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A SURVEY OF THE CURRENT CASE LAW

written by

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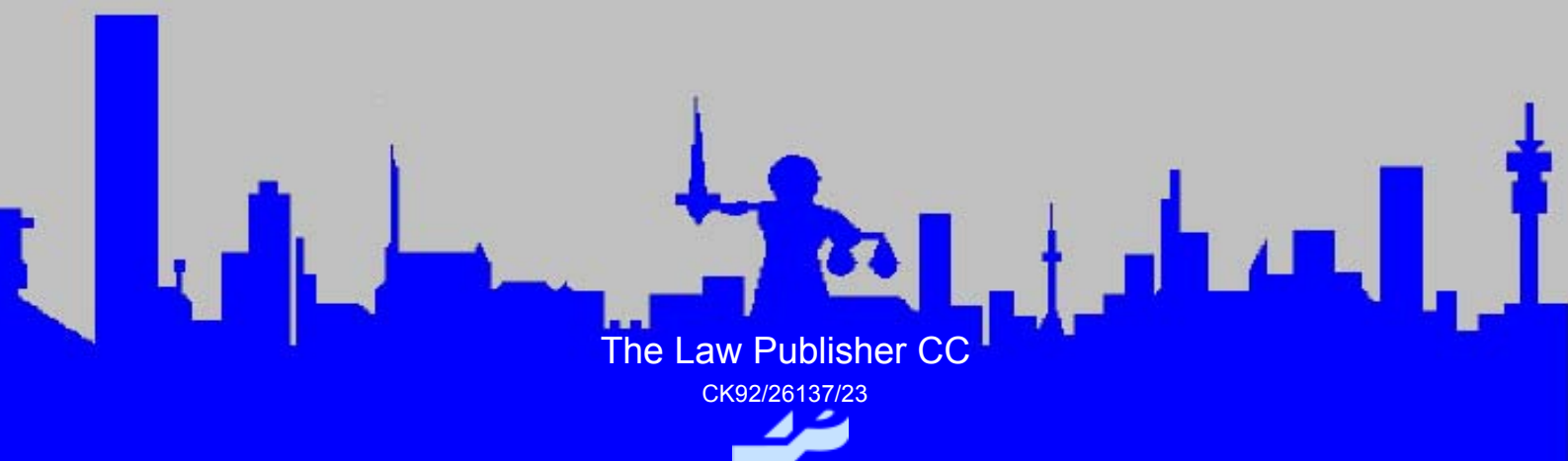

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A JUDGMENT BY LEWIS JA (NAVSA JA, SNYDERS JA and KROON JA concurring, GRIESEL AJA dissenting)
SUPREME COURT OF APPEAL
29 MAY 2009

2009 (6) SA 617 (A)

Contract

An obligation which a party to a contract deliberately fails to perfom in order to frustrate the rights of the other party may be considered to have been fictionally fulfilled in order to preserve the other party's rights.

THE FACTS

Du Plessis, the trustee of Prosperitas, concluded an agreement with Goldco Motor & Cycle Supplies (Pty) Ltd in terms of which Du Plessis leased certain premises to Goldco. Included in the lease was clause 5 which conferred on Goldco the option to purchase the premises for R4m. The option was made subject to the condition that a sectional title register was opened within 24 months, that Goldco exercise the option within 24 months by notice to Prosperitas' attorneys, and that the sale agreement be drawn up after a sectional title plan was delivered describing the premises as a sectional title unit.

Within the 24-month period, Goldco notified Prosperitas that it wished to exercise the option. The sectional title plan was completed and delivered. However, the attorneys did not draw up a sectional title plan and no agreement of sale was concluded.

Goldco contended that it had exercised the option created in clause 5 and sought enforcement in terms thereof. Du Plessis contended that no option was created in the clause, but only an agreement to agree, and that in order to exercise the option, mere notification thereof would be inadequate and the agreement of sale would have had to have been drawn up.

THE DECISION

An option is a right exercisable by the option holder. It is conferred in terms of agreement and obliges the giver of the option to keep an offer open for a fixed period. The terms of clause 5 expressly obliged Prosperitas to do so and therefore created an option. The question was whether or not the exercise of the option required fulfilment of the conditions specified in the clause.

The option could not be exercised simply by Goldco notifying Du Plessis of the exercise: the conditions for exercise were clearly specified in clause 5. Proper exercise of the option did require fulfilment of the conditions. As there had not been fulfilment - the sale agreement not having been drawn up - the question then became whether or not there had been deliberate frustration of the condition such that fictional fulfilment should be seen to have taken place.

It was important to note that the condition that a sale agreement be drawn up was not a condition in the strict sense of the word. Once Goldco had notified its exercise of the option, it cast an obligation on Du Plessis to draw up the sale agreement. Failure to honour that obligation would allow Goldco to apply the doctrine of fictional fulfilment and exercise its rights on the assumption that the obligation had been honoured. The application of that doctrine in these circumstances would be a way of compelling Prosperitas to honour that obligation.

As Prosperitas had deliberately failed to draw up the sale agreement, Goldco could effectively exercise its option as if Prosperitas had not done so. Goldco was entitled to enforce the option.

LEGATOR McKENNA INC v SHEA

A JUDGMENT BY BRAND JA (HARMS ADP, CLOETE JA, PONNAN JA and LEACH AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 2008

2010 (1) SA 35 (A)

The authority for actions undertaken by a curator derive from the court order appointing the curator. The validity of an agreement concluded by a curator may depend on the issue of letters of curatorship, but a curator may conclude agreements subject to the suspensive condition that such statutory requirements are complied with.

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. The court order appointing him made the exercise of his powers subject to the approval of the Master of the High Court.

