencement of proceedings to enforce it, in respect of the repair of a ship, or the supply of goods or the rendering of services to the ship for the employment, maintenance, protection or preservation thereof. In terms of section 11(5), such a claim ranks ahead of a claim in respect of a mortgage over a ship.

Section 11(4)(c)(v) must be considered in the light of section 11(8) and so as to avoid any overlapping between the different categories of claims listed. The meaning of 'in respect of' as used in section 11(4)(c)(v) should therefore not be construed as carrying any significant change of intention. The phrase should therefore not be construed as conferring the right to claim not only on the party which supplies goods or renders services to a ship but also on one who pays that party.

Section 11(8) confers the same rights on a party which pays the claim of a party which would have ranked under section 11(4). The three creditors whose claims were paid by Orient did not have claims which would have ranked under section 11(4) because those claims arose more than one year before the commencement of proceedings to enforce them. Accordingly, the claims Orient acquired by paying the creditors were not claims ranking under section 11(4). Its claims therefore did not rank ahead of the bank's claim.

The application was dismissed.

# What the law reports said ...

Ignorance as an excuse

In *Thrupp Investment Holdings (Pty) Ltd v Goldrick* (page 61) Thrupp leased premises to O'Briens Family Pub and Grill CC. Goldrick, a 50% owner of O'Briens, was surety for the payment of the rentals but, upon being informed that the arrear rentals had mounted up to R250 000, professed ignorance of the terms of the lease agreement. This information not only left him 'breathless' but also elicited the response 'Well look, his is ridiculous, how did it get there?'

Seeking justice before the Honourabel court

In *Mittal Steel South Africa Ltd v Pipechem CC* (page 51) Mittal sued Pipechem for payment of goods sold and delivered. Crabbia, who owned an 80% member's interest in Pipechem, wished to defend Pipechem in the action without the assistance of a legal representative.

He introduced his defence as follows:
'Private Law does not have justice as its main objective and is financially driven. And they have the privileged advantage of using their know-how and client's money or lack of money to influence the case between themselves.'

In a letter to Mittal's attorneys, he stated:
'. . .
(4) We wish to give notice should Shepstone and Wiley not accept Mr GA Crabbia as the defendant's representative. We will take the matter to the Honourable court at the High court Keerom street Cape Town for there Opinion.
(5) As stated on you point 3 Pipechem can only act through its members and in this instance is acting through GA Crabbia. As per the Rule the defendant is only able to act through its members. Therefore it may be represented by its members or attorney.'

Later, he delivered a notice stating:
'We ask the Honourabel court for a concessesion if possible for Mr G Crabbia to represent Pipechem CC
(1) Rule 19 GA Crabbia is not a Agent but Pipechem CC . . . A agent acts on behave of and is not part of . . . Crabbia is 80% of Pipechem CC and is part of Pipechem and not a Agent.
(2) GA Crabbia signed a personal guarantee as 80% owner.
(3) If the above is not acceptable to the Honourabel court the

plaintiff whishes to ask for a state attorney who will not be rewarded financially for using his or her privileged position and knowledge.'

The judge, noting that Crabbia reached the second year of engineering at the University of the Witwatersrand, said 'it appears that the written English language is not Crabbia's strongest suit'.

# *DE VILLIERS v McKAY N.O.*

A JUDGMENT BY CLOETE JA (MPATI DP, NAVSA JA, CLOETE JA, PONNAN JA and CACHALIA JA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2008

2008 (4) SA 161 (A)

## *Contract*

***The obligations of associated contracts will not be considered to be reciprocal across contracts unless it is clear that the parties intended their obligations to be reciprocal in that manner. There is no reciprocity merely because one party required the honouring of an obligation as a condition for concluding another contract.***

THE FACTS

De Villiers and McKay in his capacity as authorised trustee of the West Coast Trust concluded a contract for the sale of the trust's entire rights in The Sixteen Mile Beach Development Trust for R1m. It was intended that this trust would develop a township on land it owned. Clause 9 of the contract provided that the agreement contained all the conditions of the agreement and no amendment would be valid unless it was in writing and signed by both parties.

Prior to signature, and as a condition imposed by McKay for concluding the contract, De Villiers gave a written undertaking to a third party that the company which was to develop Sixteen Mile Beach would transfer to it plots in the intended development. The condition was imposed pre-contractually and was not included in the contract of sale.

The Development Trust was sequestrated. The trustees in insolvency paid the West Coast Trust R2.5m in dividends in respect of debts owed by the Development Trust to the West Coast Trust. The West Coast Trust refused to pay this sum to De Villiers on the grounds that the obligation to transfer plots to the third party had become incapable of performance because the property on which the development was to have taken place was sold in the process of liquidating the Development Trust's assets.

De Villiers accepted that the obligation to transfer the plots had become impossible of performance but contended that this was an obligation separate from the contract. He brought an action for payment of the amount received by the West Coast Trust.

THE DECISION

If the obligation to procure transfer of the plots was part of the consideration due by De Villiers to the West Coast Trust under the contract, then the trust would be entitled to withhold payment on the grounds that the two obligations were reciprocal. However, De Villiers' obligation did not form part of the contract as it was not included in it, and could not be included in it because of clause 9.

The only basis upon which De Villiers' obligation could form part of the contract would be upon rectification of the contract. However, there was no evidence to support rectification. The obligation was separate from the contract concluded by the parties and its performance or otherwise was therefore irrelevant to that contract.

The action for payment succeeded.

# *MILLENNIUM WASTE MANAGEMENT (PTY) LTD v CHAIRPERSON OF THE TENDER BOARD : LIMPOPO PROVINCE*



JUDGMENT GIVEN IN THE SUPREME COURT OF APPEAL ON 29 NOVEMBER 2007 BY JAFTA JA (HOWIE P, NUGENT JA, MAYA JA AND MHLANTLA AJA concurring)

2008 CLR 1 (A)

***A tender committee may condone a failure to comply with requirements of the tendering process if empowered to do so and this is in the public interest. Failure to comply with such requirements does not necessarily mean that that party should not be awarded the tender.***

## THE FACTS

The Department of Health and Social Development invited tenders for the disposal of hospital waste. Millennium Waste Management (Pty) Ltd was one of the tenderers, as was a consortium consisting of Thermopower Technology Processors, Buhle Waste and Afrimedicals JV.

Millennium's tender failed at an initial phase in which administrative compliance was assessed. This happened because Millennium had failed to sign a form entitled 'Declaration of Interest'. This form was directed at the disclosure of any connection between the tenderer and the principal. When Millennium requested the reason for the failure of its tender and was informed, it completed the Declaration of Interest form. By that time however, the consortium had been awarded the tender.

Unaware that the award had been made, Millennium brought an urgent application to restrain the department from awarding the tender to the consortium and directing that the award process be reviewed. The application was dismissed. Millennium appealed.

## THE DECISION

The assessment of the tenders and the award of one was done in terms of the Northern Transvaal Tender Board Act (no 200 of 1993). The Act empowered the Member of the Executive Council for Finance and Expenditure to make regulations governing the tender process. This he had done. Regulation 5(c) thereof empowered the tender board to accept tenders even if they failed to comply with tender requirements. The tender committee which was delegated to attend to the tender process, was therefore able to condone Millennium's failure to complete the Declaration of Interest form. The rejection of Millennium's tender simply because it failed to complete this form therefore could not be supported.

The question then was whether Millennium's tender was an acceptable tender in terms of the Preferential Procurement Policy Framework Act (no 5 of 2000). There was nothing to indicate that it was not. The fact that the Declaration of Interest form had not been completed did not indicate that Millennium's tender was attended by corruption. The evidence indicated that its omission was innocent. Accordingly, to have rejected its tender on the strength of that failure constituted unreasonable action and was influenced by an error of law. Millennium's tender was properly considered an acceptable tender.

The question then was what remedy Millennium was entitled to. Its loss amounted to the loss of an opportunity to have its tender considered, not necessarily the loss of the tender itself which may nevertheless have been awarded to the consortium. The consortium's tender had been accepted, and a contract concluded and acted upon. In these circumstances, the appropriate remedy would be to order that the tender committee reconsider the tenders and accept Millennium's tender if this is the appropriate tender award.

The appeal succeeded.

# *FAIROAKS INVESTMENT HOLDINGS (PTY) LTD v OLIVER*



JUDGMENT GIVEN IN THE SUPREME COURT OF APPEAL ON 28 MARCH 2008 BY STREICHER JA (MTHIYANE JA, PONNAN JA, HURT AJA AND KGOMO AJA concurring)

2008 (4) SA 302 (A)

***A sale of fixed property may be constituted by the exchange of letters reviving a lapsed agreement but compliance with section 2(1) of the Alienation of Land Act (no 68 of 1981) requires that any revived suspensive condition incorporated in that agreement also be recorded in writing.***

## THE FACTS

Fairoaks Investment Holdings (Pty) Limited and Willow Falls Estate brought an action against Oliver based on allegations of the conclusion of a sale of fixed property concluded by Oliver as seller and Willow Falls Estate as buyer, and breach thereof by Oliver.

A sale agreement first concluded between the parties provided that the property was sold for R2 150 000 subject to three suspensive conditions. One of the conditions was that the property was to be rezoned and that approval by the town planning authority of a site development plan for a residential development of at least fifteen housing units per hectare was to be obtained within twelve months of the date of signature of the agreement. This condition was not fulfilled within twelve months, with the consequence that the agreement lapsed. Attorneys acting for Willow Falls Estate then wrote to Oliver's attorneys offering to revive the lapsed agreement. Oliver's attorneys wrote back to them accepting this, and the unfulfilled suspensive condition was reconstituted, with the provision that compliance therewith was to occur upon or before transfer of the property. Willow Falls Estate alleged that it had waived the benefit of this condition, alternatively that by her words and conduct, Oliver had waived any right to rely on failure of the suspensive condition.

Oliver excepted to the claim on various grounds. One exception was that no cause of action was shown because it was alleged that the parties had concluded a sale of land which did not comply with the provisions of section 2(1) of the Alienation of Land Act (no 68 of 1981). Another exception was that no cause of action was shown because the contract of sale was void ab initio by the lapsing of the suspensive condition.

## THE DECISION

The first sale agreement lapsed because of a failed suspensive condition. The revival of that agreement was alleged to have taken place by the later exchange of letters, that agreement incorporating an amendment to the suspensive condition relating to the rezoning of the property.

The effect of these allegations was to profer the creation of a new agreement on terms different from the terms originally agreed to. That agreement had to comply with section 2(1) of the Alienation of Land Act, but based on the allegations made by Fairoaks in its particulars of claim, did not do so. The exchange of letters could not be interpreted so as to indicate a waiver of the requirement that the property be rezoned because payment of the purchase price was specifically made conditional upon fulfilment of that object.

As far as the alternative exception was concerned, it was clear that the rezoning of the property had not taken place within the stipulated time period. This meant that the suspensive condition had not been fulfilled. The agreement could not then be revived by the seller waiving the condition, for whose benefit the condition had not been created. The agreement was void ab initio.

On either basis, the particulars of claim did not disclose a cause of action. The exception was upheld.

# *FRASER v VILJOEN*



JUDGMENT GIVEN IN THE SUPREME COURT OF APPEAL ON 27 MARCH 2008 BY COMBRINCK JA (SCOTT JA, CAMERON JA, MTHIYANE JA AND CACHALIA JA concurring)

2008 (4) SA 106 (A)

***A party to a sale of fixed property may not authorise the other party to the sale to complete essential terms of the sale on their behalf if there is to be a valid and binding sale in compliance with section 2(1) of the Alienation of Land Act (no 68 of 1981).***

## THE FACTS

Fraser offered to buy Viljoen's property, a flat situated at Blythedale Beach KwaZulu-Natal, for R180 000. The offer was unsigned, omitted the names of the buyer and seller, and the description of the property. Viljoen counter-offered with a price of R185 000 and returned to Fraser the document which then showed his name as seller, the amended purchase price, all alterations initialled and the signature of a witness. The name of the purchaser and the description of the property remained omitted. Fraser obtained the full description of the property and inserted this in the document, and signed the addition.

Viljoen later indicated her unwillingness to proceed with the sale. Fraser brought an application for an order that the sale was valid and binding and compelling Viljoen to effect transfer. Viljoen contended that the sale agreement failed to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981) in that it had not been reduced to writing. Fraser contended that the sale agreement had been completely reduced to writing in that at the time of final signature, the description of the property had been inserted with Viljoen's authority.

## THE DECISION

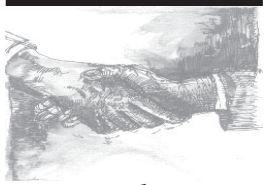
Assuming that the description of the property was inserted with Viljoen's authority, the question was whether or not there had been proper compliance with section 2(1) which requires that an agreement of sale of fixed property must be reduced to writing and signed by both parties or by their agents acting on their written authority.

Were one party to authorise the other to sign on his or her behalf, this would nullify the object of section 2(1) which is to preclude reliance on oral consensus in the conclusion of the sale of fixed property. This is what Fraser contended had taken place when the description of the property was inserted after the return of the document to him. Had Fraser returned the document to Viljoen for signature after the insertion of the property description, there would have been compliance with the section. However, since this was not done, the document failed to comply and the sale was invalid.

The application was dismissed.

# *MERCURIUS MOTORS v LOPEZ*





A JUDGMENT BY NAVSA JA (STREICHER JA, PONNAN JA, MAYA JA and MHLANTLA AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2008

2008 (3) SA 572 (A)

***An exemption clause which contains terms contrary to the essence of the contract in which it is incorporated should be clearly and pertinently brought to the other contracting party's attention rather than by way of an inconspicuous note.***

## THE FACTS

Lopez delivered a Jeep Cherokee motor vehicle to the premises of Mercurius Motors in order to have the vehicle serviced, have minor repairs and spotlights installed. The vehicle was then under warranty by Daimler Chrysler Company, and Mercurius was the franchise dealer for that company.

The work was carried out under a warranty repair order which contained the words 'not responsible for loss or damage to cars or articles left in cars in case of fire, theft or any other cause beyond our control'. Also signed was a repair order form which contained the words 'Please remove pull-out radios and valuables from your vehicle. We will not be held responsible for any theft whatsoever.' Both provisions were prominent and could easily be noticed by anyone signing the documents.

Attached to the repair order form was a carbon copy, underneath which were terms and conditions on the reverse side. They included clause 5 which provided: 'I/we acknowledge that mercurius shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (including gross negligence) of their representatives, agents or employees'.

While the jeep was at the premises, it was stolen and could not be recovered. Lopez claimed the value of the jeep from Mercurius Motors. Mercurius defended the action on the grounds that the exemption clauses applied.

## THE DECISION

As the exemption contained in the warranty repair order referred to loss as a result of a cause 'beyond our control' and the loss incurred was within the control of Mercurius, it did not apply in the present case.

The exemption in the repair order form concerned theft relating to the theft of valuables out of the vehicle, rather than of the vehicle itself. Clause 5 however, was stated in wide terms. The provision undermined the very essence of the contract of deposit, and it was therefore necessary that it should have been clearly and pertinently brought to Lopez' attention rather than by way of an inconspicuous and barely legible clause that referred to the conditions on the reverse side of the page.

Mercurius was not entitled to rely on the exemption provisions. It had been negligent in its custody of the vehicle and was therefore liable in damages to Lopez. The action succeeded.

# *WIGHTMAN v HEADFOUR (PTY) LTD*



A JUDGMENT BY HEHER JA (MPATI DP, CAMERON JA, PONNAN JA and MHLANTLA AJA concurring)
SUPREME COURT OF APPEAL
10 MARCH 2008

2008 (3) SA 371 (A)

***If a builder gives a duplicate set of keys to his employer with the intention that the employer obtains access to the premises, the builder does not thereby abandon possession of the premises in favour of the employer and the builder may still assert his right to restoration of possession of the premises upon showing that he has been unlawfully dispossessed.***

## 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 an agreement between the parties, that Wightman's failure to attach 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

Wightman did not lose possession of the premises merely because he delivered a duplicate set of keys to Headfour. He lost possession because Headfour entered the premises with the intention of taking possession, despite the agreement concluded between the parties.

In order to demonstrate his right to recover possession under the mandament van spolie, Wightman did not have to show that he was dispossessed by fraud or violence. Wightman had shown that he had had undisturbed possession of the premises and had then been dispossessed when Headfour took occupation of them, appointing its own security guards to deny entrance to Wightman. This was illicit dispossession in the sense that it was done in a manner that the law will not countenance, ie with deceit, and it entitled Wightman to restoration of possession under the mandament van spolie.

As Wightman's intention was to assert his builder's lien, he was entitled to security in place of restoration of possession. Accordingly, Headfour could furnish security as an alternative to restoring possession of the premises to Wightman.

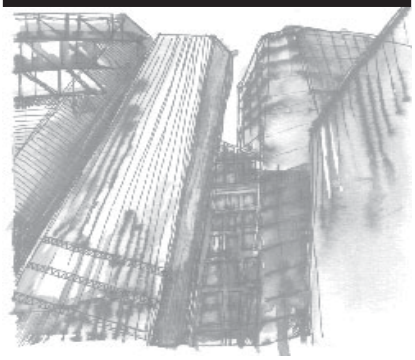
The appeal succeeded.

# *QUALIDENTAL LABORATORIES (PTY) LTD v HERITAGE WESTERN CAPE*

A JUDGMENT BY MLAMBO JA (HOWIE P, NAVSA JA, VAN HEERDEN JA AND MALAN AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2007

2008 CLR 19 (A)

***Property***



***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

Qualidental contended that Heritage Western Cape was not empowered by section 34(1) to impose any conditions to permission given for the demolition of buildings. The section provides that no person may alter or demolish any structure or part of a structure which is older than 60 years without a permit issued by the relevant provincial heritage resources authority.

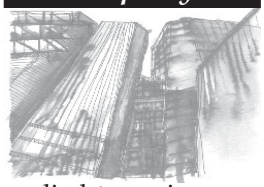
When Heritage Western Cape approved the demolition of the annex and not the villa it was in effect approving the partial demolition of a single structure. It considered the villa to be a building of considerable cultural significance and worthy of preservation. Any new development that would detract from the villa and its surrounds would be contrary to its obligation to protect and conserve the villa's landmark status. The condition imposed therefore accorded with its conservation mandate in terms of the Act and was directly in line with the principles of heritage resources management set out in the Act. Heritage Western Cape's power to impose conditions in was not as narrowly circumscribed as contended for by Qualidental.

The purpose and effect of the condition was designed to enable Heritage Western Cape to exercise a power vested in it in terms of the Act and this was consonant with the overall objective of the Act ie the conservation of a heritage resource.

The condition was therefore validly imposed. The appeal failed.

# *CARIBBEAN ESTATES (PTY) LTD v SEETHAL N.O.*





A JUDGMENT BY KONDILE J
NATAL PROVINCIAL DIVISION
27 SEPTEMBER 2007

2008 (4) SA 136 (N)

***Additional property rates may not be imposed in terms of section 159 of the Local Authorities Ordinance (no 25 of 1974) if rates in respect of the property concerned have at all times been paid although subdivided portions of the property have not been separately valued under a valuation roll.***

## THE FACTS

Caribbean Estates (Pty) Ltd owned the remaining extent of portion 2 of erf 1015, Port Edward. The property was 9,3728 hectares in extent.

In 1990 the property was subdivided into three properties. These were portion 28, portion 36 and the remaining extent of portion 2. Certificates of Registered Title in respect of portion 28 and portion 36 were taken out in the office of the Registrar of Deeds at Pietermaritzburg in 1990. After the subdivision the remaining extent reduced in size to 4,2769 hectares.

Upon subdivision, the valuation roll of the Hibiscus Coast Municipality was not changed. The valuation of the original property remained at R552 000. The zoning of the properties also remained the same.

In 2004, Caribbean applied for approval to subdivide portions 28 and 36. The municipality approved this application. Caribbean sold the subdivided portions and then applied for rates clearance certificates in respect of these properties in terms of section 118 of the Local Government: Municipal Systems Act (no 32 of 2000). The municipality stated that it was unaware of the existence of the subdivided portions and issued a rates clearance certificate for the parent property.

Caribbean requested rates clearance certificates for the subdivided properties. The municipality responded by stating that it would apply section 159 of the Local Authorities Ordinance 25 of 1974, amend the valuation roll, and impose additional general rates on portions 28 and 36. These amounted to R93 553,25 in respect of portion 28 and R478 999,64 in respect of portion 36.

Caribbean applied to review and set aside the municipality's decision.

## THE DECISION

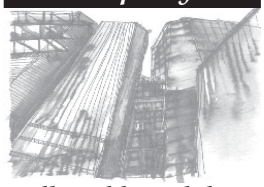
The issue by the municipality of a rates clearance certificate for the parent lot, reflecting 9,3728 hectares in extent, (and hence including portions 28 and 36) showed that all charges in respect of the three properties were up to date at the time of issue. The question was whether the rates which had been applied could be retrospectively changed by action taken under section 159(1) of the ordinance

This section provides that a council may at any time after a valuation roll for any financial year has been completed cause any property which has been omitted, to be valued, and where necessary levy and collect rates in respect thereof, or cause a fresh valuation to be made of any property which is subdivided or consolidated and where necessary levy and collect rates in respect of each subdivision, including any remainder, or in respect of the consolidated property, as the case may be, or cause any error in the valuation roll to be corrected by a valuer and where necessary levy and collect rates in accordance with the corrected statements of facts.