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 agents presented an offer to purchase the property for R540 000 to the curator. The curator signed the document, adding the words 'subject to approval of Master of the High Court'. 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 no person who has been appointed as a curator shall take care of or administer any property belonging to the person concerned unless he is authorised to do so under letters of curatorship granted under the Act. The curator contended that the sale agreement did not contravene this provision because it was made conditional on the approval of the Master of the High Court. The approval was given in July 2002, after the letters of curatorship had been granted, and it was only at that point that the sale became complete.

It is important to note that section 71(1) does not require the authorisation of the Master. The authorisation under which the curator acted when selling the property was not that of the Master, but the authorisation of the court order appointing him as curator in March 2002. That order made the exercise of his powers subject to the approval of the Master. The question then was whether when the curator signed the offer, a conditional sale agreement was concluded or a counter-offer was made.

The offer made for the purchase of the property was unconditional, but the curator's agreement was to a conditional agreement. The curator therefore did not accept the offer but made a counter-offer. The offerors did not accept the counter-offer. Therefore no binding sale agreement came into existence and no contravention of section 71(1).

The fact that no valid agreement was concluded did not however, result in the invalidity of the transfer of the property. This is because the requirements for the transfer of ownership do not depend on the validity of the

underlying agreement, but on the mutual intention that the property in question should be transferred. It was true that both parties were mistaken in regard to the sale agreement, but while this rendered the agreement invalid their mistake did not affect their mutual intention. That intention had been followed with the registration of transfer of the property, and the effect thereof was to transfer ownership of the property to the purchaser.

The argument was also put that the sale was contrary to statute in that section 71(1) required the prior issue of letters of curatorship, and as a consequence the sale was illegal. However, the signature of the curator to the offer had not resulted in a sale, and the real agreement was concluded later, after the letters of curatorship were issued.

The action failed

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.

FREDDY HIRSCH GROUP (PTY) LTD v CHICKENLAND (PTY) LTD

A JUDGMENT BY BLIEDEN J
SOUTH GAUTENG HIGH COURT
27 MAY 2009

2010 (1) SA 8 (GSJ)

An insertion of a qualification to the terms of a written contract by one of the parties is binding on the other if a the qualification is clear to the reasonable reader.

THE FACTS

In 2003, Freddy Hirsch Group (Pty) Ltd supplied Chickenland (Pty) Ltd with spices which were intended to be used by Chickenland in sauces it was to sell to its customers worldwide. The spices supplied by Freddy Hirsch all contained cayenne pepper which was contaminated with a colourant known as Sudan 1. The colourant was not permitted as an additive to the spices in terms of the Foodstuffs, Cosmetic and Disinfectant Act (no 54 of 1972).

The supply of the spices was effected in terms of an agreement concluded between the parties in November 1994. The agreement was entitled 'Application for credit facilities' and was headed 'standard conditions of sale and credit'. Clause 4* of the agreement provided that Freddy Hirsch would not be liable for defective goods unless certain conditions were met, and that Freddy Hirsch's liability would be limited to re-supplying the goods or passing a credit for the goods and would not be liable for consequential damages.

The agreement was signed on behalf of Chickenland by a Mrs Smit, a financial controller employed by Chickenland. Before signing, she notified the company's financial director that the agreement contained terms and conditions which she did not understand. The financial director was then overseas, and he instructed Mrs Smit to insert words to indicate that the company did not agree to these terms. Mrs Smit inserted the words ' std conditions not checked' and signed the agreement.

Freddy Hirsch brought an action for payment of R1 368 861,69 in respect of goods supplied to Chickenland. Chickenland raised a counterclaim which exceeded this sum claiming damages arising from the supply of the defective spice. Freddy Hirsch contended that the effect of clause 4 was to prevent Chickenland's counterclaim.

* The wording of clause 4 is set out below

4. LIMITED LIABILITY

4.1 The Company shall not be liable for any defect in the goods by reason of faulty production, workmanship, quality of raw H materials or otherwise unless:

4.1.1 It is established that the goods were correctly installed and properly cared for and used; and

4.1.2 the Customer notifies it in writing of the defect within seven days of the delivery of the goods.

I 4.2 The Company's liability shall be limited, at its option, to:

4.2.1 Repairing such goods free of charge; or

4.2.2 supplying the Customer with similar replacement goods free of charge; or

4.2.3 passing a credit for the purchase price of the goods, provided that the Company shall under no circumstances whatsoever be responsible for any consequential J or other damages whatsoever.

4.3 Notwithstanding anything to the contrary contained or A implied in these conditions the liability of the Company arising out of any defect in the goods shall not exceed the purchase price of the goods concerned.

4.4 Save as set out herein all conditions, terms, warranties or representations (express or implied, statutory or common-law) as to quality, fitness, performance or otherwise in relation B to the goods are excluded.

4.5 When the Customer purchases the goods for resale, the Customer shall ensure that the purchaser of the goods is appraised of these conditions so as to ensure that the purchaser's claims (if any) against the Company are limited to the extent stated herein. C

4.6 The Customer indemnifies and holds the Company harmless against all claims, loss, damage, expense or proceedings of whatsoever nature against or on the part of the Company arising out of the sale or distribution of the goods whether defective or not for any reason whatsoever'.

THE DECISION

Accepting the position that a person who signs an agreement thereby signifies his assent to the contents of the document, the question to be answered was what would the reasonable recipient of the application in the present case understand by the words inserted by Mrs Smit?

The plain words meant that the person signing the document had not considered the standard conditions at the time of signature. The other party, Freddy Hirsch, aware that these words formed part of the agreement, must be understood to have accepted, by its own signature, that Chickenland did not accept that it was bound by the standard terms and conditions of the agreement.

Freddy Hirsch contended that the added words should only be seen to affect unusual and unexpected terms in the agreement, but even if this was accepted, the added words would apply to clause 4 because no reasonable person would expect to find its provisions in the agreement. Unless its provisions were drawn to the attention of the reader of the standard conditions, who has given notice that it has not 'checked' them, such a clause could not be anticipated by anyone dealing with Freddy Hirsch.