This section could not apply to the municipality's action in imposing additional rates because rates and taxes in respect of the parent lot had always been paid by Caribbean Estates in accordance with the amounts levied by the municipality. The result of that was that the municipality had also received rates and taxes in respect of portion 28 and portion 36: it cannot be 'necessary' to levy and collect rates where they have already been paid. The levying and the collection of the rates in retrospect was therefore unlawful.

# *FIRSTRAND BANK LTD v SONI*





A JUDGMENT BY MADONDO J
NATAL PROVINCIAL DIVISION
2 NOVEMBER 2007

2008 (4) SA 71 (N)

***A creditor seeking an order to declare its debtor's property executable should inform the purchaser of such property of its intention to obtain such an order.***

## THE FACTS

Firstrand Bank Ltd lent Mrs Soni R635 000 on the security of a mortgage bond. Clause 16.1.1 of the bond provided that should Soni fail to pay any amount on due date, she would be in breach of the bond, resulting in all amounts owing under the bond becoming due and payable forthwith. Clause 19 provided that any failure by the bank to exercise its rights in terms of the bond and any indulgence allowed to Soni would not operate as a waiver or abandonment by the bank of any of its rights.

In February 2007, Soni sold the bonded property for R750 000, an amount sufficient to repay the loan with interest. She stopped paying her monthly bond instalments of R7 390.29, and by May 2007 the arrears on her bond amounted to R27 627.30. Firstrand furnished its discharge requirements to the transferring conveyancer, instructed its attorneys to attend to cancellation of the mortgage bond, and simultaneously brought an action for repayment of the loan with interest and costs. The summons contained the notification 'if the defendant objects to the property being declared executable, the defendant is obliged to place facts and submissions before the court to enable the court to consider them in terms of section 26(3) of the Constitution. The defendants' failure to do so may result in such an order being made.'

Firstrand brought an application for summary judgment. Soni opposed the application on the grounds that she was not notified of her alleged breach of the loan agreement and on the grounds that Firstrand had condoned any alleged breach by fixing the amount due by her in the sum of R677 427,47 as at the date on which it instructed its attorneys to attend to cancellation of the mortgage bond.

The court also considered whether or not Firstrand had complied with section 26(3) of the Constitution.

## THE DECISION

A letter of demand is not necessary where the parties have agreed that money should be paid on a certain date. The fixing of the time of performance is in itself sufficient to give rise to automatic default if performance is not made within the stipulated time. In the present case, the time when Soni was obliged to pay her bond instalment was stipulated and the consequences of breach thereof were stated in clause 16.1.1. There was therefore no need for the bank to have notified her of her breach or issue a demand.

As far as Soni's second defence was concerned, this was completely answered by clause 19 of the bond which determined that the bank could not waive or abandon its rights by failure to exercise its rights.

As far as the section 26(3) of the Constitution was concerned, the notification in the summons adequately protected Soni's right, but left out of account the interests of the purchasers of the property who might be prejudiced by the bank's action. It was just and equitable that they be informed of the bank's wish to have the property declared executable.

The application was granted but the property was not declared executable.

# *KHABISI N.O. v AQUARELLA INVESTMENT 83 (PTY) LTD*



A JUDGMENT BY BOSIELO J
TRANSVAAL PROVINCIAL DIVISION
22 JUNE 2007

2008 (4) SA 195 (T)

***A person upon whom compliance notices and directives are issued is obliged to comply therewith until such time as they are set aside under judicial review whether or not their validity is in the interim attacked.***

## THE FACTS

Aquarella Investment 83 (Pty) Ltd and the third respondent owned adjacent properties in Pretoria. They began the development of the properties with a series of three or four storey cluster units after obtaining approval of the building plans from the City of Tshwane Metropolitan Municipality.

On 22 February 2007, the second applicant in his capacity as head of Gauteng Department of Agriculture, Conversation and Environment and a Grade 1 Environmental Inspector issued compliance notices in terms of section 31L of the National Environmental Management Act (no 107 of 1998) and directives in terms of section 31A of the Environmental Conservation Act (no 73 of 1989) to Aquarella and the third respondent to cease all construction and construction related activities on the properties.

Aquarella stated that it did not accept the notices and directives, and regarded them as being invalid and of no force and effect. It proceeded with construction of the cluster units. The political head of the Department, Khabisi, then brought an urgent application to interdict Aquarella from proceeding with the development.

## THE DECISION

The first question was whether, in the light of section 24 and 25 of the Constitution, the Department was entitled to issue the compliance notices and directives to Aquarella. Section 24 provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected. Section 25 provides that no-one may be deprived of property except in terms of the law of general application.

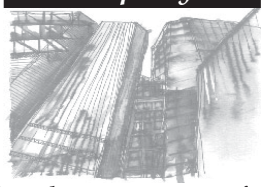
The second applicant was the responsible official, with proper expertise, competence and authority, to issue compliance notices. It was abundantly clear that once such a compliance notice had been issued, Aquarella was obliged to comply with it. The section under which the compliance notice was issued was couched in peremptory terms and did not give Aquarella the choice to decide whether to abide by it or not. The compliance notices and directives had been properly issued.

Aquarella had nevertheless refused to comply with the notices and directives. The second question therefor was whether it was entitled to refuse to comply. A person cannot simply disregard the terms of a notice or directive which that person considers to be invalid. The decision by Aquarella to disregard the compliance notices duly issued by the second applicant in terms of the National Environmental Management Act was seriously misconceived and wrong.

The application was granted.

# *LINVESTMENT CC v HAMMERSLEY*





A JUDGMENT BY HEHER JA (HOWIE P. MTHIYANE JA, COMBRINCK JA AND KGOMO AJA concurring)
SUPREME COURT OF APPEAL
28 FEBRUARY 2008

2008 CLR 95 (A)

***The owner of a servient tenement may amend the servitude over its property provided that it can show it will be materially inconvenienced in the use of its property by the maintenance of the existing servitude, that any relocation will take place on its property, that the relocation will not prejudice the owner of the dominant tenement, and that it pays the costs attendant upon relocation.***

## THE FACTS

Linvestment CC's property was subject to two servitudes registered in favour of Hammersley's property. They were a right of way and a road constituting a continuous strip of land over which the rights could be exercised.

Linvestment gave notice to Hammersley that it wished to change the course of the servitudes to another route over its property. Hammersley refused to consent to this. Linvestment alleged that Hammersley's refusal was unreasonable, that the existing servitudes constituted an inconvenience to it and a substitution would not unduly inconvenience Hammersley. It sought an order declaring that it was entitled to substituted the proposed servitude for the existing servitudes.

Hammersley opposed Linvestment's application for such and order and contended that she was under no obligation to accept the substituted servitude and that the existing servitudes could only be changed by mutual consent.

## THE DECISION

The law as stated in *Gardens Estate Ltd v Lewis* 1920 AD 144 is that the owner of the dominant tenement may determine where the servitude over its property is to be exercised, but once having made that determination, it cannot later be changed. This would constitute a complete bar to Linvestment's application. However, the question remained whether there were any grounds for questioning the correctness of the law as stated in the *Gardens Estate* judgment.

It appeared that when this judgment was decided, the later law of Holland was not considered, including the revised draft of its indigenous code of law published in 1820 which provided that when a servitude has become more burdensome to the servient owner, or hinders him in carrying out any necessary or useful repair, he may offer to those entitled to the right of servitude another equally good and convenient for their exercise, at his cost.

The judgment in Gardens Estate could therefore be reconsidered, and the common law developed. This warranted a change in the law so as to allow for a flexible approach in the relocation of servitudes. This should be permitted given the fact that a servitude might have been created many years ago and circumstances may have changed so as to require a change in the means by which it is enjoyed and exercised.

Linvestment therefore would be entitled to change the servitude if it was able to show that as servient owner, it would be materially inconvenienced in the use of its property by the maintenance of the existing servitude, that any relocation would take place on its property, that the relocation would not prejudice Hammersley as owner of the dominant tenement, and that it pays the costs attendant upon relocation.

# *NAUDÉ v TERBLANCHE*



A JUDGMENT BY HJ ERASMUS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
8 JUNE 2007

2008 (4) SA 178 (C)

***The sale of a subdivided portion of land whose title deeds record that the consent of the Minister of Agriculture and Water Affairs is required for subdivision is not void on the grounds of failure to comply with the Subdivision of Agricultural Land Act (no 70 of 1970).***

## THE FACTS

Naudé bought the remaining extent of portion 18 (a portion of portion 3) of the farm Brandwacht no. 154 in the district of Mossel Bay, from Terblanche for R250 000. The title deed of the property bore an endorsement to the effect that it could not be transferred or dealt with separately from portion 28 of the farm Brandwacht no. 154 without the written consent of the Minister of Agriculture and Water Affairs.

At the time the sale was concluded, the consent of the Minister had not been obtained.

Terblanche contended that because the consent of the Minister had not been obtained, the sale agreement was void as it was in conflict with the provisions of the Act. She refused to give transfer of the property.

## THE DECISION

The property in question was already a subdivided piece of land in respect of which the Minister had given consent subject to the conditions found in the endorsement. Terblanche however, contended that the fact that separate title deeds existed did not detract from the fact that the consent of the Minister was nevertheless required.

This contention could not be accepted. The properties were held under separate title deeds, even if they had a common owner. The consent of the Minister referred to in the Act was a requirement for the transfer or vesting of rights but not for the creation of rights and obligations between persons under contracts concluded between them.

Terblanche was obliged to give transfer of the property.

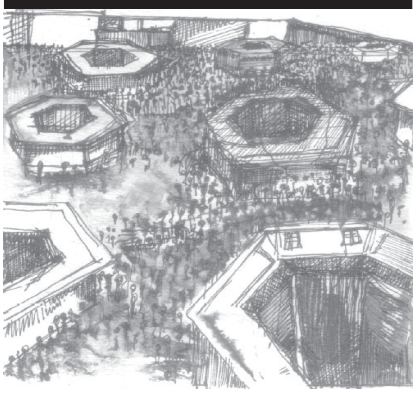
*Die situasie wat ontstaan kragtens die endossement is soortgelyk aan dié wat bestaan het onder art 3 van die Wet vóór wysiging van die artikel deur die invoeging van (onder andere) para (e) . Die endossement vereis die skriftelike toestemming van die Minister vir die oordrag of vestiging van regte ten opsigte van die eiendom by wyse van registrasiehandelinge in die Akteskantoor. Die toestemming van die Minister is 'n voorvereiste vir die oordrag of vestiging van sodanige regte, maar nie vir die ontstaan van die verbintenisskeppende ooreenkoms wat 'n persoon geregtig maak om die oordrag of verkryging van die reg te vorder nie. Die toestemming van die Minister was dus nie nodig vir die totstandkoming van die koopkontrak tussen die partye nie.*

# *BARNARD v CARL GREAVES BROKERS (PTY) LTD*

JUDGMENT BY BINNS-WARD AJ
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
22 JANUARY 2007

2008 (3) SA 663 (C)

*Companies*



***A person who is a shareholder of a company but is not yet reflected as such in the register of members of the company may demonstrate grounds for the winding up of the company on the basis that it is just and equitable that the company be wound up, or may demonstrate grounds for an order in terms of section 252 of the Companies Act (no 61 of 1973).***

## 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 Carl Greaves Brokers (Pty) Ltd, each person 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 agreement provided that payment for the shares to be held by Barnard was to be made from the commission and other amounts that he was to earn for the company as insurance and property broker. Such amounts were to be left in the company as capital investment and withdrawn by Greaves as and when such amounts are available.

The agreement expressed the parties' common intention that all three of the shareholders were to be involved in the operation of the company's business on an equal basis, subject to a deciding say by Greaves in the event of deadlock.

The management of the company's affairs proceeded in accordance with the provisions of the agreement. Neither Barnard nor another shareholder obtained registration of their ownership of shares in the company as contemplated in the agreement. Barnard bound himself as surety in favour of Firstrand Bank for the debts of the company.

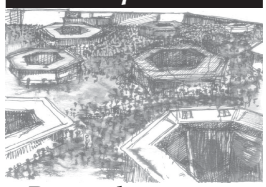
By April 2005, relations between Barnard and the other shareholders had deteriorated. It was alleged that Barnard had not been working for the company for a year. Barnard alleged that the company accounts were not being prepared satisfactorily and that there was a lack of transparency in management operations. Barnard was excluded from the business of the company.

Barnard brought an application for the winding up of the company on the grounds that it was just and equitable that the company be wound up. He also brought an application in terms of section 252 of the Companies Act (no 61 of 1973) to compel the other shareholders to purchase his shares.

## THE DECISION

An application for the winding up of a company on just and equitable grounds is normally brought by a member of the company. Assuming that some form of constructive transfer of shares to Barnard took place, it could be accepted that Barnard was the owner of shares in the company, despite the fact that he was not registered as a shareholder in the company. The question was whether despite the fact that he was not formally a member of the company, he had the locus standi to bring the application.

As surety for the company, Barnard was a contingent creditor. This had come about because of his interest in the company which was established by the shareholders' agreement. Having become excluded from the management of the company, his interest in the company entitled him, under section 346 of the Companies Act, to bring the application for the winding up of the company on just-and-equitable grounds. There did not appear however, to be sufficient



grounds to show that the company had been mismanaged in a way that would prejudice Barnard as surety. The winding up of the company on this basis therefore could not be allowed.

As far as the application in terms of section 252 was concerned, this provides that any member of a company who complains that an act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in that manner, may make an application to court for the purpose of bringing to an end the matters complained of.

The fact that Barnard was not yet registered as a member of the company did not prevent him from proceeding with an application under this section. He was a shareholder and entitled to have his name on the members' register.

The fact that Barnard had been excluded from the management of the company and had been subject to unfair and prejudicial treatment had been demonstrated. He was therefore entitled to an order under section 252 directed at bringing this situation to an end, essentially by the purchase of his shares by the other shareholders.

*In my view it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of cooperation by the company or his fellow shareholders, but is entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of s 252. The requirements of s 346(2) of the Companies Act and the considerations thereanent traversed in Rubinstein NO and Another v Langhold (Pty) Ltd 1983 (2) SA 228 (C) , which would prohibit such an approach in the context of an unregistered shareholder seeking the winding up of a company in terms of s 344 (h) of the Act, do not apply in the context of an application for relief in terms of s 252.*

# *KLAAS v SUMMERS*



A JUDGMENT BY BOZALEK J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
10 DECEMBER 2007

2008 (4) SA 187 (C)

***Section 54 of the Close Corporations Act (no 69 of 1984) do not extend to binding a corporation in respect of a third party in relation to an act by an unauthorised member who is expressly not acting as a representative of the corporation and where this is clearly understood by the third party.***

## THE FACTS

Klaas held a 41% interest in a close corporation. In terms of clause 13 of the corporation's association agreement, only a management committee member, duly authorised, could represent the corporation in dealings with third parties. Any material breach of this provision would result in the member being deemed to have offered his interest to the other members at fair value who would be entitled to purchase it within thirty days of valuation.

Klaas obtained two loans in his personal capacity from Lusitania Financial Services (Pty) Ltd. In the acknowledgements of debt, Klaas authorised and instructed the close corporation to pay to the creditor due to him until all amounts due to the creditor had been repaid. He also agreed to provide security to the creditor in the form of a pledge of his interest in the close corporation and a cession of his loan account in the close corporation. He authorised the creditor to sign all necessary documentation for this purpose.

The other two members of the close corporation took the view that in signing the acknowledgements of debt, Klaas acted in breach of clause 13. They acted in terms thereof and dispossessed him of his interest in the close corporation.

Klaas brought an application for an order reinstating himself as member of the corporation.

## THE DECISION

The principal question was whether Klaas' conduct in concluding the acknowledgments of debts amounted to representing the corporation as referred to in clause 13 of the agreement.

Clause 13.1 of the agreement intended to ensure that members of the close corporation who were not management committee members would not purport to speak and act on behalf of the corporation. The mischief it intended to avoid, was a non-management committee member binding the corporation by purporting to speak or act on behalf of the corporation. Applying the provision to a member was predicated on showing that the member purported to represent the corporation.

In executing the acknowledgements of debt, Klaas did not represent the corporation, nor did he purport to speak or act on behalf of the corporation. Even taking into account the provisions of section 54 of the Close Corporations Act (no 69 of 1984) Klaas' action could not be understood to have been that of an agent acting for the corporation since they did not concern the business of the corporation.

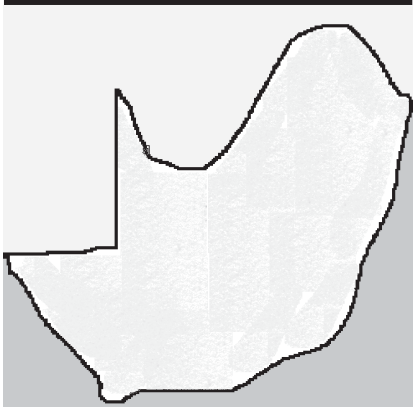
The application was granted.

# *BID INDUSTRIAL HOLDINGS (PTY) LTD v STRANG*

A JUDGMENT BY HOWIE P NUGENT JA, PONNAN JA, MAYA JA and MALAN AJA concurring)
SUPREME COURT OF APPEAL
23 NOVEMBER 2007

2008 (3) SA 355 (A)

***Jurisdiction***



***It is not permissible to arrest a person to found or confirm the jurisdiction of the court as to do so would infringe a person's constitutional rights.***

## THE FACTS

Bid Industrial Holdings (Pty) Ltd intended to sue Strang in the Johannesburg High Court for delictual damages. Strang was a citizen of Australia and was resident and domiciled in that country. Bid applied for an order for Strang's arrest in order to found or confirm the court's jurisdiction. It was unclear whether Bid's cause of action arose within the area of jurisdiction of that court or outside of it. Arrest would not involve detention of Strang but a symbolic act signifying that the court's jurisdiction had been imposed on him.

Strang opposed the application on the grounds that no prima facie case had been shown against him and that his arrest would be unconstitutional as it would be contrary to various provisions of the Bill of Rights.

The court concerned itself with the constitutionality issue only.

## THE DECISION

Section 19(1)(c) of the Supreme Court Act (no 59 of 1959) provides that a High Court may issue an order for attachment of property or arrest of a person (i) to confirm jurisdiction where the property or person is outside its area of jurisdiction but within the Republic, provided that the cause of action arose within its area of jurisdiction, and (ii) to found jurisdiction where the plaintiff is resident or domiciled within its area of jurisdiction, but the cause of action arose outside its area of jurisdiction.

The question was whether or not these provisions were contrary to rights established in the Constitution: the right to equality before the law, the right to human dignity, freedom of movement and the right to a fair civil trial. Section 12(1)(a) of the Constitution provides that everyone has the right not to be deprived of freedom arbitrarily or without just cause.

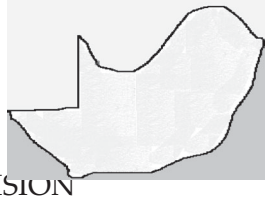
Jurisdictional arrest is without just cause. It does not achieve security for the plaintiff, nor does it secure the prospect of successful execution of any judgment obtained. Apart from this, there is no just cause in jurisdictional arrest whose purpose is only to coerce security or payment from a defendant who may not owe what is claimed.

There was no basis on which an exception could be made in terms of section 36(1) of the Constitution as it was not reasonable and justifiable to subject foreign defendants to arrest and detention. It was also clear that less restrictive means to establish jurisdiction could be applied, for example by attachment of property.

An alternative means of founding jurisdiction would be for a plaintiff to serve summons on a foreign defendant while in South Africa provided that there was an adequate connection between the action and the area of jurisdiction of the South African court, from the point of view of appropriateness and convenience.

# *GARDENER'S GRAPEVINE CC v FLOWCRETE PRECAST CC*

*Jurisdiction*



A JUDGMENT BY LEVINSOHN DJP (SWAIN J concurring)
DURBAN AND COAST LOCAL DIVISION
29 FEBRUARY 2008

2008 CLR 67 (D)

***A court will have jurisdiction in a matter in which the evidence required to establish the plaintiff's case indicates that the cause of action arose wholly within the area of jurisdiction of that court.***

## THE FACTS

Gardener's Grapevine CC rendered advertising services to Flowcrete Precast CC. It did so following the exchange of documents by fax. The first document sent by Gardener's to Flowcrete was an undertaking to be bound by the terms of conditions of their agreement, which provisions were recorded on the reverse of the document. The same document was sent back to Gardener's after having been signed by Flowcrete.

Gardener's offices were situated in Durban, and within the area of jurisdiction of the Durban magistrates' court, while Flowcrete's were situated in Queensborough within the area of jurisdiction of the Pinetown magistrates' court.

Gardener's brought an action for payment in terms of the agreement. Its action was brought in the Durban magistrates' court. Flowcrete contended that that court did not have jurisdiction in the matter and that Gardener's should have brought its action in the Pinetown magistrates' court.

## THE DECISION

The essential issue was whether or not the whole cause of action arose wholly within the area of jurisdiction of the Durban magistrates' court. To determine this, one has to determine what evidence is required to establish the elements of the plaintiff's cause of action. In the present case, this was evidence that the parties concluded a contract in terms of which Gardener's would tender advertising services to Flowcrete and that Gardener's had rendered the services.

When Gardener's sent the fax, this constituted an offer made to Flowcrete. When the fax was sent back to Gardener's this constituted the acceptance of the offer. It was made to Gardener's in Durban. It followed that the contract was concluded when the signed fax was received by Gardener's in Durban.

The performance of the contract also took place in Durban since Gardener's had indicated it had booked advertising space on behalf of Flowcrete, and this would have taken place in Durban.

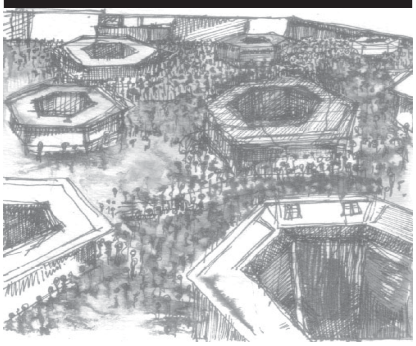
The Durban magistrates' court therefore had jurisdiction in the matter.

# *BOTHA N.O. v DEETLEFS*

A JUDGMENT BY KOEN J
NATAL PROVINCIAL DIVISION
23 JANUARY 2008

2008 (3) SA 419 (N)

## *Partnership*



***In the absence of agreement, a partner is not entitled to retain possession of a partnership asset upon termination of the partnership, and does not obtain an option to purchase such an asset merely as a result of termination of the partnership.***

## THE FACTS

From 1999, Deetlefs lived with Mr FJ Rossouw. They remained living together until Rossouw's death in 2006. Deetlefs contended that there existed between them a tacit universal partnership and that the consequences of Rossouw's death were to terminate the partnership and bring about a division of its net assets.

An asset registered in the name of Rossouw was a property in which Rossouw and Deetlefs had lived, and in which Deetlefs continued to live after his death. The property was valued at R850 000. Total assets of the deceased estate were valued at R1 554 178.87 and total liabilities at R835 038.60.

Botha, the executrix of the deceased estate, took the view that it was necessary to sell the property to discharge the liabilities of the deceased estate. In view of Deetlef's failure to co-operate in placing the property on the market, in order to market the property properly, vacant occupation of the property was necessary. She applied for Deetlefs' ejectment from the property.

## THE DECISION

The death of a partner terminates a partnership. Accordingly, any partnership which might have existed between Deetlefs and Rossouw would have terminated upon Rossouw's death. The consequence of this would be to bring about the dissolution of the partnership by the collection of its assets and the discharge of its debts. In the absence of a receiver, the parties are under an obligation to assist in this process.

A partner is not entitled to retain a partnership asset upon termination of the partnership, and does not obtain an option to buy any share in the asset which becomes available upon termination. It was therefore clear that Deetlefs' occupation of the property was unlawful. There being no justification for her continued occupation of the property, she should be ejected from the property.

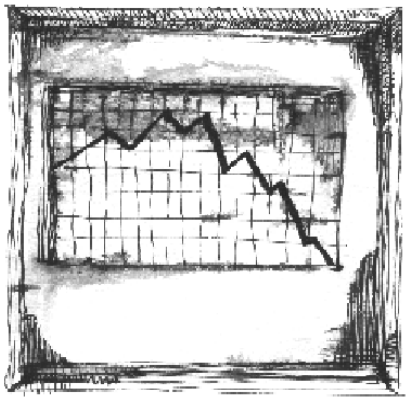
An order ejecting Deetlefs from the property was given.

# *FRANK v PREMIER HANGERS CC*

A JUDGMENT BY GRIESEL J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
15 MAY 2007

2008 (3) SA 594 (C)

***Insolvency***



***The liquidation of a company does not affect a person's right to raise a counterclaim to the company's claim based on an executory contract. In the absence of mala fides, an unliquidated counterclaim cannot be applied in set off against a claim and does not constitute a defence to a claim.***

## THE FACTS

DS Frank & Associates (Pty) Ltd rendered specialised engineering services to Premier Hangers CC resulting in an alleged debt of R238 927.58 in respect of its work. Premier Hangers contested the company's right to claim this sum, alleging that the work was not performed properly. Premier Hangers alleged that it had a counterclaim of R499 445.77 being damages suffered as a result of the company's breach of its obligations in terms of the relevant contracts.

In August 2004, the company was placed in liquidation. The liquidator ceded the company's right to claim the R238 927.58 to Mr DS Frank, a director and 50% shareholder in the company. Frank then brought an action against Premier Hangers for payment of this sum.

Premier Hangers defended the action with substantive defences based on alleged defective and incomplete performance of the work. It also denied the validity of the cession. It contended that the cession was effected fraudulently or in bad faith and with the intention of depriving it of the right to raise the counterclaim in answer to the claim brought by Frank and with the intention of rendering the counterclaim ineffectual. In consequence, it contended, the cession was illegal and contrary to public policy, alternatively the claim brought based upon it could be answered with its counterclaim because of the fraudulent basis upon which the cession was concluded.

Frank excepted to the defence based on the denial of the validity of the cession on the grounds that the reason for the ineffectiveness of the counterclaim was the liquidation of the company and not the cession, and on the grounds that no set-off of the counterclaim against the company's claim was possible because the counterclaim was not liquidated prior to the liquidation of the company.

## THE DECISION

The rights and obligations of the company and Premier Hangers were, prior to liquidation, reciprocal. Either party would therefore have been entitled to raise the other's failure to perform properly as an answer to any claim brought for enforcement of performance. Once liquidation of the company took place, the essential question became whether or not the contracts concluded by the parties had been completed or were executory. If they were executory, the liquidator had a choice whether to enforce or repudiate the contract.

It was possible to construe the contracts in the present case as executory. The liquidator had ceded the right to sue in terms of them, a clear indication that he had chosen to abide by them. It followed that, had the liquidators sued Premier Hangers, it would have had exactly the same rights as it would have had, had it been sued by the company. The question then was what its rights were, their nature and extent.

As debtor, with respect to the cedent company, Premier Hangers would have been entitled to set off its claim against the company if its claim was liquidated, and it would have been entitled to rely on that as a counterclaim to any action the company might have brought against it. However, being a claim for damages, its counterclaim was not liquidated. In the absence of mala fides on the part of cedent and cessionary, the company's claim could not be met with a

deferral of the matter by staying judgment on the cessionary's claim until the counterclaim had been disposed of.

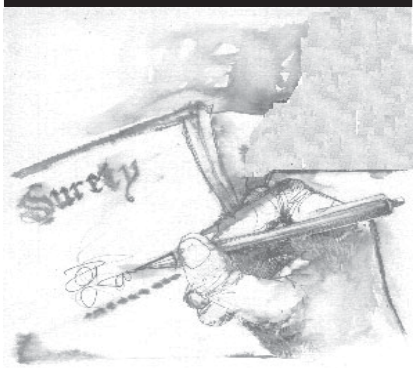
The counterclaim was therefore not a good defence to the claim. The second ground of exception was upheld.

## *CECIL NURSE (PTY) LTD v NKOLA*

A JUDGMENT BY MAYA JA
(SCOTT JA and VAN HEERDEN JA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2007

2008 CLR 57 (A)

***Suretyship***




***A surety contending that the deed of suretyship under which it became a surety was amended at a later stage bears the onus of proving the amendment. Should the earlier deed of suretyship incorporate a non-variation clause, the surety is also obliged to show that the terms thereof were complied with.***

### THE FACTS

Cecil Nurse (Pty) Ltd agreed to grant a credit facility of approximately R50 000 for the supply of showroom stock at the premises of Nkola's school and office furniture business in Umtata. Nkola was the sole director and shareholder of FMMC Holdings (Pty) Ltd which owned the business.

To formalise the agreement, Cecil Nurse sent a credit application form and deed of suretyship to Nkola. FMMC signed the credit application form and Nkola signed the deed of suretyship. The deed of suretyship included a clause 6 which provided that no alteration to the suretyship or prior representation would be binding on Cecil Nurse unless agreed to in writing. Both documents were returned to Cecil Nurse. Upon receipt, Cecil Nurse confirmed that it would supply the stock for the showroom totalling R48 402.75. It approved the credit facility and delivered the stock. Payment for the stock was received in due course.

The parties continued to do business with Cecil Nurse supplying stock to FMMC, and some three years later, FMMC had accumulated a debit balance of R150 653.94.

When Cecil Nurse brought an action for payment in terms of the deed of suretyship, Nkola alleged that after the deed of suretyship had been returned to Cecil Nurse, he and a director of Cecil Nurse had agreed that the surety's liability would be limited to R45 600, being the net value of the showroom stock. Nkola proferred an amended deed of suretyship which included such a limitation provision and alleged that this had been forwarded to Cecil Nurse after the first one had been sent to it.

### THE DECISION

Once the original deed of suretyship was sent to and received by Cecil Nurse, a contract of suretyship came into being. Cecil Nurse had discharged the onus of proving that the original deed of suretyship was received. Accordingly, unless Nkola could show that it had been amended, he was bound by it.

The amended deed of suretyship put up by Nkola constituted no more than a proposed amendment to a suretyship agreement already in existence. The onus was on Nkola to show that Cecil Nurse had agreed to its terms and in consequence, that this agreement superseded the first one. However, even assuming that the parties had verbally agreed to the amendment, clause 6 of the first deed of suretyship meant that the amended deed of suretyship could not have superseded the first one, there having been no written agreement to this by Cecil Nurse.

The action succeeded.

# *HIRT & CARTER (PTY) LTD v MANSFIELD*

A JUDGMENT BY NAIDU J
DURBAN AND COAST LOCAL DIVISION
26 SEPTEMBER 2007

2008 (3) SA 512 (D)

***Competition***

***Confidential information referred to in a restraint of trade agreement will not include customer connections as an interest to be protected if upon a reasonable interpretation of the provision referring to this restraint, such connections do not fall within the scope of the provision.***

## THE FACTS

Hirt & Carter (Pty) Ltd employed Mansfield as a photographer in its advertising business. His duties involved him taking photographs for clients of Hirt & Carter and producing photographs for use in their advertisements.

Upon taking employment with Hirt & Carter, Mansfield signed an agreement which protected Hirt & Carter in respect of confidential information and techniques obtained by Mansfield in the course of his employment. Clause 2.8 of the employment agreement provided that 'having regard for the aforegoing it is fair, reasonable and necessary for the employer to have the employees undertaking not to use confidential information against or to the detriment of the employer and whether directly or indirectly and that to safeguard the confidential information the restraint in 3 is necessary'. Clause 3 restrained Mansfield from competing with Hirt & Carter following termination of his employment.

Mansfield terminated his employment and then began working as a photographer under the name Pure Photographic Studio.

Hirt & Carter alleged that Mansfield was operating as a photographer in breach of the restraint and in breach of clause 2.8. It brought an interdict against him to prevent him from continuing the breach.

## THE DECISION

As Hirt & Carter essentially depended on breach of clause 2.8, it was necessary to interpret this provision to determine whether or not its terms had been breached. The question was whether or not the restraint protected the interest relating to customer goodwill and trade connections.

Clause 2.8 did not include customer connections as an interest to be protected by the agreement. Had the intention of the parties been to do so, this would have been included in clause 2.8. Furthermore, there would be a clear and unequivocal acknowledgment that the employee would, through his employment, form close attachments or personal relationships with clients. It followed that the only interest which Hirt & Carter sought to protect by entering into the agreement was that relating to confidential information and trade secrets.

There being no evidence that Mansfield had placed such information in jeopardy, Hirt & Carter had demonstrated no proprietary interest that might legitimately be protected.

The application was dismissed.

# *MAHADEO v DIAL DIRECT INSURANCE LTD*



A JUDGMENT BY
BORUCHOWITZ J
WITWATERSRAND LOCAL
DIVISION
1 FEBRUARY 2008

2008 (4) SA 80 (W)

***In determining whether or not a misrepresentation or non-disclosure was material in the conclusion of an insurance contract, an objective assessment should be made to determine whether undisclosed information or facts were reasonably relative to the risk or the assessment of the premiums. Materiality will also depend on the nature of the questions asked by the insurer when the insurance contract is concluded.***

## THE FACTS

Mahadeo and Dial Direct Insurance Ltd concluded an insurance contract under which Dial Direct would indemnify Mahadeo for loss or damage to his 2003 model Audi A4 1.8 Turbo motor vehicle. The contract was concluded telephonically. In the course of the telephone conversation, Mahadeo was asked for how long he had had comprehensive insurance cover and whether or not he had had any accidents or stolen car claims during that period. Mahadeo replied that he had had cover since 1998 and had had no claims from that date.

During the period in question, Mahadeo had driven the vehicle into a pothole causing minor damage. He had submitted a claim to his previous insurers and had received payment. He did not mention this incident because he did not consider it to be an accident as referred to by Dial Direct.

While the insurance contract was in force, the vehicle was involved in a collision. Mahadeo claimed indemnity from Dial Direct but Dial Direct refused to indemnify on the grounds that Mahadeo had made a material misrepresentation in the conclusion of the contract, alternatively a material non-disclosure. Dial Direct contended that it was entitled to repudiate the claim on these grounds.

Mahadeo brought an action for payment in terms of the indemnity.

## THE DECISION

An insurer may avoid a contract of insurance if the insured has misrepresented a material fact or failed to disclose one. The test for materiality is objective, ie whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums.

The issue is governed by section 63(3) of the Insurance Act (no 27 of 1943) which provides that a policy shall not be invalidated on account of any representation made to the insurer which is not true, or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless the representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy. A representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.

A reasonable assessment of what is considered material will often be determined by the nature of the questions asked by the insurer when the contract of insurance is concluded. In general, an insured's claims history is relevant to the assessment of the risk. Materiality relates both to the acceptance of the risk and to the determination of the premium at which the risk will be accepted.

In the present case, it was reasonable for Mahadeo to have considered the pothole incident not to be an accident as understood by Dial Direct. There was no reason to reject Mahadeo's evidence that he understood the question as a reference to accident or theft claims. a notional reasonable person in the position of the plaintiff would not have disclosed

the pothole incident and claim arising therefrom to the defendant. Dial Direct therefore had no grounds for contending that any material misrepresentation or non-disclosure took place, and accordingly no grounds for repudiating the claim.

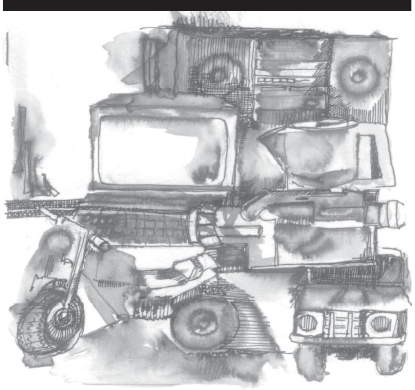
The action succeeded.

## *NEDCOR BANK LTD v SDR INVESTMENT HOLDINGS CO (PTY) LTD*

A JUDGMENT BY SNYDERS AJA (SCOTT JA, NAVSA JA, MTHIYANE JA and CLOETE JA concurring)
SUPREME COURT OF APPEAL
20 MARCH 2008

2008 (3) SA 544 (A)

***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 commits no breach of the agreement by proceeding to auction the assets according to the express terms thereof and is not obliged to deviate from those terms to consider alternative offers of purchase of the assets.***

### THE FACTS

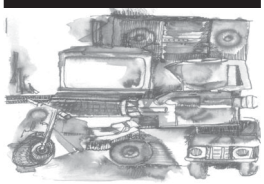
Nedcor Bank Ltd brought liquidation proceedings against SDR Investment Holdings Co (Pty) Ltd and associated companies. Its claim against the companies amounted to R12 778 225,14.

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.

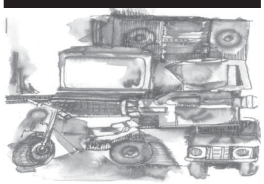
## THE DECISION

The bank clearly did not breach the express terms of the parties' agreement. SDR therefore had to show that there were implied terms or tacit terms which the bank did breach. The express terms entitled the appellant to arrange a public auction at the time that it did and to put all the assets or any part thereof up for auction without reserve. The conditions of sale applicable to the auction entitled the appellant to accept the highest bid on the afternoon of the auction. In the light of these provisions, there was no basis upon which a term could be implied, or a tacit term recognised, requiring the bank to cancel or postpone the auction, or to keep the sale open during the 14-day confirmation period. The express terms of the parties' agreement went contrary to the incorporation of any such terms.

The action was dismissed.

# *NEDBANK LTD v MATEMAN*
# *NEDBANK LTD v STRINGER*





A JUDGMENT BY VAN DER MERWE J
(DU PLESSIS J and VISSER J concurring)
TRANSVAAL PROVINCIAL DIVISION
7 DECEMBER 2997

2008 (4) SA 276 (T)

***A provision consenting to the jurisdiction of the magistrates' court does not contravene the National Credit Act (no 34 of 2005).***

## THE FACTS

Nedbank brought two applications for default judgment based on failure by Mateman and Stringer to honour their commitments under mortgage bonds passed by them. Clause 13 of their bonds provided that they consented to the jurisdiction of the magistrates' court but that the bank would be entitled to proceed against him in the High Court, should it so choose.

Mateman's property was situated in Brakpan which was within the area of jurisdiction of the Transvaal Provincial Division only, and the magistrates' court. Stringer's property was situated in Boksburg which was within the area of jurisdiction of that Division as well as the Witwatersrand Local Division, and the magistrates' court.

Both applications for default judgment were brought in the Transvaal Provincial Division. The Registrar requested a determination of whether, in the light of the National Credit Act (no 34 of 2005), the applications were properly brought in his Division.

## THE DECISION

In the Mateman case, section 90(2)(k)(vi)(aa) was relevant. This provides that a provision of a credit agreement is unlawful if it expresses on behalf of a consumer a consent to the jurisdiction of the High Court, if the magistrates' court has concurrent jurisdiction.

Clause 13 was not contrary to this provision. It provided that Mateman consented to the magistrates' court jurisdiction and merely reserved the bank's right to proceed in the High Court.

In the Stringer case, section 90(2)(k)(vi)(bb) was relevant. This provides that a provision of a credit agreement is unlawful if it expresses on behalf of a consumer a consent to the jurisdiction of any court outside the area of jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works or where the goods in question, if any, are kept.

Clause 13 was not contrary to this provision. In it, Stringer consented to the jurisdiction of the magistrates' court. This could not be understood as contravening the section.

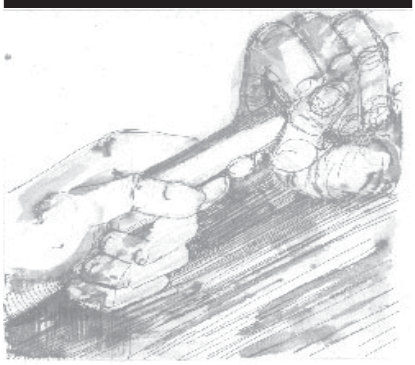
Section 90 of the Act in any event, did not oust the overall jurisdiction of the High Court which was asserted by the Supreme Court Act (no 59 of 1959).

# *CAPESPAN (PTY) LTD v ANY NAME 451 (PTY) LTD*

A JUDGMENT BY THRING J
(ALLIE J and WAGLAY J
concurring)
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
14 MARCH 2008

2008 (4) SA 510 (C)

## *Cession*



***An agreement not to cede a right (pactum de non cedendo) will normally not be upheld, but it will be upheld when the agreement is concluded as part of an agreement in which the right itself is created. In such a case, it will also be upheld against the purported cession of the right by a liquidator in insolvency.***

## THE FACTS

Chance Brothers (Pty) Ltd and Club Champion Investments (Pty) Ltd concluded agreements with Capespan (Pty) Ltd. The agreements contemplated that the two companies would supply Capespan with their products and entitle Capespan to market and distribute them throughout the world. Clause 16 of the agreements provided that the agreements, or any part share or interest therein, or any rights or obligations in terms thereof could not be ceded, assigned, or otherwise transferred without the prior written consent of the other party.

Disputes arose between Chance and Club Champion on one side, and Capespan on the other, the two companies alleging that Capespan had breached the agreements with damages resulting. The disputes were submitted to arbitration, but before this took place, Chance and Club Champion were placed in liquidation.

The liquidators concluded cession agreements with Any Name 451 (Pty) Ltd in terms of which they ceded to it all rights held by Chance Brothers and Club Champion against Capespan.

When Any Name sued Capespan, Capespan contended that the agreement not to cede (pactum de non cedendo) prevented Any Name from enforcing any alleged rights held against it by Chance Brothers and Club Champions.

## THE DECISION

Although - in accordance with the principle that commercial rights should not be withdrawn from commercial transactions - the general rule is that a pactum de non cedendo will not be upheld, there are some circumstances in which a pactum de non cedendo will be upheld. One of them is when the agreement not to cede is concluded as part of the agreement in which the right is created.

The contention that a pactum de non cedendo does not bind a liquidator in insolvency since insolvency presents a case of 'involuntary' cession is also subject to this exception. In accordance with the rule that a liquidator can acquire no greater rights against the debtor than the insolvent creditor enjoyed before its liquidation, a pactum de non cedendo concluded in such circumstances is binding on the liquidator.