Freddy Hirsch could therefore not rely on the provisions of clause 4. Chickenland was entitled to set off any claim found to be due to it in terms of its counterclaims.

The contract between the parties was in regard to the manufacture and sale of spices and spice mixtures by the plaintiff for the defendant at the latter's special instance and request. In the case of contaminated or poisonous products being sold by the plaintiff and later used by the G defendant, the results could be catastrophic to thousands, if not millions, of people throughout the world. It is for this reason that the zero-tolerance attitude of world governments, including the South African government, exists. It is against this backdrop that counsel's submission must be tested. In my view for a company that sources spices from all H over the world and thereafter packs and manufactures spice mixtures, well knowing that they are to be used in the manufacture of food products for human consumption, to contract out of all liability which may arise from such products, save for the replacement of contaminated products, is, to say the least, surprising, if not mind-boggling. Even in a world as cynically materialistic as our present one is, such clauses, in I such circumstances, are unexpected.

CLADALL ROOFING (PTY) LTD v SS PROFILING (PTY) LTD

A JUDGMENT BY NAVSA JA AND VAN HEERDEN JA (MTHIYANE JA, HEHER JA and WALLIS AJA concurring)
SUPREME COURT OF APPEAL
14 SEPTEMBER 2009

2009 SACLR 386 (A)

A contractual provision that a party has inspected goods supplied to it by the other party and is satisfied that they confirm to the quality and quantity ordered offers no basis upon which the supplying party can assert that goods supplied in terms thereof complied with the specifications of the order, if the goods supplied deviate from the specifications to the extent that the goods supplied are not the goods ordered.

THE FACTS

Cladall Roofing (Pty) Ltd ordered 13 000 square metres of 0.5mm FH Z275 galvanised IBR roofsheeting material from SS Profiling (Pty) Ltd. Cladall made the order after obtaining a quote from SS which recorded the specifications for the material given by Cladall.

In terms of clause 6.4 of the standard terms of agreement agreed to by the parties Cladall confirmed that the goods on any tax invoice issued duly represented the goods or services ordered by it at the prices agreed to and, where delivery/ performance had already taken place, that the goods were inspected and Cladall was satisfied that they conformed in all respects to the quality and quantity ordered and were free from any defects.

In terms of clause 7.3, no claim under the agreement would arise unless Cladding had, within 3 days of the alleged breach or defect occurring, given SS Profiling 30 days written notice by prepaid registered post to rectify any defect or breach of Agreement.

SS supplied the material, but Cladall alleged that the material did not comply with the required specifications. It brought an action against SS claiming resulting damages and refused to pay the balance of the purchase price still outstanding.

SS contended that it was entitled to rely on clauses 6.4 and 7.3 notwithstanding any alleged deficiency in the material, and counterclaimed for payment of the balance of the purchase price still outstanding. For the purposes of deciding the matter, the parties accepted that the material did not comply with the required specifications.

THE DECISION

It was clear from Cladall's order that what it purchased was a very specific product which had to comply with particular specifications. None of the specifications had however, been met. In consequence, what SS supplied was not the item which Cladall had ordered.

Clauses 6.4 and 7.3 related to the supply of defective goods, not goods which had not been ordered. They therefore provided no grounds upon which SS could be excused from performing properly in terms of the parties' agreement. SS had not supplied the goods Cladall had ordered and in these circumstances, these provisions were inapplicable to the case.

Cladall was therefore entitled to withhold full payment of the goods it had ordered.

VOLVO (SOUTHERN AFRICA) (PTY) LTD v YSSEL

Contract

A JUDGMENT BY NUGENT JA (STREICHER JA, JAFTA JA, MAYA JA and HURT AJA concurring)
SUPREME COURT OF APPEAL
20 AUGUST 2009

2009 SACLR 396 (A)

A person stands in a position of trust when another person relies on him and that reliance is justifiable in the circumstances. Secret commissions made in breach of that trust to the other person must be repaid.

THE FACTS

In 2000, Yssel was appointed manager of the information technology division of Volvo (Southern Africa) (Pty) Ltd. His employment was effected through the intermediary of a labour broker, Highveld Personnel (Pty) Ltd, which invoiced Volvo for Yssel's services and then remunerated Yssel.

In 2004, Yssel took steps to change similar arrangements then in place between other employees and Volvo by arranging the substitution of their labour brokers for Highveld Personnel. All the affected parties were agreeable to the change, and thereafter Highveld invoiced Volvo for the services of the other employees and paid them for services rendered.

At the time when this change took place, Yssel agreed with Highveld that he would be paid a commission for having brought about the substitution. This was not however, disclosed to Volvo. In the period 2004 to 2005, Yssel was paid a total of R775 107 by way of commission.

When Volvo discovered that Yssel was being paid a commission, it sought repayment of the amount paid and brought an action in the High Court claiming payment. It alleged that the commission had been earned in breach of a fiduciary duty that he owed to Volvo to act in its interests and not in his own.

THE DECISION

Yssel had concluded no employment agreement with Volvo, but the question remained whether or not Yssel owed a fiduciary duty toward Volvo, and had, by arranging the amendment of the service agreements and earning a commission, breached that duty. In determining whether a fiduciary relationship existed between the parties, it is necessary to determine whether or not one party's reliance on the other party was justified in the circumstances.

In the present case, Yssel had been appointed to his position by Volvo in order to serve its interests. This was so irrespective of the fact that the company had not actually employed him. Having been placed in that position, the company was entitled to expect him not to advance his own interests at its expense in whatever manner this might have taken place. It was only because Yssel had the position of manager that he was able to do so. He was therefore in a position of trust vis-a-vis Volvo and was under a duty not to breach that trust.

Yssel was therefore obliged to repay the commissions he had earned as a result of the breach of trust. The action succeeded.