In the present case, it was clear that the parties concluded the two agreements with the intention of having an ongoing business relationship. The reason for the pacum de non cedendo was therefore to avoid the possibility of a person unknown to the other person becoming a party to that business relationship, which could create complications in the event of disputes between them. Clause 16 was incorporated in the agreement in which the parties' rights were created and was therefore an example of the establishment of a pactum de non cedendo in the same agreement in which the non-cedable right was created.

The cession by the liquidator was therefore invalid. The claims brought by Any Name were dismissed.

# *VAN STADEN N.O. v FIRSTRAND LTD*



A JUDGMENT BY MURPHY J
TRANSVAAL PROVINCIAL DIVISION
6 FEBRUARY 2008

2008 (3) SA 530 (T)

***If a ceded asset is encumbered by a party when it is known that the asset has been ceded, the cessionary retains its right to the asset in preference to the party in whose favour the asset was encumbered.***

## THE FACTS

Boland Bank PKS Ltd lent R750 040 to Renbes Family Foods CC. Retief van Heerden signed a suretyship agreement for repayment of the loan, and as security ceded to the bank a fixed deposit of R250 000 and any re-investment, renewal or substitution thereof.

In August 1999, van Heerden took out an investment insurance policy with Momentum Group Ltd. The initial and only premium was R250 000, and this was paid from the fixed deposit with the knowledge and consent of the bank and in substitution of its security. The capital value of the policy was guaranteed in the sum of R250 000.

In November 2000, Renbes was liquidated. The following month, Momentum gave an interest-free loan of R267 891 against the policy to van Heerden.

When the bank sought repayment of its loan to Renbes and became aware that the loan could not be repaid, it claimed payment of R250 000 from Momentum in terms of its rights as cessionary. Momentum contended that it was only obliged to pay the cash value of the policy, and amount of R29 690.

In January 2003, van Heerden's estate was sequestrated. The trustee, van Staden, claimed payment of the full surrender value of the policy, an amount of R293 911.

## THE DECISION

Momentum contended that the broker consultant and marketing adviser who arranged the transfer of the fixed deposit to Momentum did not have the authority to bind Momentum and therefore could not have bound Momentum to any obligation toward the bank in regard to the cession. However, whether or not she did have such authority, this was irrelevant to the effectiveness of the cession. A cession may be established without the consent of the debtor. The cession was effective irrespective of the broker's authority to bind Momentum.

The broker's authority did have some relevance to the question whether Momentum knew of the cession. Had Momentum not known of the cession, and had paid van Heerden in good faith, it would not be obliged to make payment to the bank. The probabilities were that the broker knew of the cession. Given the scope of her authority in relation to Momentum, that knowledge could be imputed to Momentum. Momentum was therefore not entitled to assert an entitlement to the policy in priority to the bank. The fact that the terms of its policy allowed it to make a loan to the insured against the security of the policy could not have the effect of conferring on Momentum a greater right than that of the bank.

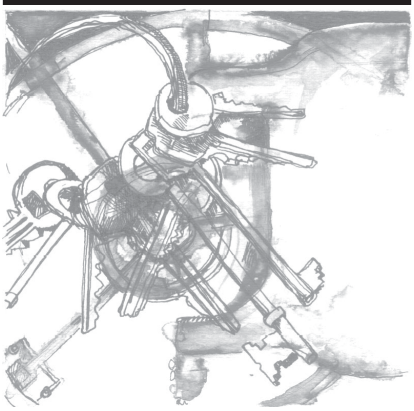
The full surrender value of the policy was therefore an asset in van Heerden's sequestrated estate, and the bank was entitled to assert its rights as cessionary in respect thereof. The claim succeeded.

# *DU PREEZ v ZWIEGERS*

A JUDGMENT BY HOWIE P (NUGENT JA, CLOETE JA, HEHER JA and MAYA JA concurring) SUPREME COURT OF APPEAL 28 MARCH 2008

2008 (4) SA 627 (A)

## *Agency*



***An attorney who disburses money deposited in his trust account contrary to instructions received without first ascertaining that a change of instruction has been issued will be considered to have acted negligently.***

## THE FACTS

On 11 May 2001, attorneys acting for Du Preez and the second respondent addressed Zwiegers by fax and stated conditions under which their clients agreed to accept a loan of R3 850 000. A condition of the loan was that Du Preez was to pay a deposit of R385 000 to DLA International Financial Services, an entity which had procured the loan. Du Preez's attorneys stipulated that this sum was to be paid into Zwiegers' trust account and would not be paid over to DLA without Du Preez's written consent, and in any event not before the loan payment of the full amount of the loan was made. Zwiegers was an attorney practising as such in Johannesburg.

The money was paid into Zwiegers' trust account. Zwiegers subsequently received a hand-written note to the letter signed by Du Preez which stated that the letter was 'hereby cancelled'. He also received an instruction from his own client, a Mr Louw, to the effect that the R385 000 was to be paid to an account designated by him. Zwiegers required written instructions to this effect, and upon receiving them, paid the money to Asset Allocation Consultants (Pty) Ltd.

After DLA failed to pay the loan, Du Preez sought to recover the deposit but failed. He then brought an action against Zwiegers based on contract alternatively delict, alleging breach of a mandate to deal with the funds only on his instructions, or of a duty to deal with the funds without negligently causing him harm.

## THE DECISION

The fundamental question was whether a reasonable person in the Du Preez's position would have relied only on Louw's statements and instructions or would have contacted Du Preez to ascertain what he wanted done with the money.

It was clear that a duty rested on Zwiegers to deal with the money deposited into his trust account with care and that his actions in regard thereto had failed to adhere to that duty. In this, he was negligent. Furthermore, it could not be held that Zwiegers acted lawfully when he transferred the money: ignoring the instructions given in regard to the money could not be considered to be lawful.

A depositor is entitled to expect an attorney to take reasonable care to protect his interests and an attorney into whose trust account money is paid owes a duty to the depositor even if the depositor is not an existing client of the practice.

As far as the element of fault was concerned, Zwiegers had failed to deal with the money on the instructions of the original depositor. He had ignored the instructions contained in the letter sent to him and, after that letter was ostensibly cancelled, dealt with the money as if it was Louw's rather than that of the party that had communicated with him. It could be expected of him to have at least telephoned Du Preez's attorneys to obtain confirmation of the changed instruction. The omission to do so amounted to negligence.

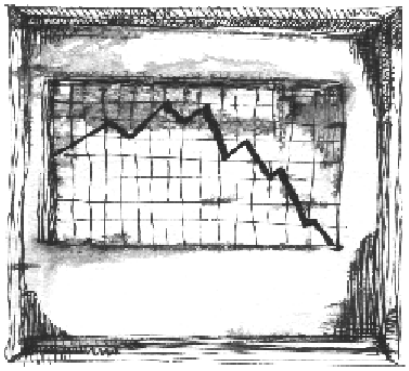
Zwiegers was liable in damages in the sum of R385 000.

# *EX PARTE KELLY*

A JUDGMENT BY SOUTHWOOD J (HARTZENBERG J and BERTELSMANN J concurring) TRANSVAAL PROVINCIAL DIVISION
18 FEBRUARY 2008

2008 (4) SA 615 (T)

***Insolvency***



***The costs of sequestration as estimated in the papers founding an application for sequestration may not be varied after the order of sequestration has been given. Such an order must be understood to contain a limitation on the amount recoverable on account of such costs.***

## THE FACTS

Kelly gave notice that she intended to apply for the surrender of her insolvent estate. Laeveld Korporatiewe Beleggings Bpk gave notice that it intended to oppose the application. Laeveld withdrew its opposition, and each party agreed to pay its own costs.

An order sequestrating Kelly's estate was then given.

Kelly's application papers affirmed that there were sufficient assets in her estate to result in a dividend for creditors of 20 cents in the rand after deduction of the costs of sequestration. The costs of sequestration included a figure of R10 887 in respect of attorney's fees. They did not include a figure for valuator's fees. The application papers were not amended after Laeveld gave notice that it intended to oppose the application and the order of sequestration was given based on the original application papers.

The attorney's bill of costs, when presented for taxation, amounted to R68 729,42 including valuator's fees of R26 311,20. Only an amount of R10 887 was allowed.

The taxed bill was subjected to review.

## THE DECISION

In an application for sequestration of an estate, the amount stated to be costs of the sequestration will, in part, be the basis upon which the court granting the order of sequestration grants the order. The assumption is that the attorney's costs stated in the papers will be at the amount stated. The order given should be understood to contain the limitation on those costs.

Were the amount of attorney's costs be permitted to increase, this would affect the amount of the dividend payable to creditors, raising the possibility that creditors would be called upon to contribute to the costs of sequestration. There was therefore also a practical reason why the figure stated in the application papers should not be varied at a later stage.

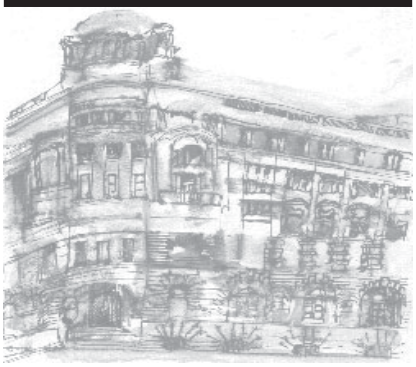
The attorney's fees were therefore correctly limited to the sum of R10 887. The application to review was set dismissed.

# *FIRSTRAND BANK LTD v NATIONAL LOTTERIES BOARD*

A JUDGMENT BY NUGENT JA (HOWIE P, STREICHER JA, COMBRINCK JA and CACHALIA JA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2008

2008 (4) SA 548 (A)

***Banking***



***Giving possession of one's money to another for a limited period amounts to giving consideration and may be understood as a payment of a stake in a lottery if the purpose of so giving possession is to obtain a chance to win a prize.***

## THE FACTS

Firstrand Bank Ltd offered a savings account to customers from which money could be withdrawn on 32 days' notice. No charge was imposed on the customer for opening the account. Money held in the account earned interest at 0.25% per annum. The bank also gave monthly prizes to account holders in various sums, the largest being R1m. The prizes were given to customers selected randomly by computer. A customer's chance of winning a prize increased with the amount of his deposit.

The National Lotteries Board contended that the operation of the savings account involved a contravention of the Lotteries Act (no 57 of 1997) which prohibits unauthorised lotteries. Section 63 of the Act however, allows lotteries in respect of which there is no subscription. The bank contended that as no customer was asked to pay a subscription, the permission provided for in section 63 applied to the savings accounts in question.

The Board applied for an order declaring that the savings accounts were prohibited by the Lotteries Act.

## THE DECISION

A subscription is defined as the payment of any money for the right to compete in a lottery.

The fact that customers did not transfer any money in order to have the savings account, and thereby participate in the lottery, did not mean that no payment had been made. This is because the idea of payment is not confined to the transfer of money in extinction of a debt.

A lottery involves the payment by the participant of a stake, which may or may not be in the form of money. The fact that the bank was prepared to offer a prize pointed to the fact that something of value was given to it by the customer in order to obtain the chance of winning the prize. What passed from the customer to the bank was possession of the money, and with that the earning of interest on the money by the bank. The right to possession alone constituted consideration which was capable of being staked. This was of considerable value to the bank and given this fact, whether or not its possession by the customer would have conferred on the customer any value was irrelevant. That there was value, in any event, was apparent from the fact that it gave the chance to win R1m.

The savings account therefore did involve the payment of a 'subscription' and did not fall within the permission given in section 63.

The Board's application succeeded.

# *PESTANA v NEDBANK LTD*



A JUDGMENT BY
SCHWARTZMAN J
(GOLDSTEIN J and TSHIQI J
concurring)
WITWATERSRAND LOCAL
DIVISION
19 NOVEMBER 2007

2008 (3) SA 466 (W)

***A bank's unconditional transfer of funds from one account into another constitutes a payment into the receiving account and cannot be reversed without the consent of the bank's customer. A garnishee order against the paying account holder cannot be implemented once the payment has been made.***

## THE FACTS

Nedbank Ltd credited Pestana's account with R480 00 after receiving an instruction from a customer that it transfer the money from the customer's account into that account. On the same day, Nedbank received a fax from the South African Revenue Service in terms of section 99 of the Income Tax Act (no 58 of 1962) requiring it to pay R496 000 to SARS from its customer's account. Nedbank then reversed the credit, re-transferred the R480 000 and paid SARS debiting its customer's account.

Section 99 provides that the Commissioner may declare any person to be the agent of any other person, and the person so declared an agent shall be the agent for the purposes of the Act and may be required to make payment of any tax, interest or penalty due from any money which may be held by him or due by him to the person whose agent he has been declared to be.

Pestana objected to the reversal of the credit, and brought an action against Nedbank claiming that the bank re-credit his account.

## THE DECISION

The notice given by SARS had the effect of a garnishee order. It compelled the bank to make payment from its customer's account, but did not do so unconditionally: it did not freeze the customer's account and it did not transfer or effect a cession of the funds in his account to SARS.

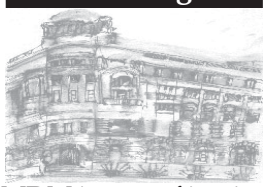
The purpose of the section 99 notice was not to attach money in the bank account, because money paid into a bank account is the property of the bank and not the customer. Its purpose was to attach the customer's right to the money. However, the bank's customer no longer had such a right from the moment that the transfer to Pestana's account took place. That transfer took place with the bank's unconditional intention to make payment. Having unconditionally intended to make payment from its customer's account, and accept payment into Pestana's account, it could not thereafter unilaterally reverse the credit.

It was also incorrect to contend that the transfer of the money had been done by mistake as there was no evidence to show that the bank had made a mistake in effecting this transfer. There was nothing to suggest that Pestana had been aware of any mistake in the transfer and no basis on which to reverse the credit on the grounds that there was some underlying defect vitiating the reason for it.

The action succeeded.

# *JOINT STOCK COMPANY VARVARINSKOYE v ABSA BANK LTD*





A JUDGMENT BY NAVSA JA (HOWIE P, PONNAN JA, MAYA JA AND CACHALIA JA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2008

2008 SACLR 119 (A)

***A bank which is aware of a claim by a third party to funds in its customer's account is obliged to allow payment of such funds to satisfy such claim in preference to any claim of set off later arising by the bank.***

## THE FACTS

The Joint Stock Company Varvarinskoye was a company incorporated according to the laws of the Republic of Kazakhstan. It was responsible for the establishment of a gold and copper mine and processing facilities at a gold-copper deposit located in Northern Kazakhstan which was owned by the European Minerals Corporation. The mine and its facilities were known as the Varvarinskoye Project.

Varvarinskoye appointed MDM Ferroman (Pty) Ltd as project engineer and lead contractor at the site. The parties concluded a contract which included a clause 14.4 which was intended to ensure that MDM's subcontractors would be paid. The clause provided that statements rendered from time to time would certify the amount of each interim payment due to be paid by the contractor to each subcontractor, and the employer would deposit such amounts into an account to be maintained with Absa Bank or Investec Bank. Sums could only be withdrawn from the subcontractor account if the contractor made a request in writing to the subcontractor account bank and that bank had received a copy of an invoice from the relevant subcontractor detailing the amount of such payment, the account into which the amount should be paid and an irrevocable instruction from the contractor to make such payment to the subcontractor's account.

Absa Bank was shown a copy of the contract. It knew about the process provided for in clause 14.4 and the arrangements in regard to authorised signatories. Absa and MDM had concluded an agreement that Absa was entitled to set off any amounts owing to it against any amounts standing to the credit of MDM in any of its six accounts at the bank.

Absa and MDM concluded cross-suretyship agreements which secured the debts of two other companies by MDM in favour of Absa. Relying on these agreements and the set off agreement, Absa applied money deposited into the account provided for in clause 14.4 to the overdrawn balance of the account of a cross-surety, thus reducing the credit balance in that account by R28 244 780.59.

Varvarinskoye cancelled the contract with MDM. MDM was placed in liquidation. Varvarinskoye contested Absa's right to set off amounts standing to the credit of the account into which deposits had been made in terms of clause 14.4. It claimed an order that the money in the account vested in it.

## THE DECISION

It is not a universal and inflexible rule that only an account holder may claim money held in a bank account. Furthermore, the fact that a bank becomes the owner of money deposited in an account does not prevent a third party from claiming that money.

The basis of Absa's claim to the money in MDM's account was set off. At that point, Absa knew about the purpose of the account and the source of the funds in it, the purpose being to hold funds for later payment to subcontractors. It also knew that the company for which a cross-suretyship had been given had no involvement or interest in the money. In these circumstances, where no other party had a claim to the funds in the account, the bank was obliged to allow the claim of the party which it knew had a proper claim to those funds.

The order sought by Varvarinskoye was granted.

# *MILOC FINANCIAL SOLUTIONS (PTY) LTD v LOGISTIC TECHNOLOGIES (PTY) LTD*

A JUDGMENT BY FARLAM JA (HOWIE P, CLOETE JA, VAN HEERDEN JA and SNYDERS AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2008

2008 (4) SA 325 (A)

**Contract**

***Payments made by a debtor must be appropriated to the debt most onerous to the debtor. The principle of reciprocity of performance of contracts may be applied to the performance of multiple contracts if there is a sufficiently close link between those contracts.***

## THE FACTS

Logistic Technologies (Pty) Ltd owed Miloc Financial Solutions Ltd money arising from two causes, the cession to Miloc of amounts owing to the Standard Bank and a loan made to Logistic by Miloc in May 2004. Logistic's claims were secured by suretyships given by the other respondents. Logistic also held security in the form of a pledge of 20% of the share capital of Sigma Logistic Solutions (Pty) Ltd. The shares had been sold to Moolman, the eleventh respondent, for R1.5m. In terms of that agreement, the purchase consideration was to be paid to Miloc, and upon the happening of that event, the operation of the pledge would cease and Sigma's obligations toward Miloc would terminate.

On the same date as the conclusion of these agreements, Moolman also purchased one hundred shares in Information Dynamics (Pty) Ltd, the tenth respondent, and one hundred shares in Logtek USA Inc, from Logtek Group Investments (Pty) Ltd, for R4m. In terms of this agreement, the purchase consideration was to be paid to Miloc, and upon final payment, the operation of a pledge held over the seller's shares would terminate, as would the seller's obligations to Miloc and those of the Moolman Trust.

Moolman paid a total of R2m to Miloc, R1m on 3 September 2005 and R1m on 2 December 2005.

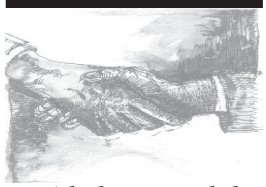
On 8 March 2006, Miloc's attorneys sent a letter to Moolman stating that the date of payment of the amounts outstanding under the two agreements was extended to 18 April 2006. The letter acknowledged that Moolman wished to use the shares in Sigma Logistics as collateral to raise funds to settle the unpaid balance and confirmed that Miloc was prepared to release the shares from the pledge, provided it received suitable guarantees for payment of the R3.5 million balance.

On 13 April 2006, Miloc's attorneys sent a letter to Moolman extending the date of payment to 30 June 2006, subject to certain conditions. On 30 June 2006, Miloc's attorneys sent letters of demand to Moolman and Logistic Technologies requiring payment of all amounts outstanding. This included a demand for R1.5m in respect of the Sigma Logistics share sale agreement and R3.5m under the Logtek USA agreement. Miloc brought an application for an order compelling payment.

Moolman's attorneys contended that the R2m paid to Miloc could have been applied to the indebtedness arising out of the Sigma Logistics agreement and that that would have enabled Moolman to raise the capital necessary to pay the outstanding balance of R3.5m.

## THE DECISION

When Moolman paid the first amount of R1m, only the Sigma Logistics agreement had been concluded. The amount paid therefore reduced the amount owing under that contract. When Moolman paid the second amount of R1m, there were two amounts owing, the balance of R500 000 under the Sigma Logistics agreement and the R4m under the Logtek USA agreement. Neither the debtor nor the creditor appropriated this payment to either of the two debts, and therefore the common law rules applied: payment was to be appropriated to the debt most onerous to the debtor. The debt more in the interests of Moolman



to pay was the debt owing under the Sigma Logistics agreement as this would have discharged the debt owing under that agreement in full and would have released the Sigma shares from the pledge. This would have enabled Moolman to use them as collateral and raise finance for the purposes of paying the debt owing under the Logtek USA agreement.

Moolman must therefore be taken to have paid the debt due under the Sigma Logistics agreement. It followed that Miloc had not been entitled to cancel the agreements and call for payment.

The principle of reciprocity in the performance of contracts applied: Moolman's obligation to make payment under the Logtek USA agreement was so closely linked with Miloc's obligation to release the Sigma shares from the pledge that his obligation was suspended until such time as Miloc met its obligation.

Miloc's application was dismissed.

*It is clear, in my view, that on the version of the contract deposed to by him, the eleventh respondent's obligation to pay the balance due under the USA agreement was so closely linked to the appellant's obligation to release the Sigma shares that the principle of reciprocity applies: that is to say the appellant must release the Sigma shares before being able to claim the price of the USA shares. In the interim the eleventh respondent is entitled to withhold performance of his obligation to pay for the USA shares, which obligation is suspended: see* BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk *1997 (1) SA 391 (A) at 418B-H.*

# *TRANSNET LTD v OWNER OF MV SNOW CRYSTAL*



A JUDGMENT BY SCOTT JA (FARLAM JA, CLOETE JA, COMBRINCK JA and HURT AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2008

2008 (4) SA 111 (A)

***The performance of some service by an organ of state which is arranged in terms of regulations under which that organ is governed may be understood to take place as the performance of a contract concluded between the party which secured that performance and the organ of state.***

## THE FACTS

In March 2002, the agents of the owner of the *Snow Crystal* entered into negotiations with Transnet Ltd for the dry docking of the *Snow Crystal* towards the end of that year. The parties agreed on the dry docking for the period 1-14 December 2002. In June 2002, the owner's agent submitted an application for the use of the dry dock for that period, and the booking was accepted by Transnet Ltd.

The application was submitted in terms of regulation 61 of the Harbour Regulations. The regulations provided that the dock master may give preference to a ship which arrives in a damaged or leaking condition or to a ship which requires the dry dock for a period not exceeding 72 hours. They also provided that no ship would have an absolute right of use of the dry dock either in turn or at any other time. Regulation 61(10) provided that if a ship failed to leave the dry dock upon expiration of the period agreed upon, the ship could be removed at the expense of the owner if the dry dock was required by another ship.

On 29 November 2002, Transnet notified the *Snow Crystal's* agents that the dry dock was occupied by another ship, the *Gulf Fleet 29*, and the dry dock would only become available on 6 December. This date was later revised to 10 December. On 8 December, the agents were notified that, due to rain, the *Gulf Fleet 29* would only undock on 10 December. The owners of the *Snow Crystal* then cancelled the booking for the dry dock, and claimed damages for breach of contract.

Transnet defended the claim on the grounds that no binding contract had been concluded, alternatively, if it had, performance of the contract had become impossible through no fault of its own.

## THE DECISION

It was not correct to say that the use of the dry dock came about as a result of the application of the regulations, as opposed to the conclusion of a contract. Transnet was empowered to conclude contracts. Furthermore, the owner of the Snow Crystal had given undertakings to Transnet in terms of the regulations including an undertaking to pay the applicable charges. Those obligations entitled Transnet to enforcement, should they be breached, in which case it would have correctly asserted that the owner's liability arose from contract. The relationship between the parties was that of a reciprocal commercial transaction in which Transnet undertook to provide the dry dock in return for payment.

As far as the defence of impossibility of performance was concerned, Transnet could have required the Gulf Fleet 29 to move from the dry dock as it was entitled to do this. However, Transnet had not taken steps to do so. This meant that it could not plead that any supervening impossibility of performance had taken place.

# *SWART v JANSE VAN RENSBURG*



A JUDGMENT BY COMBRINCK JA (FARLAM JA AND HEHER JA concurring)
SUPREME COURT OF APPEAL
29 FEBRUARY 2008

2008 SACLR 109 (A)

***A contractual provision entitling one party to payment of a fixed sum as a genuine pre-estimate of damages is enforceable.***

## THE FACTS

NPS Distributors (Edms) Bpk bought certain fixed property from Janse Van Rensburg. In terms of the agreement, Janse Van Rensburg would be entitled to cancel the agreement should NPS default in meeting its obligations, in which case NPS would be obliged to vacate the property and Mr PF Swart would be obliged to pay NPS R60 000 as pre-estimated and agreed damages.

The agreement also provided that no pre-contractual representations had been made by Janse Van Rensburg and that no warranties were made by Janse Van Rensburg that the property could be used for any purpose other than residential.

NPS defaulted in meeting its obligations in that it failed to deliver guarantees on due date. Janse Van Rensburg gave notice of the default, and then cancelled the agreement and claimed R60 000. He brought an action against Janse Van Rensburg for payment.

Swart defended the action on the grounds that the agreement had been concluded on the basis of the mistaken assumption that the property would be rezoned, that the provision for payment of R60 000 was a penal provision in contravention of the Act on Penal Provisions (no 15 of 1962), alternatively that Janse Van Rensburg had repudiated the contract and NPS had accepted the repudiation.

## THE DECISION

Whether or not the Act was applicable, in order to ensure that the provision for payment of R60 000 was acceptable under the common law, it had to be clear that this amount represented a genuine pre-estimate of damages. As such, it would be enforceable. The evidence showed that Janse Van Rensburg would suffer damages as a result of a failed sale. Accordingly, it was clear that the amount of R60 000 represented a genuine pre-estimate of damages consequent upon cancellation. The provision could therefore not be considered invalid and it was enforceable against Swart.

As far as the common mistaken assumption was concerned, every indication was that the parties had been aware that the property was zoned as residential and proceeded with implementation of the sale on that basis. NPS had not indicated at that stage that it considered the zoning of the property on a different basis was essential to its intention to proceed with the transfer of the property. There was therefore no basis for accepting that a mistaken assumption common to the parties to the agreement had existed and constituted a basis for avoiding the agreement.

The action succeeded.

# *UNIVERSITY OF KWAZULU-NATAL v GOGA*



A JUDGMENT BY LEVINSOHN DJP (SWAIN J AND THERON J concurring)
NATAL PROVINCIAL DIVISION
23 APRIL 2008

2008 SACLR 158 (N)

***An employer agreement which divides the duties of a common employee between each employer may be enforced by one employer in respect only of those duties owed by the employee to that employer.***

## THE FACTS

Goga was employed by the Provincial Government of KwaZulu-Natal (Department of Health) as a principal orthopaedic specialist. Under an arrangement concluded by the provincial government and the University of Kwazulu Natal, some doctors employed by the provincial government were to teach students at the university and fulfil other functions for the university. The university was also to enjoy access to hospitals and pathological laboratories under the control of the provincial government.

Goga performed academic services for the university under the arrangement concluded between it and the provincial government. He was a member of the joint medical staff and an associate professor at the university.

In November 2005, the university instituted disciplinary proceedings against Goga. These concerned his involvement in the appointment of staff at the hospital and his behaviour toward a colleague in matters to do with the hospital.

Goga contended that the allegations against him related to hospital administration issues arising exclusively from the performance of his duties as an employee of the province, and did not relate to academic issues or the rendering of services as a lecturer. He brought an application for an interdict challenging the jurisdiction of the disciplinary tribunal and an order for the permanent stay of the prosecution against him.

## THE DECISION

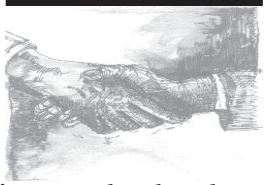
Under the arrangement concluded between the provincial government and the university, the joint medical staff was appointed by both the province and the university. The parties envisaged that the province would control the duties of the joint medical staff insofar as its clinical and administrative work at the hospital was concerned, and the university would control their academic duties. The parties intended that there should be a distinction between the two functions.

The functions relating to the complaint brought against Goga in the disciplinary proceedings were relevant to the performance of his duties in the hospital, in contradistinction to his duties at the university. Since the complaint was brought by the university, this ignored the provisions of the arrangement concluded between the province and the university. The substance of the charges levelled against Goga did not relate to his academic duties and it was therefore incompetent for the disciplinary tribunal to determine the matter.

The application succeeded.

# *BROWN v YEBBA CC*





JUDGMENT BY LEVINSOHN DJP
DURBAN AND COAST LOCAL DIVISION
9 MAY 2008

2008 CLR 189 (D)

***A dispute resolution system provided for in an agreement may not be applicable in the debatement of an account ordered by a court. A court may vary an order which is interlocutory if the effect thereof is to bring finality to the dispute between the parties.***

## THE FACTS

Brown and the other applicants were estate agents who had contracted with Yeba CC to operate as estate agents under the Remax branding. They were entitled to commissions earned on sales, less a franchise fee of 6½% on commissions earned. Sellers would be obliged to pay commissions to Yeba which would then pay to the agents such commissions as they had earned, less the franchise fee. Should disputes arise between the parties, a dispute resolution mechanism was provided for.

Brown and the other agents contended that Yeba was wrongfully withholding commissions due to them. They brought an application to compel Yeba to pay them their commissions and entitle them to collect commissions from whoever was obliged to pay commission in terms of sales contracts.

The application resulted in an order by consent in terms of which the matter was postponed and Yeba undertook to pay R183 800.80 to the applicants' attorneys by the close of business on 16 October 2007 and set forth how this amount was calculated and arrived at. A debatement of account was then to follow based upon transactions not included in the first payment.

Brown then brought an urgent application for an order that the previous order be amended by the deletion of the debatement order and substitution of an order that Yeba pay R415 610,95, being the amount calculated to be due under the agreement.

Yeba contended that the previous order could not be varied and that disputes between the parties were to be resolved by the arbitration procedures provided for in their agreement.

## THE DECISION

The court order did not intend that the dispute resolution mechanism provided for in the parties' agreement was to be used in determining the amount due by Yeba CC to Brown and the other applicants. It was therefore not open to Yeba to insist that this mechanism by employed in this determination. The intention was that the final determination was to be given after setting the matter down again for final adjudication by the court.

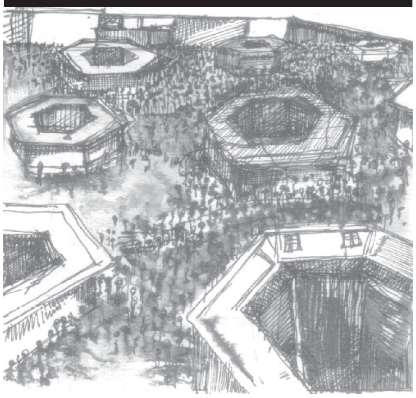
Since the parties had been unable to reach any agreement, the circumstances indicated that the order should be varied. The effect of such an order would be far-reaching. Accordingly, a debatement of account was called for. The order was accordingly varied so as to require a debatement of account and judgment for the applicants in the amount found to be due.

# *EX PARTE NEW SEASONS AUTO HOLDINGS (PTY) LTD*

A JUDGMENT BY HORWITZ AJ
WITWATERSRAND LOCAL
DIVISION
31 MARCH 2008

2008 (4) SA 341 (W)

***Companies***



***A board of directors does not have the power to pass a resolution winding up their company. Such a resolution must be passed by the members in general meeting.***

## THE FACTS

The board of directors of New Seasons Auto Holdings (Pty) Ltd passed a resolution for the winding up of the company. No general meeting of the shareholders was held to pass a resolution winding up the company. The company then brought an application for its winding up, basing its application on the resolution passed by the board of directors.

The court considered the question whether a winding up order could be given on the strength of the resolution of the board of directors alone.

## THE DECISION

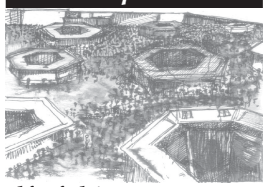
Section 346(1)(a) of the Companies Act (no 81 of 1973) provides that a company may apply for its own winding up. The section has been interpreted as not referring to a company in general meeting, leaving it open to a company's board of directors to resolve to bring such an application. However, there have also been interpretations in direct contradiction to this. It has been held that the section is not definitive of the question and that the answer lies in the proper interpretation of Article 59 of a company's Articles of Association, as recorded in the Companies Act.

Article 59 provides that directors may exercise all such powers of the company as are not by the Act, or by the Articles, required to be exercised by the company in general meeting. This empowers directors to manage the business of the company, which is to be distinguished from the affairs of the company. It does not empower the directors to liquidate the company merely because section 346(1)(a) does not expressly require liquidation of the company by resolution of the members in general meeting. The directors are given the power to manage the business of a company, which is the antithesis of liquidating it.

The resolution of the board of directors alone was therefore insufficient. The application was dismissed.

# *SCHWARTZ NO v PIKE*





A JUDGMENT BY HEHER JA (MTHIYANE JA and VAN HEERDEN JA concurring) SUPREME COURT OF APPEAL 19 SEPTEMBER 2007

2008 (3) SA 431 (A)

***A provision for the valuation of a member's interest which requires parties to reach agreement on the value, failing which an independent valuer should be agreed upon and appointed, failing which either party may apply to a third party for such appointment, requires that the parties follow the procedures provided for before enforcing their rights thereunder.***

## THE FACTS

Clause 16 of Lore Marketing 46 CC's Association Agreement, concluded by Pennels, Pike and Van der Merwe as members of the close corporation, provided that upon the death of any member, the duly appointed executor of the deceased's estate was to enter into negotiations with a view to reaching an agreement as to the reasonable and fair value of the deceased's interest as at date of death. If the parties were unable to reach an agreement, then they were to jointly appoint a chartered accountant to determine the reasonable and fair value of the deceased's interest. If the parties concerned were unable to reach an agreement as to the appointment of a chartered accountant, then either the remaining members or the executor could request the acting president of the South African Institute of Chartered Accountants to nominate a chartered accountant for the purpose of determining the value. Any such nomination would be final and binding on all the remaining members and the executor.

Pennels died. Schwartz was appointed executor. In June 2003, he wrote a letter to Pike and Van der Merwe stating he had placed a value on Pennel's interest in Lore Marketing. He referred to clause 16 and invited them to put forward their own valuations. At that time, there was a dispute between the parties as to whether or not Lore Marketing had been operating a certain restaurant business.

Schwartz then requested the president of the South African Institute of Chartered Accountants to appoint a chartered accountant to determine the value. The appointed party determined the value at R2 107 424. Schwartz demanded half of this amount from Pike and Van der Merwe. They refused to pay this sum, contending that Schwartz had not properly applied the provisions of clause 16 in that they had not been requested to agree on the appointment of a chartered accountant to determine the value of Pennel's interest in Lore Marketing.

Schwartz applied for an order that Pike and Van der Merwe each pay R1 053 712 to the deceased estate.

## THE DECISION

Schwartz contended that clause 16 did not expressly oblige the executor to request the other members to agree on the appointment of a person to value the member's interest, and that for such an appointment, it is merely necessary that no agreement should have been reached.

However, a proper construction of the clause shows that the parties were to firstly negotiate on the value of the interest, and then - if they were unable to agree on that - agree on the appointment of a valuator. Failing agreement on that, any party could secure the appointment of a valuator on application to the South African Institute of Chartered Accountants. Based on this interpretation, the provisions of the clause had not been applied. Neither party could secure the appointment of the valuator before attempts to reach agreement had taken place and there had been a failure in those attempts. The absence of agreement did not amount to disagreement.

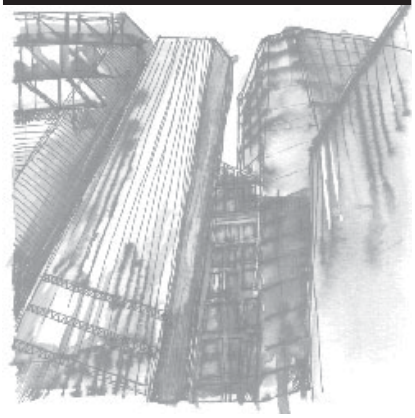
The application brought by Schwartz was premature, the provisions of clause 16 not having been applied beforehand. The application was dismissed.

# *PROPHITIUS v CAMPBELL*

A JUDGMENT BY NICHOLSON J
DURBAN AND COAST LOCAL DIVISION
11 DECEMBER 2007

2008 (3) SA 552 (D)

***Property***



***A purchaser of property who takes transfer of property without knowledge that the property has been sold to another party may assert its right of ownership against that other party if his right to ownership was established before that party acquired its right.***

## THE FACTS

The Campbell Children's Trust sold its property - erf 757, Palm Beach in Kwazulu Natal - to the third respondent for R45 000. Ten months later, the trust sold the same property to Prophitius for R195 000. Both agreements contained suspensive conditions that the purchaser obtain a loan for payment of the purchase price.

Two months later, the third respondent sold the property to the fourth respondent for R165 000. This agreement contained no suspensive condition.

The trust transferred the property to Prophitius. The trust alleged that the title deed had become lost and registration of transfer took place following an application in terms of regulation 38 of the Deeds Registries Act (no 47 of 1937). Some three months later, the trust transferred the property to the third respondent which simultaneously transferred the property to the fourth respondent. Upon registration of transfer, the Registrar of Deeds issued a deed of transfer to the fourth respondent.

Both Prophitius and the fourth respondent claimed that they were the owner of the property. Prophitius brought an application for an order declaring him to be the owner and the fourth respondent counter-applied for an order declaring him to be the owner.

## THE DECISION

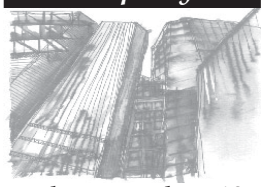
If parties to a transaction wish to transfer ownership and contemplate that ownership will pass as a result of the delivery, then they have the necessary intention to transfer ownership and ownership passes by delivery. This rule of law, established in *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369, implies that there need not be an underlying reason for the transaction separate from the intention to transfer, without which the transaction is void. It would follow from this that the transfer to Prophitius resulted in ownership passing to him.

In accordance with the rule that he who comes first obtains the better right, Prophitius - the earlier holder of the right of ownership - could assert his right against the fourth respondent. This he was able to do without having to prove that the sale of the property to him was based on any valid underlying transaction, and irrespective of the fact that the trust had been fraudulent when it sold the property to him. There was no evidence that Prophitius knew of the sale to the third respondent, a factor which would have led to a different conclusion if there had been such evidence.

The application brought by Prophitius was granted.

# *PS BOOKSELLERS (PTY) LTD v HARRISON*





A JUDGMENT BY MEER J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
12 APRIL 2007

2008 (3) SA 633 (C)

***A restrictive condition in a title deed which creates an exception in the case of boundary walls should not be construed as applying to retaining walls in cases where the boundary wall functions as a retaining wall.***

## THE FACTS

Harrison owned a property in Geneva Drive, Cape Town. She submitted building plans for approval to the local authority, secured approval, and commenced building operations. These involved demolition of the existing structure and the construction of a new dwelling.

The title deed of the property contained a restrictive condition that prohibited the erection of any building or structure or any portion thereof, except boundary walls and fences, nearer than 3,15 metres to the street line which forms a boundary to the property.

The building plans included provision for the building of retaining walls within the margin referred to in the title deed restriction. Harrison began construction, including the retaining walls.

The retaining walls enabled Harrison to increase the ground level of the property, and thereby increase the ultimate height of the building. Its height was restricted by section 98 of the Zoning Scheme Regulations which provided that no building in that area was to exceed three storeys in height, and no point on the facade of any building within that area was to be more than 10 metres above the level of ground abutting such facade immediately below such point.

PS Booksellers (Pty) Ltd owned a neighbouring property. It and the ratepayers association brought an application for an interdict to prevent continued building operations pending an appeal against the approval of the plans and an application for the demolition of any construction contravening the title deed conditions.

## THE DECISION

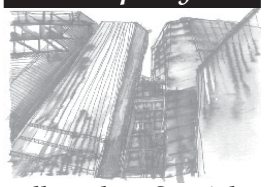
Harrison contended that the retaining walls were in fact boundary walls because they were situated on the boundary of the property. However, they could not be characterised as boundary walls for that reason alone: they did not enclose an open area and they abutted an area filled with soil and a swimming pool. They therefore did not fall within the exception referred to in the title deed's restrictive condition.

It was also clear that the retaining walls enabled the increase in the height of the ground level resulting in a contravention of regulation 98.

The interdict was granted.

# *VAN RENSBURG N.O. v NELSON MANDELA METROPOLITAN MUNICIPALITY*





A JUDGMENT BY FRONEMAN J
SOUTH EASTERN CAPE LOCAL DIVISION
3 APRIL 2007

2008 (2) SA 8 (SECLD)

***An order that structures built in contravention of title deed restrictions be demolished may be given if an assessment of the infringement of the rights of neighbours intended to be protected by such restrictions indicates that such an order is preferable to a damages award.***

## THE FACTS

After the Shan Trust became the owner of erf 105, Summerstrand, in Port Elizabeth, it began renovations to a garage situated on the property and the construction of another building on the property.

Restrictive conditions in the property's title deed registered in favour of the Nelson Mandela Metropolitan Municipality and any erf holder in the Summerstrand Extension Township provided that the property could be used for residential purposes only, that only one single-house dwelling for use by a single family and ordinary outbuildings required for such use could be built on the property, and no garage other than for ordinary use for persons residing on the property could be erected on the property.

The renovations to the garage had been done without plans being submitted and approved by the municipality. Plans were later submitted and approved. The municipality sent a letter of warning to the Shan Trust. A neighbour, the Hobie Trust represented by Van Rensburg, was assured that the unlawful activities would be rectified. When this did not happen, Van Rensburg applied for an order rectifying the buildings, but later withdrew the application on the understanding that the municipality would ensure that only one additional dwelling unit was permitted on the erf and that only four guestrooms would be allowed for lease accommodation. This was not adhered to. Special consent use for eleven bedrooms was granted by the municipality, but the special consent use was later withdrawn because the Shan Trust failed to comply with the requirements set for that use.

Van Rensburg applied for an order that the new buildings be demolished.

## THE DECISION

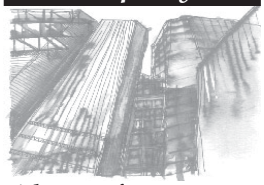
The court had a discretion to order the payment of damages rather than order demolition of the offending buildings. The exercise of this discretion involved assessing the extent to which the encroachment on the rights of neighbours had taken place.