DUET AND MAGNUM FINANCIAL SERVICES CC (IN LIQUIDATION) v KOSTER

A JUDGMENT BY PRELLER J
TRANSVAAL PROVINCIAL DIVISION
4 FEBRUARY 2007

2010 (1) SA 312 (T)

Prescription

Prescription begins to run against a claim which is conditional on proof that the debtor is liable under some statutory provision as soon as the creditor is aware of the identity of the debtor and the facts giving rise to the claim, and not when the creditor has proved the condition.

THE FACTS

The liquidators of Duet and Magnum Financial Services CC brought an action against Koster to set aside a disposition of R459 446,71 made to him.

Koster defended the action on the grounds that the claim had prescribed, the disposition having been made, at the latest, by March 2002. Summons was served in July 2005.

The court was asked to determine whether or not the disposition was correctly characterised as a 'debt' and accordingly a claim to which prescription did apply, it being contended that the debt could only arise after an order for the setting aside of the disposition had been made.

THE DECISION

The term 'debt' has a wide meaning which includes the obligation to do something or refrain from doing something. It could therefore include the obligation to make payment of R459 446,71 as claimed by the liquidators. However, the fact that a prerequisite to the success of such a claim is an order that the disposition was liable to be set aside did not prevent the obligation from arising in the first place.

It followed that prescription would commence to run as soon as the creditor was aware of the identity of the debtor and the facts giving rise to the claim. The liquidators's claims were therefore debts as provided for in the Prescrption Act, and prescription had already run against them.

CITY OF JOHANNESBURG v RENZON AND SONS (PTY) LTD

Prescription

A JUDGMENT BY JAJHBAY J
WITWATERSRAND LOCAL
DIVISION
7 JUNE 2005

2010 (1) SA 206 (W)

A municipality's claim for charges arising from services rendered to a property under empowering legislation is a tax and accordingly a debt arising out of it prescribes after thirty years as provided for in section 11(a)(iii) of the Prescription Act (no 58 of 1969).

THE FACTS

Renzon and Sons (Pty) Ltd owned property in the municipal area controlled by the City of Johannesburg. The City levied assessment rates and sewerage charges on the property under the Local Authorities Rating Ordinance (no 11 of 1977) and Sewerage By-Laws. These included the period up to and including 21 May 2003, and amounted to R126 347.54.

Renzon paid all amounts due up until February 1999. After that date, it paid assessment rates but not sewerage charges.

On 29 July 2003, the City commenced action against Renzon claiming payment of all amounts due to it including sewerage charges arising from February 1999. Renzon defended the action on the grounds that the claim for sewerage charges had prescribed in terms of the Prescription Act (no 58 of 1969) within three years.

The City contended that section 11(a)(iii) of the Act applied and as its claim was a 'debt in respect of any taxation imposed or levied by or under any law' the period of prescription was thirty years.

THE DECISION

The question to be determined was whether the sewerage charge was a 'debt in respect of any taxation, imposed or levied by or under any law'. The real nature of the charge had to be determined.

The sewerage charge was levied irrespective of whether or not the property owner used the service. It was 'compulsory' in the sense that it was a compulsory contribution in support of government, and levied on persons, property, income, commodities, and so on. It was a charge levied under empowering legislation and was to be considered a benefit to the property owner on which a tax had been levied.

It followed that the applicable prescription period was that provided for in section 11(a)(iii), a period of thirty years.

CITY OF CAPE TOWN v REAL PEOPLE HOUSING (PTY) LTD

A JUDGMENT BY NUGENT JA (HARMS DP, MALAN JA, HURT JA and TSHIQI AJA concurring) SUPREME COURT OF APPEAL 30 NOVEMBER 2009

[2009] ZASCA 159

Property

A municipality is obliged to issue a certificate in terms of section 118(1) of the Local Government Municipal Systems Act (no 32 of 2000) if the property owner has paid all amounts owing in the two years preceding the issue of the certificate, irrespective of whether or not earlier debts have been paid.

THE FACTS

The City of Cape Town collected money owed to it for property rates and taxes and the provision of services. It did so in terms of the Local Government Municipal Systems Act (no 32 of 2000) which imposed on it the obligation to do so.

Section 118(1) of that Act provided that a Registrar of Deeds could not register the transfer of property except upon production of a certificate issued by a municipality that all such money becoming due to it in the previous two years had been paid.

In the collection of the money, the City applied a debt collection policy which included the rule that payments made to it would be first allocated to the oldest debt progressing to the latest debt. The rule was provided for in a bye-law promulgated by the City.

Real People Housing (Pty) Ltd owned a property in respect of which money was owing in terms of section 118(1). Some of the money had been owing for longer than two years. The City refused to issue the certificate required for transfer of the property unless all money owing to it was paid.

Real People offered to pay only money owing in the last two years and claimed that after having done so, it was entitled to a certificate in terms of section 118(1).

THE DECISION

The implication o f *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) is that a property owner is entitled to a certificate in terms of section 118(1) even if the municipality is owed money in respect of debts which are older than two years, if the property owner has paid all debts arising within the last two years.

A municipality has an obligation to issue the certificate required for transfer of the property, and the terms of section 118(1) make it clear that the condition under which that obligation arises is that all amounts becoming due in the previous two years have been paid. There is no qualification to that condition. Once it is fulfilled, the obligation arises and the municipality must issue the certificate. This means that it must issue the certificate irrespective of the fact that earlier debts are still owed to it.

Real People was entitled to the certificate it sought.

KOVACS INVESTMENTS 724 (PTY) LTD v MARAIS

A JUDGMENT BY MPATI P (BRAND JA, LEWIS JA, MAYA JA AND BOSIELO AJA concurring) SUPREME COURT OF APPEAL 20 AUGUST 2009

2009 SACLR 361 (A)

Although it is possible for parties to tacitly agree on a method of compliance with obligations provided for in their agreement in a manner different from that provided for in such an agreement, a waiver of rights will not be understood to have taken place unless it is clear how the alternative method of compliance was to be performed and the variation constitutes only the temporary suspension of the original obligation.