The history of the matter showed that the Shan Trust had disregarded not only the legitimate interests of its neighbours, but also the requirements set by the municipality over a very long period. While it might be possible to quantify the diminution in value of the Hobie Trust's property, continued enjoyment of its privacy and the privacy of others living as neighbours to the property would be destroyed were an order demolishing the offending structures and buildings on that property not given. The title conditions for the suburb intended to ensure that the suburb retained its character and the developments on the property undermined that purpose. Damages would not alleviate that difficulty.

An order that the new buildings be demolished was given.

# *KOUMANTARAKIS GROUP CC v MYSTIC RIVER INVESTMENT 45 (PTY) LTD*

*Property*



A JUDGMENT BY MHLANTLA AJA (HOWIE P, FARLAM JA, NAVSA JA, KGOMO AJA concurring)
SUPREME COURT OF APPEAL
14 MAY 2008

2008 SACLR 199 (A)

***A revocable property guarantee issued to secure payment of the purchase price does not constitute security for the seller but indicates the method of payment the seller can expect. If such a guarantee qualifies the guarantor's obligation to pay, this does not entitle the guarantor to withhold payment at a whim.***

## THE FACTS

The Koumantarakis Group CC bought Erf 301, Portion 16, Springfield Park from Mystic River Investment 45 (Pty) Ltd for R12m. Clause 3.2 of the agreement provided that the price was to be paid by a deposit of R1m secured by a bank guarantee acceptable to the first respondent and payable on transfer, to be lodged within three days of fulfilment of a suspensive condition, and by a similar guarantee for the balance payable on transfer and to be lodged within 45 working days of the deposit being lodged.

Koumantarakis requested Mystic to indicate the form of guarantee which would be acceptable to it. Upon receiving no response, Koumantarakis obtained a guarantee from the Standard Bank in its usual form. Paragraph 4 of the bank guarantee provided that should any new or previously undisclosed fact emerge which may prejudice the bank's security or any circumstances arise to prevent or unduly delay registration of transfer, it reserved the right to withdraw from the guarantee by giving written notice to that effect.

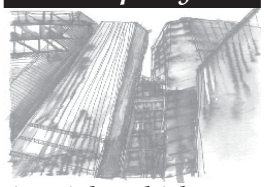
Mystic stated that the guarantee was unacceptable because it entitled the bank to withdraw. It stated that a guarantee acceptable to it was one which expressly provided that it was to expire one year from date of issue and was irrevocable. It notified Koumantarakis that a guarantee in that form was required within seven working days, failing which it would be considered to be in breach of the agreement. After Koumantarakis refused to deliver a guarantee in the form required by Mystic, Mystic cancelled the agreement.

Citing the evidence of a conveyancer with extensive experience in property transactions, to the effect that the guarantee it provided was a long-standing and general practice of financial institutions and generally accepted as a form of guarantee in property transactions, Koumantarakis contested Mystic's right to cancel the agreement. It brought an application for an order preventing transfer of the property to anyone other than itself.

## THE DECISION

The function of the guarantee was not to provide security to Mystic but to provide for payment upon transfer. It gave Mystic the assurance that Koumantarakis would have the necessary funds when transfer was to take place, but did not provide Mystic with any rights in respect thereof. If Mystic had wanted to have rights, it should have required an irrevocable guarantee and provided for this in the sale agreement.

The next question was whether Mystic acted reasonably when it rejected the guarantee. Mystic contended that the revocability of the guarantee entitled the bank to reject payment on a whim. However, the bank could not do so, because it would be obliged to indicate which new facts had arisen upon which it had determined to revoke the guarantee. As far as the second qualification to the guarantee was concerned - circumstances arising to prevent or unduly delay registration of transfer - the circumstances referred to would be those arising after the issue of the guarantee. The seller is responsible for the timeous



transfer of the property and it would therefore be within its power to ensure the speediest transfer. The right to withdraw from the guarantee was therefore not an extensive right which could be exercised capriciously and at a whim.

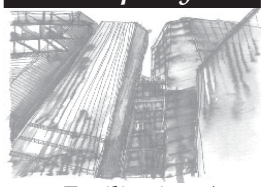
The application brought by Koumantarakis succeeded.

*In this case, it appears to me that the guarantee in the context of this contract is not irrevocable and was not intended to serve as security in the true sense of the word. It is evident that the letter issued by Standard Bank is a contractual undertaking and that payment will be made upon registration of transfer.*

*[33] The parties agreed to structure payment in staggered phases. This was a two-tier stage, where the guarantee for the deposit had to be furnished within three days after the due diligence exercise and the guarantee for the balance to be provided 45 days later. It was a term of the agreement that such guarantees would only be payable upon a later date, that is, on registration of transfer. In my view, absent the word 'irrevocable' in the present contract, one is left with the usual undertaking provided by a financial institution. If the seller required security pending transfer, it should have stipulated in the agreement that it required an irrevocable guarantee. It is not for the seller to achieve by later objection what it could have, but did not, achieve by appropriate agreement.*

# *JOHANNESBURG METROPOLITAN MUNICIPALITY v GAUTENG DEVELOPMENT TRIBUNAL*





A JUDGMENT BY GILDENHUYS J
WITWATERSRAND LOCAL DIVISION
5 FEBRUARY 2008

2008 (4) SA 572 (W)

***A development tribunal acting under the powers given to it by the Development Facilitation Act (no 67 of 1995) may approve applications for land development areas and amend town planning schemes, without the participation of a municipality, provided that the tribunal is guided by the municipality's integrated development plan.***

## THE FACTS

In November 2003, the owner of Portion 229 of the farm Roodekrans No 183 IQ, applied to the Gauteng Development Tribunal under section 31 of the Development Facilitation Act (no 67 of 1995) for the establishment of a land development area, ie a township to be known as Poortview Extension 19, consisting of twenty one erven. Of these, nineteen were proposed to be residential, one agricultural and one special for purposes of access. At the time when the application was lodged, the land was zoned agricultural under the applicable town planning scheme. That zoning did not allow residential development or township establishment. The property fell outside the urban development boundary of the Johannesburg Metropolitan Municipality.

The Tribunal approved the establishment of the land development area in respect of Poortview.

On 17 May 2004 the owners of Portion 228 of the farm Ruimsig No 265 IQ, made a similar application to the Gauteng Development Tribunal under section 31 of the Development Facilitation Act for the establishment of a land development area, a township to be known as Ruimsig Extension 59. The property was then zoned agricultural and was situated outside the municipality's urban development boundary.

The Tribunal approved the establishment of the land development area in respect of Ruimsig.

The municipality refused to recognise the Tribunal's decisions and brought an application to review them and set them aside. It contended that the Tribunal's decisions were not authorised by the Development Facilitation Act, violated the fundamental requirement of legality, and usurped its town planning powers and functions as conferred on it under the Local Government: Municipal Systems Act (no.32 of 2000).

## THE DECISION

Section 33(2)(j)(vi) of the Development Facilitation Act entitles a tribunal to determine whether the provisions of any law relating to land development are to be suspended insofar as they apply to a proposed development. In making its decisions, the Tribunal had considered itself entitled to deviate from the delineation of the municipality's urban development boundary. This was an integral part of the municipality's spatial development framework and urban development plan, but these policy guidelines themselves recognised and accepted that deviations from them could take place. Since the evidence showed that the Tribunal had considered the merits of deviating from the urban development boundary, its decision to do so was not inconsistent with the manner in which the municipality itself would have decided the applications.

The Tribunal had the power to approve development applications involving rezonings and the establishment of townships. In giving such approval, it had to be guided by the municipality's integrated development plan, including its urban development boundary. It could, in special cases, approve developments on land lying beyond the delineation of the urban development boundary.

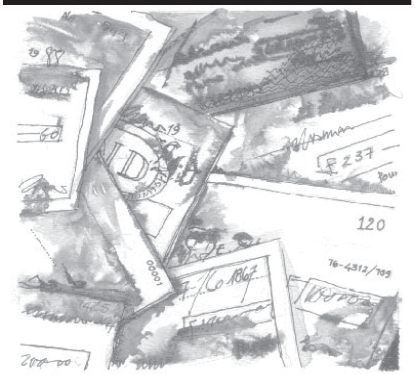
The application failed.

# *WATSON N.O. v SHAW N.O.*

A JUDGMENT BY FOURIE J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
13 JUNE 2007

2008 (1) SA 350 (C)

## *Enrichment*



***Payments made in violation of regulation 28(1)(d) of regulations promulgated under the Medical Schemes Act (no 131 of 1998) may be recovered on the basis of unjustified enrichment of the recipient.***

## THE FACTS

De Villiers was a trustee of the medical scheme Publiserve. He was also the sole member of Afrisure CC.

During the period October 2000 to January 2001, Publiserve paid some R5m to Afrisure in consideration for De Villiers having effected the transfer of 5 251 members from another medical scheme to Publiserve. The payments to Afrisure consisted of brokerage fees made up of a once-off placement fee and marketing fee. Provision was also made for payment of R100 per member per month for the rendering of certain services by Afrisure.

Publiserve was wound up by order of court and Watson was appointed its liquidator. Watson contended that the payments made to Afrisure were not due to it as they were made in contravention of the Medical Schemes Act (no 131 of 1998) and the regulations made under it. Regulation 28(1)(d) provides that a medical scheme must not compensate any person for the introduction or admission of a member to that medical scheme when acting as a broker unless such person has been accredited by the Council for Medical Schemes to act as a broker and enters into a prior written agreement with the medical scheme concerned, and the nature and compensation payable to such person must be fully disclosed in the financial statements of the medical scheme concerned. No prior written agreement was concluded between Publiserve and De Villiers on behalf of Afrisure.

Watson brought an action against Afrisure and De Villiers for recovery of the R5m. The claim against Afrisure was based on unjustified enrichment, alternatively a voidable disposition in terms of section 29 of the Insolvency Act (no 24 of 1936). The claim against De Villiers was a damages claim alternatively that he was personally liable for the debts of Publiserve in terms of section 424 of the Companies Act (no 61 of 1973).

## THE DECISION

The requirement that there be a written agreement governing compensation payable for introductions to a medical scheme is not a mere formality. The legislature intended that payment of broker fees without a written agreement is null and void and illegal.

The fact that Publiserve also acted in violation of the regulation did not mean that it was equally at fault and that the 'par delictum' rule could be applied against it. Even if it could be considered at fault in some degree, that rule should be relaxed in order to prevent an injustice from being done.

It followed that Publiserve was entitled to return of the money paid on the basis of an enrichment action, the condictio ob turpem vel iniustam causa.

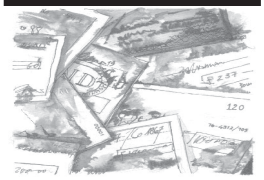
It was also entitled to return of the money paid on the basis of another enrichment action, the condictio indebiti, because the payments had been made without there being a legal reason for the payments, and were made in the bona fide and honest belief that the money was owed to Afrisure.

The payments in respect of the rendering of services, as opposed to those described as broker's fees, were not referred to by the Act. However, they were in reality payments for broker's fees and were to be treated in the same way as those expressly described as broker's fees.

The action succeeded.

# *NAIDOO v SANBONANI EXPRESS FREIGHT*





A JUDGMENT BY LEVINSOHN J
DURBAN AND COAST LOCAL DIVISION
19 FEBRUARY 2008

2008 SACLR 74 (D)

***A party alleging that it holds a salvage lien on account of having stored and insured an owner's goods, and asserting that right against the owner of the goods, must show that the owner has been unjustly enriched at its expense.***

## THE FACTS

Naidoo agreed with Pillay that Pillay would transport his goods from Durban to Johannesburg. Pillay contracted with Sanbonani Express Freight to execute the transportation and delivered the goods to Sanbonani for this purpose.

Sanbonani held the goods in storage but refused to transport the goods to Johannesburg until it had been paid monies allegedly owed to it by Pillay. It contended that it held a lien over the goods and was entitled to assert it against Naidoo.

Naidoo contended that as owner of the goods, he was entitled to delivery of goods and that Sanbonani did not hold a lien that could be asserted against him.

## THE DECISION

Since there was no contractual relationship between Naidoo and Sanbonani, the lien asserted against Naidoo could not be a debtor-creditor lien but it would have to be shown that it was a salvage lien which is a real right, not dependent on the existence of an agreement.

All that Sanbonani had done in this regard was allege that it held the goods in storage and had insured them. This it had done in the knowledge that the goods had to be transported to Johannesburg without delay. This was insufficient to show that Naidoo had been unjustly enriched at its expense. There was no indication of the costs incurred by Sanbonani in storing and insuring the goods, nor of the reasons for it having done so.

Sanbonani had failed to establish a salvage lien. Naidoo was entitled to delivery of the goods.

# *GOUNDER v TOP SPEC INVESTMENTS (PTY) LTD*

A JUDGMENT BY MPATI DP (NUGENT JA, VAN HEERDEN JA, CACHALIA JA AND MHLANTLA AJA concurring)
SUPREME COURT OF APPEAL
8 MAY 2008

2008 SACLR 214 (A)

***Credit Transactions***

***An agreement of loan is not an agreement contemplated in section 15(2)(b) of the Matrimonial Property Act (no 88 of 1984) even if it refers to an intention to mortgage immovable property in a separate agreement.***

## THE FACTS

In April 2006, Mr and Mrs Gounder and Top Spec Investments (Pty) Ltd concluded a loan agreement in terms of which Top Spec undertook to lend the Gounders R1m. The loan was repayable on 3 July 2006. The agreement provided that the Gounders were liable for payment of a raising fee of R140 000 as well as a penalty raising fee of 10% of the loan per month commencing 4 July 2006, should the loan not be repaid on due date.

The agreement also provided that registration of transfer of the Gounders' residential property was to take place and Mr Gounder signed a power of attorney to register a mortgage bond over her property. The registration of a mortgage bond over the property did not take place.

The Gounders were married to each other in community of property.

Top Spec advanced the loan to the Gounders. They failed to repay the loan on due date. Top Spec brought an application for repayment of the loan as well as payment of the raising fee and the penalty raising fee. The Gounders defended the application on the grounds that only Mr Gounder had signed the loan agreement. Top Spec contended that as section 15(1) of the Matrimonial Property Act (no 88 of 1984) applied, the absence of Mrs Gounder's signature was irrelevant. The sub-section provides that, subject to sub-section 2 and 4, a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse. Top Spec also contended that in any event, section 15(9) applied. That sub-section provides that when a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) and that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions, it is deemed that the transaction concerned has been entered into with the consent required.

## THE DECISION

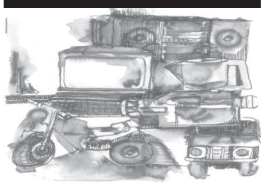
Sub-section 2(b) provides that a spouse shall not without the written consent of the other spouse enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate. The first question therefore, was whether the parties had intended to enter into such a contract.

This sub-section does not prohibit one spouse from entering into an agreement of loan, but prohibits the spouse from entering into an agreement relating to immovable property with the effect therein described. The Gounders entered into an agreement of loan, and not such an agreement. The fact that the agreement referred to an intention to provide security in the form of a mortgage bond over the property did not render the agreement one for the mortgaging of the immovable property as it remained an agreement on its own, separate from any agreement to mortgage the property. The agreement was therefore not one contemplated in section 15(2)(b).

As far as the penalty stipulation was concerned, the effect of this would be to more than double the amount of the loan. This constituted an excessive penalty in terms of section 3 of the Conventional Penalties Act (no 15 of 1962) and should be struck out and substituted with the ordinary mora rate of interest.

# *BISNATH N.O. v ABSA BANK LTD*





A JUDGMENT BY CLOETE JA (SCOTT JA, PONNAN JA, MAYA AJA and SNYDERS AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2008

2008 CLR 234 (A)

***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.***

## 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.

## THE DECISION

A mortgagee, such as the bank, is not in the same position as a pledgee in respect of the fruits of a moveable. A mortgagee is usually not in possession of the mortgaged property and so there is no reason why the obligations of a pledgee should be imposed on it. Only if the mortgagee is in possession of the mortgaged property do such obligations arise.

In the present case, there was no evidence to show that the bank did take possession of the mortgaged property. Accordingly, it was under no obligation to account for rentals payable in respect of the property after it was sold in execution.

Clause 13 conferred on Absa the right to collect rentals. However, it did not exempt the bank from any obligation to do so.

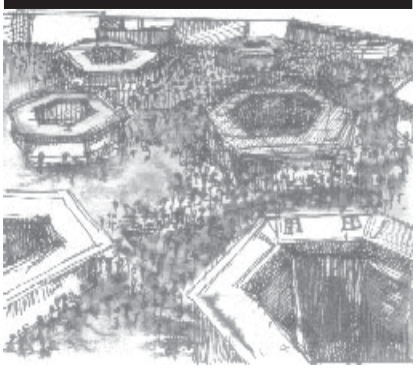
The action succeeded.

# APCO AFRICA (PTY) LTD v APCO WORLDWIDE INC

A JUDGMENT BY PONNAN JA (MPATIP, CAMERON JA, VAN HEERDEN JA and SNYDERS AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2008

2008 (5) SA 615 (A)

**Corporations**



***A company formed to operate in the same manner as a partnership may be wound up on the grounds that it is just and equitable that it be wound up if it is impossible for the shareholders to place the confidence in each other which each has a right to expect, and that impossibility has not been caused by the person seeking to take advantage of it.***

## THE FACTS

Apco Worldwide Inc concluded a memorandum of understanding with Arcay Communications Holdings (Pty) Ltd, with a view to drafting and implementing a joint business plan for the offering and expansion of public affairs services in South Africa and the targeting of new business opportunities for both companies. Apco was a company incorporated in the United States and Apco was a South African company.

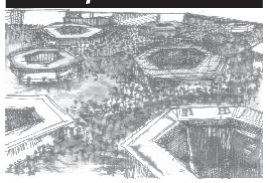
Two years later, in 2000, the parties concluded a shareholders' agreement and incorporated Apco Africa (Pty) Ltd whose object was to conduct business as a provider of public affairs and strategic communications and other related services. Each was to have a 50% shareholding in Apco. There were to be four directors, two of whom were to be nominated for appointment by each of Apco and Arcay. The agreement provided that should a deadlock arise at a meeting of directors, the matter should not be proceeded with but should be referred to a shareholders' meeting for resolution in good faith. Should resolution not be achieved, the matter was to be referred to a Texas Auction. The unanimous consent of the directors was required for the company to change the nature of its business or discontinue its business, or dispose of its assets. The parties were to co-operate and consult with each other regarding the activities of the company in the utmost good faith, the affairs of the company being administered and promoted with the highest degree of integrity between the shareholders.

In November 2005, Apco Inc seconded one of its own personnel to work for Apco. This caused resentment on the part of the two directors appointed by Arcay, and the relationship between Apco Inc and Arcay deteriorated. Apco Inc took the view that the business relationship between the parties had deteriorated to the point where the business operations should be terminated and Apco wound up. Arcay however, took the view that the business should continue as it had before the arrival of Apco Inc's seconded employee. Apco Inc proposed the immediate implementation of the Texas Auction provision, but Arcay rejected this. Apco Inc gave notice of a directors' meeting, but Arcay objected to his on formal grounds. Alternative dates were given, but Arcay failed to respond. Apco Inc then stopped referring work to Apco and stated that it would no longer refer any work to the company.

Apco Inc contended that the shareholders had reached deadlock and as a result, Apco was no longer able to function. It brought an application for the winding up of the company on the grounds that it was just and equitable that the company be wound up.

## THE DECISION

Section 344 of the Companies Act (no 61 of 1973), which provides that a company may be wound up by the court if it appears to the court that it is just and equitable that the company should be wound up, confers a wide discretion on a court to order the winding up of a company. The just and equitable provision is not to be limited to cases where the substratum of the company has disappeared or where there has been a complete deadlock. If a private company, is in essence,



a partnership, circumstances which would justify the dissolution of the partnership would also justify the winding-up of the company under the just and equitable provision.

In was clear that the basis of the relationship between Apco Inc and Arcay was, substantially, that of a partnership. Apco was a small private company and its origins were in a partnership initially formed between the two shareholders. This continued by virtue of the fact that in the company, their shareholding was equal and both were entitled to appoint directors. The company was formed for a specific purpose, but the internal disputes, mutual disillusionment and distrust and the consequent breakdown of the relationship between the shareholders of the company had prevented the implementation of that purpose. It had become impossible for the partners to place the confidence in each other which each had a right to expect.

There was therefore clear evidence that it was just and equitable that Apco should be wound up. The application was granted.

## *HUGHES v JOHN DORY TRUCKING (PTY) LTD*

A JUDGMENT BY SWAIN J
NATAL PROVINCIAL DIVISION
10 MARCH 2008

2008 (5) SA 300 (N)

***A creditor seeking the winding up of a company on the grounds that it is just and equitable that the company be wound up must show that the effect of the existing state of affairs of the company is such that its prospects of being paid are prejudiced.***

### THE FACTS

Hughes, a director of John Dory Trucking (Pty) Ltd, brought an application for the winding up of the company on the grounds that it was just and equitable that the company be wound up. He was a shareholder in the company. It was accepted that he was also a creditor of the company.

Hughes' application relied on the allegation that an illegality or fraud had been committed in connection with the objects of the company and that the company, operating as a partnership, could no longer do so.

The company opposed the application.