THE FACTS

Marais sold to Kovacs Investments 724 (Pty) Ltd the commercial section of a building known as 'Sanbel' for R18 454 041. The price was payable by way of a deposit of R8 304 319 which was payable in two instalments—R7 627 444 on or before 15 August 2005, and R676 875 on or before the possession date—and the balance by way of a loan from a bank or financial institution to be granted by 15 August 2005.

The sale was subject to a suspensive condition that Kovacs be granted a loan for the balance of the purchase price by 15 August 2005. It was provided that the suspensive condition could only be waived by mutual agreement between the two parties.

The sale was subject to a second suspensive condition that Kovacs was to obtain written approval of the terms and conditions of the agreement from investors nominated by Interneuron Property (Pty) Ltd, such approval to be obtained on or before 15 August 2005.

The deposit was not paid in full by due date but was paid on 19 August 2005. On that date, Kovacs confirmed fulfilment of the first and second suspensive conditions. However, the loan actually obtained by that date fell short of the balance required by R499 722.

The agreement also provided that no variation of its terms and conditions or any purported consensual cancellation thereof would be of any force or effect unless reduced to writing and signed by the parties.

Marais contended that the agreement had lapsed due to non-fulfilment of the suspensive conditions. Kovacs contended that there had been substantial compliance with the suspensive conditions and that Marais had waived strict compliance with them.

Marais applied for an order that the agreement was of no force or effect.

THE DECISION

Kovacs contended that the parties had reached informal consensus on the acceptability of a lower amount having been granted as a loan for payment of the balance of the purchase price, and that this did not constitute a variation of the agreement which would be affected by the non-variation clause.

The established rule in these circumstances is that provided the obligations under a written agreement are to be complied with in full, performance of one of the obligations in a manner different from that stipulated in the written agreement, and accepted by the other party, is considered to be sufficient compliance and the obligation as having been discharged. The agreement for a different manner of performance does not have to be in writing.

This rule however, did not assist Kovacs in the present case because acceptance of the lower amount granted as a loan could not be seen as a waiver but as a variation of the terms of the agreement. This was so because it was not a temporary suspension of the enforcement of an obligation but, in the absence of any indication of how the shortfall was to be made up, an amendment of the terms of agreement. Such an amendment was contrary to the non-variation clause, and also not permissible in terms of the Alienation of Land Act (no 68 of 1981).

The application was granted.

HOOFAR INVESTMENTS (PTY) LTD v MOODLEY

JUDGMENT BY LEVINSOHN DJP (NILES-DUNER J and KRUGER J concurring)
KWAZULU NATAL HIGH COURT
18 MAY 2009

2009 (6) SA 556 (KZP)

The obligation to pay property rates and services rests on the owner of the property concerned and not the purchaser of the property.

THE FACTS

Hoofar Investments (Pty) Ltd sold certain fixed property to Moodley for R425 000. Clause 7 of the agreement provided that Moodley was obliged to pay the costs of and incidental to transfer.

An amount of R87 979.52 was owing on the property in respect of property rates and services. The municipality refused to issue a certificate in terms of section 118(1) of the Local Government: Municipal Systems Act (no 32 of 2000) until this amount was paid.

Hoofar contended that in terms of clause 7, Moodley was obliged to pay this amount. It refused to give transfer of the property until Moodley paid R87 979.52 in respect of the property rates and services.

Moodley brought an application to compel Hoofar to give transfer without the requirement that he pay the R87 979.52.

THE DECISION

In the context of clause 7, 'incidental' could not refer to property rates and services, but to costs associated with the conveyancing process.

The obligation to make payment for this was enforceable in terms of section 118(1) which effectively conferred a hypothec over the property in preference to a mortgage bond. This was an obligation placed on the present owner of the property, in this case Hoofar, and not on a third party such as a purchaser, in this case Moodley.

In terms of the Act, it was Hoofar's obligation to obtain the certificate and there was no basis upon which this obligation could be transferred to Moodley.

The application was granted.

The hypothec created in this case in terms of s 118 cannot in my view be distinguished from the statutory hypothec referred to in both Sauerlander 's case and Abdullha 's. I find that it was incumbent upon the respondent to have obtained the s 118 certificate. In the circumstances C it would have been required to pay the amount claimed, albeit under protest. Its dispute with the municipality is of no concern to the applicant and there is no basis upon which the applicant's right to claim transfer can be thwarted or delayed by this issue.

AGRI SOUTH AFRICA v MINISTER OF MINERALS AND ENERGY; VAN ROOYEN v MINISTER OF MINERALS AND ENERGY

Property

A JUDGMENT BY
HARTZENBERG J
NORTH GAUTENG HIGH COURT
6 MARCH 2009

2010 (1) SA 104 (GNP)

An owner of unused mineral rights existing before the promulgation of the Mineral and Petroleum Resources Development Act (no 28 of 2002) may bring a claim arising from loss of those rights based on the allegation that its rights were expropriated by virtue of the effect of section 5(4) of the Act read with Schedule II of the Act.

THE FACTS

Agri South Africa and Van Rooyen held coal and clay rights over certain fixed properties. In May 2004, the Mineral and Petroleum Resources Development Act (no 28 of 2002) came into operation. Section 5(4) provided that no person could prospect for or remove, mine, conduct exploit mineral rights without (a) an approved environmental management programme or approved 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, and (c) notifying and consulting with the land owner or lawful occupier of the land in question.

Schedule II of the Act provided for the preservation of existing unused mineral rights, allowing the owner of such rights, the right to apply for a prospecting or mining right within one year. Failure to bring such an application resulted in the lapsing of such rights.

Agri and Van Rooyen contended that the effect of the section was to expropriate their mineral rights. Both lodged claims for compensation but both were rejected. They brought actions against the Minister of Minerals and Energy for payment of compensation. The Minister excepted to the claims on the grounds that section 5(4) does not expropriate rights.

THE DECISION

In order to determine if the parties' mineral rights were expropriated, it would be necessary to compare those rights before and after the promulgation of the Act and ascertain that the expropriation in question was consistent with section 25 of the Constitution.

Prior to the promulgation of the Mineral and Petroleum Resources Development Act, it was possible for an individual to own mineral rights. It was not necessary for that person to exploit such rights and it was possible for them to sell such rights to other parties. The Act changed this position, providing that the State is the custodian of the mineral rights of the country. The Act makes no acknowledgement of existing rights of mineral right owners. But for Schedule II to the Act, those that have not been exploited disappear. Henceforth, the only way to obtain mineral rights is to obtain them from the State.

The object of Schedule II to the Act is to afford owners of existing unused mineral rights, the opportunity to comply with the Act. Failure to comply with the schedule's requirements however, results in the owner losing those rights. The owner must make the necessary application accompanied by the motivating documentation if the rights are to be preserved. However, approval of the application does not necessarily follow after the application is made. Such is the effect of the provisions of the Schedule that they really afford the individual mineral right owner no more than an opportunity to mitigate its damages. The Act in effect admits that the owners will lose their rights and this constitutes expropriation of their rights.

It follows that owners of old-order mineral rights may prove that their rights have been expropriated and it is open to such an owner to claim and prove that his rights have been expropriated. This is what Agri and Van Rooyen were doing and intended to do in the action they had brought against the Minister. The exception brought against the claims was therefore without foundation.

The exception was dismissed.

AMRICH 159 PROPERTY HOLDING CC v VAN WESEMBEECK

A JUDGMENT BY MATHOPO J
SOUTH GAUTENG HIGH COURT
21 AUGUST 2009

2010 (1) SA 117 (GSJ)

Credit Transactions

An arrest tanquam suspectus de fuga depends on proof that the debtor intends to leave the country with the intention of evading or delaying payment of his debt. Such an arrest is inconsistent with constitutional rights if made at a time when the creditor had other means to secure payment of his claim.

THE FACTS

On 25 June 2009, Amrich 159 Property Holding CC arrested Van Wesembeeck tanquam suspectus de fuga. It alleged that Van Wesembeeck intended to leave the country in order to evade payment of his debt to Amrich.

The parties had concluded a sale agreement in terms of which Van Wesembeeck had purchased certain fixed property from Amrich. Van Wesembeeck had taken occupation of the property and paid a deposit. In May 2009, the deposit was repaid to Van Wesembeeck's attorneys, as well as occupational interest payable by Van Wesembeeck in terms of the sale agreement. Amrich issued summons to enforce its rights and Van Wesembeeck entered an appearance to defend the action. He also counterclaimed for reduction of the purchase price. Van Wesembeeck made arrangements to return to Belguim, but before his departure Amrich arrested him and he was detained at the Sandton police station.

Van Wesembeeck applied for the discharge of the order of arrest.

THE DECISION

The arrangements for departure made by Van Wesembeeck did not constitute sufficient grounds for his arrest. The sole purpose of arrest is to prevent departure with the intention of evading or delaying payment of one's debt. Van Wesembeeck had already indicated his intention to counterclaim against the action brought by Amrich and had thereby indicated what his intention was. The arrangements for departure themselves did not indicate a different intention.

The arrest of a person in order to secure payment of a debt is also constitutionally unacceptable. Since there is no legal justification for detaining a person whose civil liability has been proved, there is less legal justification for detaining a person whose civil liability has not yet been proved. Amrich should have used less restrictive measures to ensure that Van Wesembeeck would be answerable to its action against him.

The order arresting Van Wesembeeck was discharged.

RAQA v HOFMAN

A JUDGMENT BY BINNS-WARD AJ
(SALDANHA J concurring)
WESTERN CAPE HIGH COURT
29 MAY 2009

2010 (1) SA 302 (WCC)

A person who purchases an item under an instalment sale agreement and then gives delivery to a third party on the understanding that the third party will be liable for all amounts due under the instalment sale has only a monetary claim in relation to the item, and no locus standi to sue a person who has caused damage to it.

THE FACTS

Hofman bought a car under an instalment sale agreement with the intention that Ngceza would take delivery of the car and pay all amounts due in terms of the agreement. Hofman would remain the credit receiver under that agreement.

Hofman and Ngceza agreed that in the event of Ngceza failing to pay any amounts due in terms of the instalment sale agreement, Hofman would be entitled to require payment from Ngceza and if necessary, recover possession of the vehicle from him.

After Ngceza had taken delivery of the vehicle, it was involved in a collision. In an action to recover damages resulting from the collision, Hofman alleged that he was the owner, alternatively the bona fide possessor, of the vehicle.

Raqa, the defendant in the action, contended that Hofman did not have locus standi to bring the action as he was neither the owner, nor the bona fide possessor, of the vehicle.

THE DECISION

Hofman's right to obtain possession of the vehicle was a contingent right in that it depended on Ngceza defaulting in terms of their agreement. Hofman never had any intention of taking possession of the vehicle or of using it for his own benefit. His position was in effect that of a guarantor of payments due under the instalment sale agreement.

Hofman's interest in relation to the vehicle was a money claim for payment of the amounts due under the instalment sale agreement. He did not have any claim for damages sustained by the vehicle as damage to the vehicle had no effect on his claim for payment.

It followed that there was no basis in law for a claim by Hofman in respect of damage sustained by the vehicle. The action was dismissed.

ABSA BROKERS (PTY) LTD v RMB FINANCIAL SERVICES

A JUDGMENT BY MHLANTLA JA AND NUGENT JA (MLAMBO JA, LEACH JA AND BOSIELO AJA concurring)
SUPREME COURT OF APPEAL
20 AUGUST 2009

2009 SACLR 377 (A)

A joint wrongdoer should be joined in an action in which its joint and several liability to the plaintiff may be relevant, even if the plaintiff has made no allegations as to the joint wrongdoer's liability.