### THE DECISION

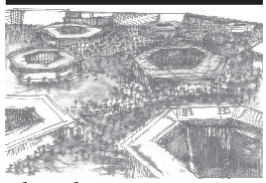
A director does not have locus standi to apply for the winding up of his company, but a creditor may do so, although usually on the grounds that the company is unable to pay its debts. This was an unusual case in that a creditor based his application on the just and equitable ground.

The two allegations made by Hughes in support of the just and equitable winding up of the company, being made by a creditor, required proof that they would result in John Dory rapidly being reduced to a condition of insolvency to the prejudice of creditors' prospects of being paid. A creditor has no interest in the kind of conduct complained of in the running of a company, falling within the above categories, unless such conduct impinges upon the creditor's right to payment. Hughes however, had not shown that his prospect of being paid was affected by the state of affairs he had alleged existed.

The application failed.

# *OVATION PRESERVATION PENSION FUND v EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD*





A JUDGMENT BY LEACH AJA (SCOTT JA, MLAMBO JA, HURT AJA AND KGOMO AJA concurring)
SUPREME COURT OF APPEAL
2 JUNE 2008

2008 SACLR 301 (A)

***A court placing a company under curatorship under the authority of the Financial Institutions (Protection of Funds) Act (no 28 of 2001) has a wide discretion in any order it gives and may order that the curator is restricted in disinvesting company assets. The effect of the order may be to affect third party rights, and may authorise the payment of costs out of the assets of the company.***

## THE FACTS

Ovation Global Investment Services (Pty) Limited and Ovation Global Investment Nominees (Pty) Limited were placed under curatorship by order of the Cape High Court. Ovation Global Investment Services conducted business of investing money on behalf of clients in various investment schemes and financial products. This was done in the name of its nominee company.

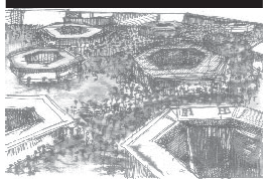
The order of court under which the companies were placed under curatorship provided that investments in or administered by the business or companies should not without the prior approval of the Registrar be withdrawn, transferred or otherwise disinvested from the business or companies (order 4.2). It also ordered that the curators were authorised, in their discretion and depending on available resources, to maintain payments to annuitants, pensioners and other beneficiaries who receive regular payments (order 5.5) and that they were directed to take custody of the cash, cash investments, stocks, shares and other securities held or administered by the companies (order 5.6). The effect of other orders was to entitle the curators to recover costs from the assets and investments of investors.

Ovation Preservation Pension Fund and the other appellants had concluded agreements with Ovation Services to administer their business and had invested substantial funds with it. They had also entered into an agreement with Ovation Nominees which had undertaken to hold assets on its behalf. They opposed the orders given by the court on the grounds that they constituted an unjustified interference with their rights of ownership in their investments as their investments were not assets of the Ovation companies. They also opposed the curators' authority to defray the costs of the curatorship from their investments.

## THE DECISION

The companies were placed under curatorship under the authority of the Financial Institutions (Protection of Funds) Act (no 28 of 2001). Section 5(5) of that Act empowers a court to make orders with regard to the powers and duties of the curator and any other matter which the court deems necessary. These confer on a court a wide discretion. The essential feature of an order in terms of section 5 is that it vests in the curator the management and control of the business of the institution. The order does not change the nature of the trust assets held by the institution, does not extinguish the institution's contractual rights and obligations, and does not vest ownership of the trust assets in the institution. However, the enjoyment of the full rights of ownership in the trust assets may be affected, and the rights of third parties may be affected.

As far as the order for costs was concerned, it had to be remembered that curatorship is there to protect the assets of investors. There was no reason why those investors should not bear any necessary costs in respect of the curatorship intended to benefit them.



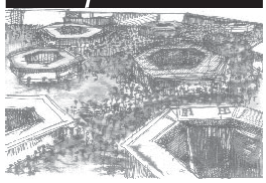
There appeared to be no reason why any other person than those in whose favour the curatorship was granted should bear any costs related thereto in the event of the institution's funds being insufficient.

As far as the attack on order 4.2 was concerned, in view of the wide discretion conferred on a court in terms of section 5(5), there was no reason why an order authorising such a restriction on disinvestment should not be accepted.

*It is clear that the funds obtained by the Financial Services Board by way of levies are to be used by the board in the performance of its functions, and while those functions involve the supervision of compliance with laws regulating financial institutions and the provision of financial services, they do not include the running of an institution under curatorship. While the respondent, as executive officer of the board, is entitled to apply for an order appointing a curator, the curator and not the respondent, thereafter administers the institution. The costs and expenses incurred in running an institution under curatorship are a product of that curatorship. They cannot be construed as being expenses incurred by the board in the performance of its functions, and a court cannot order the board to bear them.*

# *POINT 2 POINT SAME DAY EXPRESS CC v STEWART*





JUDGMENT BY VAN ROOYEN AJ
WITWATERSRAND LOCAL DIVISION
7 DECEMBER 2007

2008 SACLR 379 (WLD)

***A member of a close corporation acting without the authority of the close corporation does not bind the close corporation when the party with which that person contracts knows that the member does not have the power to bind the close corporation.***

## THE FACTS

Point 2 Point Same Day Express CC employed Stewart as a sale agent. In terms of the employment agreement, Stewart was restrained from dealing with another party engaged in business in competition with Point 2 Point for a period of one year following termination of her employment with Point 2 Point without the written consent of Point 2 Point.

On 9 January 2007, Stewart resigned from employment with Point 2 Point. On 15 January 2007, one of the two members of Point 2 Point, a certain Mr Calisse, acting in his capacity as Operations/Sales Director on behalf of the close corporation, addressed a letter to Stewart releasing her from the restraint of trade clause. He did so without the authority or consent of the other member of the close corporation, a Ms Jacobson. Shortly thereafter, Calisse resigned his membership of the close corporation.

Stewart began competing with Point 2 Point in violation of the restraint of trade clause. She contended that she had been released from its provisions by the letter addressed to her by Calisse acting on behalf of the close corporation.

Point 2 Point took the view that the letter sent by Calisse did not bind it as it was sent without authority and brought an application to interdict Stewart from competing with it. Stewart contended that section 54 of the Close Corporations Act (no 69 of 1984) applied and that Point 2 Point was bound by his action.

## THE DECISION

Section 54(1) provides that in relation to a person who is not a member and in dealing with the corporation, any member of a corporation shall be an agent of the corporation. Section 54(2) provides that any act of a member shall bind a corporation, whether or not such act is performed for the carrying on of business of a corporation unless the member so acting has in fact no power to act for the corporation in the particular matter and the person with whom he deals has, or ought reasonably to have, knowledge of the fact that the member has no such power.

Section 54(2) shows that the operation of section 54(1) is not absolute. It envisages the possibility of a member contracting for a close corporation when not having the power to do so, the effect thereof being that the close corporation is not bound.

In the present case, it was clear that Calisse did not act with Jacobson's consent, and he did not act with the authority of Point 2 Point. Furthermore, Stewart would have known that Calisse did not have the power to bind Point 2 Point by releasing her from her restraint obligations. Section 54(2) was therefore directly applicable. Point 2 Point was not bound by the letter sent by Calisse purporting to release Stewart from those obligations.

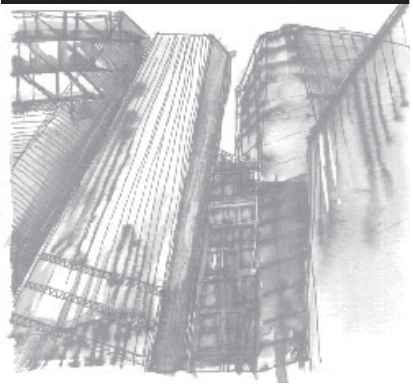
The interdict was granted.

# *BLAKE v CASSIM*

.A JUDGMENT BY MPATI AP (CAMERON JA, CLOETE JA, PONNAN JA and LEACH AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2008

2008 (5) SA 393 (A)

***Property***



***A seller is not obliged to define the form of guarantee required for the transfer of property before the obligation to furnish the guarantee arises. The obligation to deliver the guarantee arises at the time provided therefor in the sale agreement and is not conditional upon the seller being in a position to give transfer of the property.***

## THE FACTS

Mr M.I Mia purchased a 100% interest in Odhin Investments CC from a consortium of people represented by Blake. In terms of the sale agreement, a unit in a sectional title scheme was to be transferred to Odhin at Blake's expense. The scheme was part of a development being conducted by the consortium.

The purchase price was payable by a deposit of R50 000 within seven days of signature to the agreement, and the balance of R1 550 000 on the date of registration of Mia as owner of the member's interest. The balance was to be secured by two guarantees. The dates on which the guarantees were to be furnished was not specified. Clause 20.2 recorded that the guarantees were to be furnished from the proceeds of the sale of Mia's property within one year, after which period, guarantees for the full purchase price were to be provided by Mia. Mia's property was not sold within the one-year period.

Eighteen months after the conclusion of the agreement, Mia's estate was sequestrated. Cassim and the second respondent were appointed trustees in the insolvent estate. They advised Blake that they intended to proceed with the purchase of the member's interest in Odhin.

Blake's attorneys then notified Cassim that the guarantees provided for in the agreement had not been furnished and required remedy of this breach within 14 days, failing which the agreement would be cancelled as permitted by clause 13 of the agreement. Cassim obtained from the Standard Bank confirmation that guarantees would be issued upon fulfilment of four conditions relating to the property. Blake's attorneys rejected this as not constituting a bank guarantee as provided for in the agreement, and cancelled the agreement.

Cassim brought an application for an order declaring the cancellation invalid.

## THE DECISION

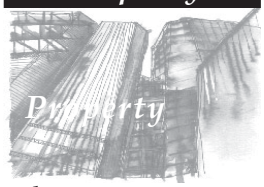
Whether or not Blake had been entitled to cancel the agreement depended on the proper interpretation of clause 20.2 and not on any subsequent discussions or correspondence between the parties, the latter being excluded by a non-variation clause. That clause clearly stipulated the time for delivery of the guarantees. No later date was agreed between the parties. The notification of breach as given by Blake's attorneys was therefore valid and competent in terms of the agreement and formed a proper basis for the cancellation of the contract.

As far as the form of the guarantees ultimately furnished was concerned, the fact that the agreement provided these had to be in a form acceptable to the seller did not place an obligation on Blake to define that form before cancellation on the ground of failure to deliver the guarantee could be made.

Applying clause 20.2 to the events that actually took place, since Mia's property was not sold within the one-year period, from the expiry of that period, both guarantees became deliverable forthwith. There was no reason to interpret the clause as requiring that the seller be in a position to give transfer before that obligation arose. The cancellation following the notification given by Blake's attorneys was therefore valid.

# *STANDARD BANK OF SOUTH AFRICA LTD v D FLORENTINO CONSTRUCTION CC*






A JUDGMENT BY DAVIS J
CAPE OF GOOD HOPE
PROVINCIAL DIVISION
18 FEBRUARY 2008

2008 (5) SA 534 (C)

***A lien-holder's rights may be ordered to accept substituted security at the instance of a party which is not the owner of the property over which the lien is asserted, in circumstances where that party's interests are in essence the same as those of the owner.***

## THE FACTS

D Florentino Construction CC executed certain building work at the home of Mr D Wessels. It did so in terms of the standard JBCC minor works contract, which included a provision that Florentino would retain a right of retention over the building works as security for payment under the contract unless a payment guarantee was provided by Wessels within 14 days of the conclusion of the contract. A payment guarantee was not provided.

Wessels failed to pay Florentino R123 561,07 arising from the building work. Florentino asserted its builder's lien and claimed payment. Wessels died and an executor was appointed in his deceased estate.

Standard Bank of South Africa Ltd held a mortgage bond over the property securing loans of R2 462 500 advanced to Wessels. It wished to enforce its claims in execution proceedings against the property, and applied for an order that Florentino relinquish the property to Wessels' executor, subject to the preservation of such rights and/or entitlements as to liens and/or rights of retention as Florentino held.

## THE DECISION

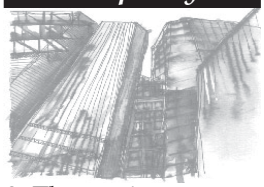
There is no precedent of a party other than an owner asserting rights of substitution against the holder of a lien. In the present case, the Standard Bank was not the owner of the property but the mortgage bond holder, and the question was whether it, as opposed to Wessels' executor, was entitled to assert rights of substitution against Florentino. However, the bank's application was directed and bringing about the enforcement of the owner's rights of substitution against Florentino. In these circumstances, the court could exercise a discretion on the merits and grant the order sought by the bank.

The factors determining the exercise of this discretion were (i) that the form of an order in the bank's favour could be framed so as to provide adequate security for Florentino. Since a lien is a form of security for a claim, if Florentino's claim had to be adequately secured; (ii) the only asset being the property, if the impasse continued, the owner could only discharge its obligation by selling the property, and interest charges against the property would continue to escalate to the detriment of the deceased estate and of all the parties concerned, (iii) a sale would result in the various claims being satisfied to best advantage of all, (iv) the claim was disputed, (v) if Florentino abandoned its lien it might find that part of its claim was not ranked above the bond.

The balance of these factors was in favour of the bank. Accordingly, in the exercise of its discretion, the court could order that Florentino relinquish its property to the executor.

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





A JUDGMENT BY FARLAM JA (MPATI AP, SNYDERS AJA AND KGOMO AJA concurring, HEHER JA dissenting)
SUPREME COURT OF APPEAL
2 JUNE 2008

2008 SACLR 253 (A)

***A provision that public places based on the normal need therefore indicated as such upon approval of a subdivision of property vest in a local authority without compensation does not imply that an owner is entitled to compensation for the provision of public places in excess of such need. A condition that an owner provide for such public places upon subdivision does not amount to expropriation of property.***

## THE FACTS

Helderberg Park Development (Pty) Ltd submitted an application to rezone its land. The City of Cape Town granted the application and in doing so imposed certain conditions in terms of section 42(1) and (2) of the Land Use Planning Ordinance 15 of 1985 (Cape). They included a condition that a 32 metre wide road reserve of part of the property located on the whole of the western boundary be given off free of charge before any sub-divisional plan would be approved.

When Helderberg submitted a subdivision application, in compliance with the condition, its plan provided for the creation of a 32 metre wide public street of about 2,1986 hectares in extent. The City of Cape Town approved the application.

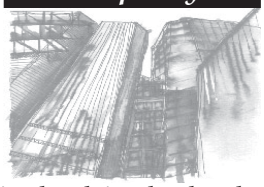
Helderberg contended that the condition imposed was too extensive and that a 16 metre wide provision would have been sufficient, according to accepted town planning and sound traffic engineering criteria, to give road access solely to any development that might occur pursuant to the subdivision of the land itself. It contended that the contemplated 32 metre wide street along the western boundary of the land, being twice as wide as that which would have been adequate, was necessary to serve the additional purpose of ensuring that its property would be extended as an arterial and/or metropolitan road.

Relying on section 28 of the Ordinance, Helderberg brought an action against the City of Cape Town for payment of compensation in the sum of R3 170 635,20. The section provides that the ownership of all public streets and public places on land indicated as such at the granting of an application for subdivision shall, after the confirmation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the administrator from time to time, regard being had to such need.

Helderberg contended that by necessary implication, the section provides that if the provision of public streets over land, indicated as such at the granting of an application for subdivision of land, is not based on the normal need therefor arising from the subdivision, the owner shall, to the extent that it is not so based, become entitled to just and equitable compensation from the local authority in whose area of jurisdiction the land is situated, when, upon the confirmation of the subdivision, ownership of those streets vest in that local authority.

## THE DECISION

The section does not imply that if an owner's subdivision of land includes areas for public streets and public places which are not based on the normal need therefor arising from the subdivision, the owner is entitled to claim compensation from the local authority in respect of the excess. The intention of the section could not be to confer



on an owner such a right merely by the owner having included such unneeded areas. The necessary implication contended for by Helderberg was therefore unacceptable and it could not rely on it.

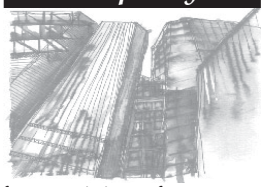
The condition imposed by the City of Cape Town in granting the subdivision did not amount to an expropriation of property because Helderberg had not been obliged to submit to the vesting of its land subject to the condition. It could have avoided the vesting of these portions of its land in the local authority by not proceeding with the proposed subdivision. Furthermore, Helderberg could have appealed the imposition of the condition in terms of section 44 of the Ordinance. Review proceedings would also have been available to it had the appeal failed. Helderberg had followed neither of these avenues available to it. It was not entitled to institute a claim for damages in circumstances where appeal proceedings were available to it.

The appeal was upheld.

*The owner could have appealed to the Premier under section 44 of LUPO against the imposition of the condition and on the basis of the concession made by the appellant for the purposes of the adjudication of this part of the case its appeal should have succeeded. If it had not it could have successfully taken the decision to impose the condition on review. But it did not do any of these things. It actually applied for the extension of the allegedly invalid approval of the subdivision (invalid because it was based upon an invalidly imposed condition) when it was due to expire. It thereafter proceeded with the subdivision for which it obtained approval and now seeks to be compensated for doing so. Although it calls its claim a claim for 'compensation', it is in truth, as counsel for the appellant contended, a claim for constitutional damages.*

# *TALJAARD v T L BOTHA PROPERTIES*





A JUDGMENT BY NUGENT JA (CAMERON JA, CLOETE JA, PONNAN JA and SNYDERS AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2008

2008 SACLR 318 (A)

***A mandate concluded and performed by an estate agent without a fidelity fund certificate as required by the Estate Agency Affairs Act (no 112 of 1976) is not invalid.***

## THE FACTS

TL Botha Properties procured the sale of Taljaard's property in terms of a mandate given by Taljaard. The commission payable was R30 000 and Taljaard paid this to TL Botha.

At the time the mandate was concluded and carried out, TL Botha did not have a fidelity fund certificate as required by the Estate Agency Affairs Act (no 112 of 1976). Taljaard contended that the mandate was invalid for failure to comply with the Act, and claimed return of the R30 000.

## THE DECISION

Section 34A of the Act provides that no estate agent shall be entitled to any remuneration or other payment in respect of or arising from the performance of any act of an estate agent, unless at the time of the performance of the act a valid fidelity fund certificate has been issued to such estate agent.

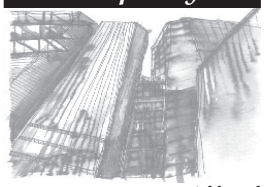
The section does not expressly invalidate a contract of mandate concluded in violation of its terms. Given that the section was enacted in response to a judgment which held that the prohibition does not have the effect of invalidating the contract of mandate of an estate agent who acts in contravention of its terms (*Noragent (Edms) Bpk v De Wet* 1985 (1) SA 267 (T)) the section could not be interpreted otherwise.

The claim was dismissed.

*In my view the difficulty which counsel plainly experienced in formulating a clear and acceptable meaning for the word 'strike' can be attributed simply to his insistence that the ordinary dictionary meaning of the word was not compatible with the context in which it appears. I see no difficulty in giving the word its ordinary meaning. Indeed, if the contention of the insurer is that that meaning was intended to be modified, then it has only itself to blame for failing to do so in clear language. The contra proferentem rule would apply to any suggestion that the word 'strike' should be given a meaning which would restrict the scope of the defendant's liability to indemnify the plaintiff in the event of the destruction of the truck*

# *KUNGWINI LOCAL MUNICIPALITY v SILVER LAKES HOME OWNERS ASSOCIATION*





A JUDGMENT BY VAN HEERDEN JA (STREICHER JA, MTHIYANE JA AND SNYDERS JA concurring)
SUPREME COURT OF APPEAL
2 JUNE 2008

2008 SACLR 277 (A)

***A local authority's adjustment of property rates is a legislative act and must accordingly follow the procedures laid down in the legislation under which it is empowered to act.***

## THE FACTS

The Kungwini Local Municipality proposed in its budget of 2004 that the rates applicable to properties in the Bronberg area be increased from R0.02 per rand value to R0.54 per rand value. Bronberg fell within the area of jurisdiction of the Municipality.

The local councillor for the area, a Mr Boot, lodged a formal objection to the increase both to the Municipality and the Director-General of Finance. However, following a newspaper advertisement that a draft budget would be available for inspection, at a special council meeting of the Municipality, it was resolved that the assessment rate tariff of R0.054 per rand value for properties in the Bronberg area be approved. It was further decided that a percentage tariff increase for the Bronberg area of 145.45 per cent for the 2004/2005 financial year be approved.

Notice of the approval was then promulgated.

Boot objected to the increase and noted that the percentage increase was incorrectly stated as it was in fact 170 per cent. The Municipality's council resolved to correct the error, considered all objections to the rates determination, and dismissed the objections.

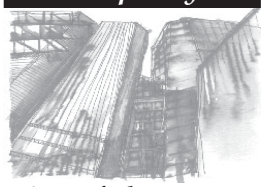
The Silver Lakes Home Owners Association then brought an application for an order declaring null and void the decision of the Municipality to increase the rate tariff for properties in the Bronberg area. The application was refused and the Municipality's decision to increase the rates was confirmed.

The Association also applied for an order that promulgation of the assessment rate tariff of R0.054 per Rand value for properties in the Bronberg area be declared null and void and be set aside.