THE FACTS

The Claasen Family Trust brought an action against Absa Brokers (Pty) Ltd claiming damages arising from the investment of some R1m in an investment product known as the RMB Guaranteed Cashflow Investment. Absa settled the action by paying the Trust R585 686.56.

Absa then brought an action against RMB Financial Services and the other respondents claiming that they were joint wrongdoers and liable to pay a contribution in respect of the damages paid to the Trust.

RMB excepted to the claim on the grounds that section 4 of the Apportionment of Damages Act (no 34 of 1956) applied and no notice of the Trust's action had been given to it in terms of section 2. Section 2 provides that where it is alleged that two or more persons are jointly or severally liable in delict to a third person for the same damage, such persons may be sued in the same action. Section 4 provides that if a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him, the plaintiff shall not thereafter sue him except with the leave of the court.

Absa contended that notice of the Trust's action need not have been given to RMB because in that action, it had not been alleged that RMB and the other respondents were jointly and severally liable in delict to Absa for the same damage, as provided for in section 2.

THE DECISION

It was true that no allegation was made in the Trust's action that others were jointly or severally liable in delict to the Trust in respect of the loss it had suffered. However, the allegation referred to in section 2 need not be an allegation actually made at some time. The provision allows for the bringing of an action against a joint wrongdoer on the basis that that party either is in fact a joint wrongdoer, or is alleged to have been one. It is a procedural provision and does not impose conditions for the bringing of actions against joint wrongdoers.

The purpose of the Act as a whole is to avoid the bringing of a multiplicity of actions. Where joint wrongdoers, alleged or actual, are relevant to a matter, they are to be sued in the same action. In the event that this has not taken place, they are to be notified of the action in order to be given an opportunity of joining in it.

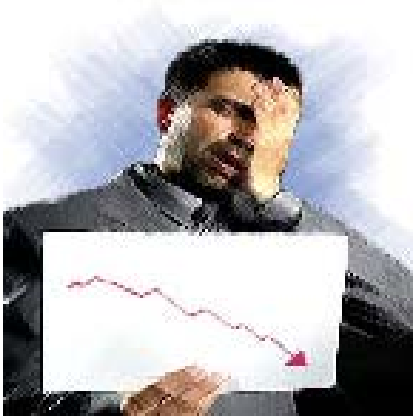
Absa was given leave to amend its particulars of claim in order to comply with the Act.

EX PARTE BOUWER AND SIMILAR APPLICATIONS

A JUDGMENT BY MAKGOKA J
NORTH GAUTENG HIGH COURT
9 MARCH 2009

2009 (6) SA 382 (GNP)

Insolvency



An application for voluntary sequestration must be made upon clear and full evidence that the applicant is insolvent, the reasons therefor, and an accurate valuation of the applicant's assets.

THE FACTS

Bouwer and the other applicants applied for the voluntary sequestration of their estates. Various aspects of the affidavits filed in support of the application raised concern as to whether the applications should be granted.

THE DECISION

A court will not give an order sequestrating a person's estate merely on the strength of an allegation that the person's liabilities exceed his assets. The affidavits in support of an application for sequestration must give a court sufficient evidence to show that sequestration will be to the advantage of creditors and that they will receive a non-neglible dividend.

In the present cases, the affidavits failed to give detailed reasons for the insolvency, failed to state what movable assets the applicants had, and failed to state their income and expenditure. The valuation certificates given by the estate agents were deficient in a number of respects. They failed to indicate the market price to be expected on a sale of the debtors' properties based on similar sales in the area. Since the certificates were all stated in the same terms, this raised doubt as to whether or not the agent had properly examined each property to assess their value, and based the valuation on personal knowledge of market prices. Other certificates stated conclusions which could not have been based on any facts which could warrant them.

In one application, the applicant had left out of account an alleged liability arising from a loan required for the payment of legal fees in the application itself. This suggested a lack of candour with the court.

The applications were refused.

INVESTEC BANK LTD v MUTEMERI

A JUDGMENT BY TRENGOVE AJ
SOUTH GAUTENG HIGH COURT
25 SEPTEMBER 2009

2010 (1) SA 265 (GSJ)

An application for sequestration is not a proceeding for enforcement of payment of a debt and therefore cannot be stayed on the basis of section 129(1) and 130(1)(b) of the National Credit Act (no 34 of 2005). A debt counsellor does not have the right to intervene in a sequestration application as he has no direct and substantial interest in the application.

THE FACTS

Investec Bank Ltd brought an application for the sequestration of Mutemeri and his wife to whom he was married in community of property. The Mutemeris owed Investec some R2m on loans secured by mortgage bonds over their fixed property, as well as R118 723.47 on a credit card account. Investec's application was brought after giving the Mutemeris notice in terms of section 129(1)(a) of the National Credit Act (no 34 of 2005).

While the application was still pending, the Mutemeris applied to a debt counsellor for a review of their debts in terms of section 86 of the National Credit Act. In that application, they alleged that they had debts of R17.8m and assets of R4m, including three fixed properties. The application would not be heard for another year.

Investec continued with its application for sequestration, alleging that the Mutemeris had committed acts of insolvency. It did not submit any valuation in respect of their fixed properties but contended that sequestration would be to the benefit of creditors.

Mutemeri opposed the application on the grounds that the effect of section 129(1) and 130(1)(b) of the National Credit Act was to stay the application for sequestration. The debt counsellor to be appointed in the application for debt review applied for leave to intervene in the matter.

THE DECISION

Section 130(1)(b) provides that a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days. If a notice to the debtor has been issued in terms of section 129(1) then the consumer must not have responded to it or rejected the credit provider's proposals.

Assuming that the effect of these provisions was to bar Investec from proceeding against Mutemeri for an order to enforce their credit agreement, the question was whether the application for sequestration was such an application. Whereas the motive of an applicant for sequestration may well be to obtain payment of a debt, the question remains whether or not the application is intended to enforce a credit agreement will be apparent from the nature of the relief sought.