## THE DECISION

The power to impose property rates is derived from the Constitution and is a legislative act, as opposed to an administrative act. In imposing property rates, a municipality must therefore follow the procedures laid down in the applicable legislation, in particular section 10G(7) of the Local Government Transition Act (no 209 of 1993), sub-section (d) of which provides that if an objection is lodged within the relevant period, the municipality shall consider every objection and may amend or withdraw the determination or amendment and may determine a date on which the determination or amendment shall come into operation.

The Association contended that the Municipality's decision to increase the property rates was null and void on the grounds that there was no consideration or discussion of the objections raised before the decision was taken. However, the Municipality did not simply ignore or refuse to consider the concerns raised and objections made by or on behalf of the residents of the Bronberg area in the course of the public participation process followed prior to its resolution to increase the property rates. Section 10G(7) envisages that interested parties should be given a proper opportunity to make submissions in respect of, inter alia, property rates levied by a municipality and that the Municipality is obliged to give their submissions proper



consideration. However, the section does not require the formal consideration of objections and submissions at two different stages of the process, ie both before the relevant resolution is taken as well as after the publication of the notice required in terms of the section.

With regard to the attack on the promulgation of the approval of the increased assessment rate, the notice of the approval failed to indicate when the increase would take effect. This meant that the Municipality could, in effect, apply a retrospective increase, which was not permissible in terms of the Act.

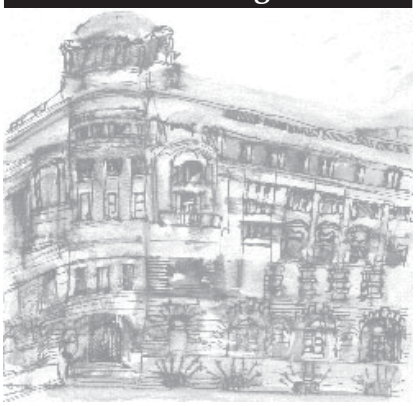
*In my view, the 'scheme' contained in section 10G(7) of the LGTA envisages that interested parties should be given a proper opportunity to make submissions in respect of, inter alia, property rates levied by a municipality and that the Municipality is obliged to give their submissions proper consideration. However, section 10G(7) does not appear to necessitate the* formal *consideration of objections and submissions at two different stages of the process, namely both* before *the relevant resolution is taken as well as* after *the publication of the notice required in terms of section 10G(7)(c). The principle of public participation in pursuance of democratic, accountable and effective local government is, to my mind, given effect to by the express provision made for the lodging and consideration of objections after the publication of the resolution in the section 10G(7)(c) notice.*

# *HOLTZHAUSEN v ABSA BANK LTD*

A JUDGMENT BY CLOETE JA
(HARMS JA, NAVSA JA, BRAND JA
and HEHER JA concurring)
SUPREME COURT OF APPEAL
17 SEPTEMBER 2004

2008 (5) SA 630 (A)

***Banking***



***Evidence that a bank manager has been asked to confirm that funds have been deposited into an account and that the manager has complied with this request in order to satisfy a customer that a transaction has been properly implemented may constitute sufficient evidence to lead to a reasonable inference that could lead to a finding that the bank has made a negligent misstatement leading to economic loss.***

## .THE FACTS

Holtzhausen sold a quantity of diamonds for R500 000. Before delivering the diamonds to the buyer's agent, he ascertained that the R500 000 had been paid into his bank account. He did this by examining his bank statement where the deposit was reflected, and attending a branch of Absa Bank Ltd where he informed the branch manager of the transaction and requested confirmation that the deposit had been made. Holtzhausen gave the bank manager three telephone numbers given to him by the agent in order to verify that the deposit had been made. The bank manager telephoned the numbers for this purpose. Holtzhausen alleged that the manager assured him that the money had been deposited. The manager authorised the withdrawal of R20 000 payable to the buyer's agent as commission on the sale.

It subsequently transpired that a fraud had been perpetrated and the credit to Holtzhausen's account was reversed.

Holtzhausen brought an action against the bank. He alleged that the bank manager's words and conduct had involved the making of a negligent misstatement causing economic loss. He claimed damages against the bank.

The trial court granted an order of absolution from the instance. Holtzhausen contended that the order was wrong as reasonable inferences could be drawn from the evidence which could lead to a finding in his favour.

## THE DECISION

There were reasonable inferences and there was evidence which could lead to a finding for Holtzhausen.

On the issue of unlawfulness, the evidence showed that the bank manager's statement was made in response to a serious request, that Holtzhausen approached him because of his expertise and knowledge of banking matters; and that his purpose in making the enquiry was, to the knowledge of the bank manager, to ascertain whether he could safely proceed with the transaction. It could be inferred that the bank manager realised that Holtzhausen would rely on his answer. There were no considerations of public policy, fairness or equity to deny Holtzhausen's claim, no possibility of limitless liability could arise, and an unfair burden would not be placed on the manager or the bank if liability were to be imposed since the manager could have refused to act on Holtzhausen's request and could have protected himself and the bank against the consequences of any negligence on his part by a disclaimer.

On the issue of negligence it was true that on Holtzhausen's evidence the bank manager did not expressly state that the cheque would be honoured, but had said that the money was safe and that he could proceed with the transaction, and had authorised the withdrawal of R20 000 when he knew that unless the cheque was honoured, there would be no or insufficient funds in the plaintiff's bank account to meet this liability. This evidence could lead to a finding that there was a misrepresentation, and that if the information obtained by the bank manager by telephoning the three numbers furnished to him by the plaintiff was not sufficient to justify this

representation, the bank manager should not, without making further enquiries, have made it.

The order of absolution from the instance should not have been given. The appeal succeeded.

## *SASRIA LTD v SLABBERT BURGER TRANSPORT (PTY) LTD*

A JUDGMENT BY HURT AJA (MPATI AP, STREICHER JA, MTHIYANE JA and MHLANTLA AJA concurring)
SUPREME COURT OF APPEAL
30 MAY 2008

2008 SACLR 312 (A)

***Insurance***

***There is no need to apply any other rules of interpretation to ascertain the extent of an insurer's obligations if the ordinary meaning of a provision sufficiently indicates their extent.***

### THE FACTS

Sasria Ltd insured Slabbert Burger Transport (Pty) Ltd against loss of or damage to a truck directly related to or caused by any riot, strike or public disorder, or any act or activity calculated or directed to bring about a riot, strike or public disorder.

While the policy was in force the truck was destroyed by fire. This happened at a time when drivers employed by Slabbert were on strike. Those who were on strike engaged in threatening and intimidating activities in regard to those who continued to work, including the setting on fire of trucks.

There were no witnesses to Slabbert's truck being set on fire, but circumstantial evidence indicated that Slabbert employees had done so.

Slabbert claimed indemnity under the insurance policy. Sasria rejected the claim on the grounds that the indemnity covered a strike taking place in the context of a riot or public disorder.

### THE DECISION

The ordinary meaning of the word 'strike' as defined in the dictionary, 'a concerted cessation of work on the part of a body of workers for the purpose of obtaining some concession from the employer or employers' gave sufficient indication of the circumstances under which Sasria would be obliged to indemnify Slabbert. There was no need to apply any other rule of interpretation to determine this.

Applying the ordinary meaning, it was clear that the destruction of the truck amounted to loss or damage directly related to or caused by any riot, strike or public disorder. Accordingly, Sasria was obliged to indemnify Slabbert for the loss of the truck.

# *HOLLELY v AUTO & GENERAL INSURANCE COMPANY LTD*



A JUDGMENT BY MEYER AJ
WITWATERSRAND LOCAL
DIVISION
18 AUGUST 2008

2008 SACLR 389 (WLD)

***Failure to disclose previous claims, the effect of which is to determine a lower premium applicable to an insurance policy, is grounds for invalidating the policy because of a non-disclosure material to the assessment of the risk.***

## THE FACTS

Auto & General Insurance Company Limited insured Holleley against damage to his motor vehicle.

The insurance contract was concluded following two telephone conversations between Holleley's fiancee as his representative, and Auto & General's representative. In answer to a question whether he had claimed for any accidents or stolen vehicles during that period, Holleley's fiancee answered '[n]o, not at all.' Smith was also asked whether Holleley had any vehicle claims in the last two years and whether he had had any accidents or losses not claimed for such period. She answered in the negative to each question.

The policy provided that the answers provided by Holleley to questions posed by the insurer allowed the insurer to determine the payment and to decide if it could accept the risk of the policy or not, and that if the declarations made were not entirely true or correct, the insurer could invalidate the cover. The policy contained the declaration 'Claims submitted/ losses suffered in the past 2 years for the regular driver and spouse: None declared.'

In the year prior to the conclusion of the insurance agreement, Holleley had been involved in an accident in which another car had collided into the rear of his vehicle. Holleley had submitted a claim in respect of this accident to his insurers at the time. If this had been disclosed to Auto & General it would not have allowed a 'no claim' discount on the premium it charged Holleley when the policy came into force.

Following Holleley's claim for indemnity under the insurance policy, Auto & General repudiated liability on the grounds that Holleley had failed to disclose facts material to it in the assessment of the risk at the time the policy was issued.

Holleley contended that the earlier accident was not material because it had been caused by the fault of the other party. He brought an action for payment in terms of the policy.

## THE DECISION

Auto & General bore the onus of showing that the test for materiality, as defined in section 53(1) of the Short-term Insurance Act (no 53 of 1998), applied, the section having been amended to ensure there would be no difference in the test for materiality in cases of non-disclosures and untrue representations. In consequence, Auto & General had to show that the policy could be invalidated because of a representation or non-disclosure made to it, warranted to be true and correct, and which was 'likely to have materially affected the assessment of the risk under the policy concerned'.

A reasonable prudent person would consider that the information relating to Holleley's previous collision and insurance claim should have been disclosed to Auto & General so that it could form its own view as to the effect of such information on the assessment of the premium. Such information was material to the decision whether or not to grant a premium discount in the form of a no claim bonus and the extent of such discount on the standard premiums to be charged in the event of a contract of insurance being concluded.

The effect of the non-disclosure was that Auto & General was induced to take on the risk at a substantially reduced premium. This meant that the non-disclosure was material and it was entitled to repudiate liability.

# *STREET POLE ADS DURBAN (PTY) LTD v ETHEKWINI MUNICIPALITY*

A JUDGMENT BY CAMERON JA (HOWIE P, MTHIYANE JA, PONNAN JA and MHLANTLA AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2008

2008 (5) SA 290 (A)

**Contract**

***An agreement which envisages performance by a party referred to in the agreement and no other must be performed by that party and not a sub-contractor.***

## THE FACTS

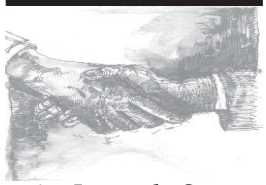
In May 1999, the University of Natal and the Ethekwini Municipality's predecessor concluded an agreement in terms of which the university undertook to obtain sponsors of advertising on street lights and electricity poles. The municipality undertook to allow the use of its poles for this purpose, and was entitled to 90% of the revenue obtained from sponsors.

Clause 1.5 recorded that the university had developed and would continue to develop know-how to implement the programme and clause 2.1 provided that the university would undertake the project on the terms and conditions set out. Clause 5 recorded that the university agreed and undertook to carry out the project and operate the project from its premises, to provide the manpower, infrastructure, resources and other facilities necessary to fulfil its obligations, to endeavour to obtain sponsors to adopt poles and to use its best endeavours to collect all project income. Clause 10 provided that the university was to ensure that its representative and senior management devote sufficient time and attention to the project, that the advertising content of sponsors would be legal and conform to the specifications from time to time. Clause 23.5 provided that neither party could cede any of its rights or delegate or assign or subcontract any of its obligations in terms of the agreement without the prior written consent of the other party.

The agreement was to subsist for five years, but would be renewed for further five-year periods unless the municipality gave notice of termination. If such notice of termination was given, any adoption agreement concluded by the university with sponsors would continue in force and the main agreement would continue for purposes of its performance.

In 2002, the university concluded an adoption agreement with Street Pole Ads Durban (Pty) Ltd in terms of which Street Pole Ads would manage the adoption process for the university, and conclude sub-adoption agreements with sponsors. The university received 20% of gross turnover obtained from sponsors, and paid 90% of this to the municipality. The adoption agreement concluded with Street Pole Ads subsisted for three years and was renewed by notice for a further three years in 2005.

The adoption agreement gave to Street Pole Ads the exclusive use of the poles for it to hire out and to use, and vested in it the power to do anything in relation to the advertisements and their display that was lawful. The adoption agreement prevented the university from enforcing any of the terms of the main agreement without Street Pole Ads' prior written consent and required the university to permit Street Pole Ads to represent the university in all negotiations and discussions with the municipality. The university could also not agree to any amendment of the main agreement, unless negotiated by Street Pole Ads, nor could it waive any of its rights under that agreement, without the prior written consent of Street Pole Ads.



In March 2004, the municipality gave notice of termination of the agreement. Street Pole Ads contended that the effective date of termination would be August 2008 as it had renewed the adoption agreement. The municipality contended that the adoption agreement concluded between the university and Street Pole Ads was unenforceable against it and if it was enforceable, any sub-adoption agreement concluded by Street Pole Ads was subject to approval by the municipality and 90% of the revenue generated therefrom payable to the municipality. It sought an order supporting its contentions.

## THE DECISION

The central issue was whether the conclusion of the adoption agreement violated the main agreement. The main agreement envisaged that the university would play an active role in the securing of sponsors and the conclusion of adoption agreements. It did not envisage that the university would transfer the performance of these aspects to another party. This was clear from clause 1.5, 2.1 and 5 of the agreement.

While it was true that the agreement did not expressly require the sponsors to number more than one, the agreement clearly provides for, and required, the continuing participation of the university itself.

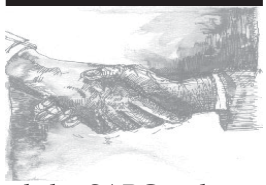
The provisions of the main agreement were not compatible with the adoption agreement, which gave to Street Pole Ads the exclusive use of the poles for it to hire out and to use. It was plain from its provisions that the adoption agreement entailed the university's wholesale abdication from the role the main agreement envisaged for it. Instead, Street Pole Ads obtained the rights, and undertook the duties, which were previously those of the university, which retained only certain limited rights and duties. It was still obliged to pay the municipality 90% of what it received from Street Pole Ads.

The agreement did not divest the university of title to sue the municipality to perform its obligations (ie, to make the poles available for hire to sponsors). For this reason the adoption agreement did not amount to a cession. However, it did amount to a subcontract. A subcontractor is one who agrees with the contractor to perform any part of the work that the contractor previously agreed to perform for another. This is was the adoption agreement did and this was in violation of clause 23.5.

The order sought by the municipality was granted.

# *DIGITAL HORIZONS (PTY) LTD v SA BROADCASTING CORPORATION*

**Contract**



A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL
DIVISION
8 SEPTEMBER 2008

2008 SACLR 360 (WLD)

***The acceptance of a tender in irregular circumstances rendering the tender process unfair is insufficient in itself to warrant an interdict preventing the implementation of the ensuing contract, if the balance of convenience favours implementation of the contract.***

## THE FACTS

The South African Broadcasting Corporation called for tenders for the supply of four high density outside broadcast vehicles together with cameras and related equipment. Digital Horizons (Pty) Ltd and Sony South Africa (Pty) Ltd submitted tenders. The SABC awarded the contract to Sony.

The SABC's procurement policy was that it would procure goods and services from enterprises with a Level 1 to 5 B-BBEE rating. This meant that the enterprise would have to have a significant share ownership by black people. Digital had a level 4 B-BEE rating. Sony's share capital was wholly owned by Sony Japan which had no black South African shareholding.

A Bid Evaluation Committee considered the tenders, and ranked Digital's tender in first place, and Sony's in third place. This recommendation was conveyed to an ad hoc procurement committee which made the decision to award the tender. The procurement committee awarded the tender to Sony on the grounds of its better price and its reputation. The committee did not consider Sony's lack of a BEE rating. It negotiated only with Digital in regard to price.

The broadcast vehicles were required to ensure the SABC had the capacity to broadcast two major soccer competitions, the Confederation Cup to be held in 2009 and the Soccer World Cup to be held in 2010. The international soccer body FIFA, required the SABC to have the units for use during these events, if it were to enjoy the substantial revenue to be gained from the broadcast of them. It would take approximately fifty weeks to construct the units. There was a considerable demand for the units and it was necessary, in order to achieve the deadlines imposed by the sporting events, to begin construction of two of them immediately

Digital brought an application for an interdict preventing the SABC from implementing the agreement concluded with Sony pending the review of the decision to award the tender to Sony.

## THE DECISION

Given the irregularities that took place in the tender evaluation process, it could be assumed that Digital had demonstrated that it had a prima facie right to review of the decision made by the SABC and that the award of the tender was not fair.

However, the balance of convenience weighed in favour of the SABC because it had been shown that if an interim interdict was granted pending the hearing of the review, then whatever the outcome, it would not be possible for the successful tenderer to fulfil its obligations to enable the SABC to comply with its obligations in regard to the Confederation Cup. The risk of the SABC not being able to televise the two soccer competitions far outweighed Digital's right to administrative justice.

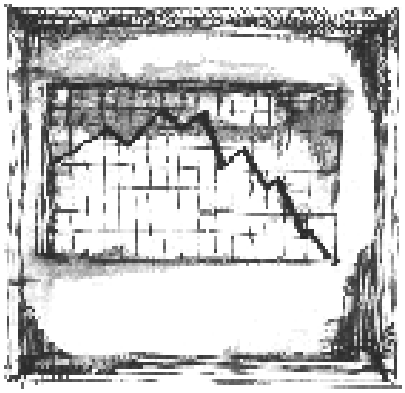
The application was dismissed.

# *MOHAMMED ABDULMOHSIN AL-KHARAFI & SONS v PEMA N.O.*

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL
DIVISION
9 SEPTEMBER 2008

2008 SACLR 323 (WLD)

***Insolvency***



***If the object of a transaction is to secure an advantage over other creditors in the event of the liquidation of the debtor, the transaction will not be in the ordinary course of business as provided for in section 46 of the Insolvency Act (no 24 of 1936). In determining whether a set off has taken place in the ordinary course of business, it must be determined if the transaction in question is unusual or anomalous.***

## THE FACTS

In 1998, Kharafi concluded a contract with Protech Projects Construction (Pty) Ltd for the performance by Protech of certain engineering work in Ethiopia. MAK (Pty) Ltd concluded a similar contract with Protech for the performance by Protech of certain engineering work in Botswana.

Between 2003 and 2005 in London, Protech obtained five arbitration awards against Kharafi following arbitration proceedings arising from the Ethiopia contract. Kharafi's counterclaims in the arbitrations were dismissed. It paid a portion of the awards against it, but R15 436 414 remained unpaid.

MAK had claims against Protech arising from advances given to Protech in the course of performance of the Botswana contract. Protech was unable to pay its debts and, to Kharafi's knowledge, MAK threatened that it would apply for the winding up of Protech. Kharafi took cession of these claims, following a resolution by MAK's board of directors that the cession should be effected. The cession document expressly recorded that the cession was effected in order to effect simultaneous payments of the sums owed by and due to Protech, ie the sum of Pula15 103 452.18 and the amount due in terms of the arbitration award. Kharafi then applied set off against the amount claimed by Protech in terms of the arbitration award and advised Protech that it had done so. No consideration was given by Kharafi to MAK for the cession of MAK's claim against Protech.

Within a year, Protech was placed in liquidation. Protech's liquidators applied to the Master in terms of section 46 of the Insolvency Act (no 24 of 1936) to disregard the pre-liquidation set off.

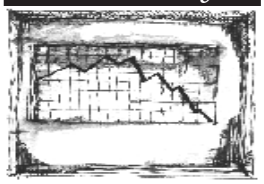
The Master concluded that the set off was not done in the ordinary course of business, and held that the liquidators should disregard it. Kharafi applied for a review of this decision.

## THE DECISION

Section 46 in effect, provides that a liquidator may, with the approval of the Master, disregard a set off applied in consequence of the cession of a claim if the set off was not effected in the ordinary course of business.

Kharafi's knowledge of Protech's inability to pay its debts meant that the object of the cession was to avoid participating as a concurrent creditor in the winding up of Protech. The object being to secure an advantage over other creditors, this made the transaction one in fraud of creditors. A disposition made in these circumstances could not be in the ordinary course of business.

Whether or not the set off was effected in the ordinary course of business also had to be seen against the background of the litigious relationship between the parties, and whether, given this situation, businessmen would regard the transaction, with all of its particular facets, as unusual or anomalous. In this regard, the preceding cession had to be taken into account. It was unusual or anomalous that no consideration was given for the cession, and that it was effected contrary to normal



funding arrangements between the companies. These features indicated that the set off was not effected in the ordinary course of business and thus fell within the terms of section 46.

Kharafi also contended that it and MAK were companies within a single economic entity, the effect being to render the cession unnecessary. In consequence, the court should pierce the corporate veil and consider them as one, for the purposes of determining the applicability of section 46. However, there was no evidence to support this. Kharafi was not a shareholder in MAK and—whatever the method by which the Botswana contract was conducted, whether Kharafi, as opposed to MAK, was seen as contracting with Protech, the parties applying set off of claims between them—nothing indicated that Kharafi was considered to be the contractor instead of MAK.

The application to review the Master's decision was dismissed.