An application for sequestration is not in itself an application for an order enforcing payment of a claim. Its purpose and effect is to bring about a convergence of claims so that all claimants may be treated equally in the orderly winding up of the insolvent estate. An order sequestrating a debtor's estate is not an order that a particular debt be paid. An application for sequestration is therefore not an application for enforcement of the sequestrating creditor's claim and is not subject to the requirements of section 130(1).

As far as the debt counsellor's application for leave to intervene was concerned, considering the role to be played by a debt counsellor under the Act, it was clear that he had no legal interest of his own and acted only as mediator and facilitator. He did not have a direct and substantial interest in the application and that his application for intervention should accordingly fail.

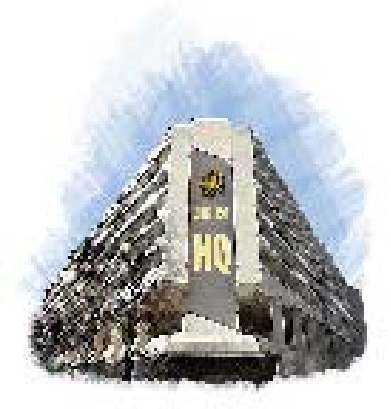
The application was granted.

VERIMARK HOLDINGS LTD v BRAIT SPECIALISED TRUSTEES (PTY) LTD

JUDGMENT BY MALAN J
WITWATERSRAND LOCAL DIVISION
28 AUGUST 2009

20009 SACLR 351 (W)

Companies



A scheme of arrangement in terms of section 311 of the Companies Act (no 61 of 1973) should not be sanctioned if the compromise proposed is between the proposer and a class of shareholder and a separate meeting of that class of shareholder is not held to consider and vote on the proposal.

THE FACTS

The Van Straaten Family Trust proposed a scheme of arrangement in terms of section 311 of the Companies Act (no 61 of 1973) under which it would obtain all of the shares of minority shareholders of Verimark Holdings Ltd at 50 cents per share. The trust was a majority shareholder in Verimark.

A scheme meeting was held and voting on the proposed scheme took place. 80.06% of scheme members voted in favour of it and 19.93% voted against it. Those voting included shareholders whose shares would not be purchased at the offer price of 50 cents per share in terms of the scheme of arrangement. These shareholders, defined as 'excluded members', were the trust, which held 46% of the shares in Verimark, and three others, which held 17% of the shares in Verimark.

Brait Specialised Trustees (Pty) Ltd and the other respondents opposed the sanctioning of the scheme of arrangement. They contended that the excluded members were a class of shareholder different from the remaining shareholders, and should not have been permitted to vote.

THE DECISION

The excluded members and the other members were all ordinary shareholders of Verimark. However, for the purposes of determining classes of shareholder, it was necessary to determine firstly between whom the compromise or arrangement was proposed. After that, it could be determined whether separate meetings of different classes of shareholder should be held.

The offer made by the trust was, on a true analysis, made to the minority shareholders, ie the 'scheme participants'. It was not made to the proposer, nor to the 'excluded members'. Only the 'scheme participants', as defined, were entitled to accept or reject it. It followed that only they should have been allowed to vote on it.

The scheme of arrangement therefore could not be sanctioned.

CLIPSAL AUSTRALIA (PTY) LTD v GAP DISTRIBUTORS (PTY) LTD

A JUDGMENT BY MALAN J
WITWATERSRAND LOCAL
DIVISION
25 SEPTEMBER 2009

2009 SACLR 405 (W)

The corporate veil will be lifted in circumstances in which a company has been established in order to evade the consequences of a court order.

THE FACTS

Clipsal Australia (Pty) Ltd obtained an order interdicting two firms owned by Gap Distributors (Pty) Ltd from infringing its registered design in certain electrical sockets. The order was obtained in March 2007 after a successful appeal to the Supreme Court of Appeal. The interdict also applied to Gap Distributors.

After the interdict was granted, Gap's controller, a certain Mr Botbol, registered Lear Imports (Pty) Ltd. That company began importing and selling electrical products in South Africa, including electrical sockets.

Clipsal brought an application for an order that Gap Distributors was in contempt of the order given by the Supreme Court of Appeal. Gap opposed the application on the grounds that the order given by the Supreme Court of Appeal was not given against Lear, a company separate from Gap.

THE DECISION

While there were differences between the Lear electrical sockets and those referred to in the Supreme Court of Appeal's order, these were immaterial differences. The Lear electrical sockets were sufficiently similar to the Gap sockets to be considered identical to them. In order to show that Gap was in contempt of the court order, it was necessary to show only that the order existed, that it had been served on Gap and Gap had failed to comply with it. Having shown this, an evidential burden was then cast on Gap to establish that its failure to comply was neither wilful nor mala fide. Gap had not discharged this burden.

Lear Imports could not be considered to be a legal persona separate from Gap. Both companies were controlled by Botbol. Lear Imports was a sham established by Botbol to evade the effect of the court order. In these circumstances, the corporate veil could be lifted.

The application was granted.

CUNINGHAME v FIRST READY DEVELOPMENT 249

A JUDGMENT BY BRAND JA
(MAYA JA, MHLANTLA JA,
HURT JA AND TSHIQI AJA
concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2009

2009 SACLR 426 (A)

A company incorporated as an association not for gain cannot have as its object any object inconsistent with the kind of objects referred to in section 21(1)(b) of the Companies Act (no 61 of 1973). Conflict of interests between members of the company is inconsistent with the idea of communal or group interests provided for in that section.

THE FACTS

Wimbledon Lodge (Pty) Ltd purchased a sectional title unit in a development which was a conference hotel known as Villa Via situated in Gordon's Bay. The sectional title units of the development were rooms in the hotel, as well as commercial areas consisting of parking space, restaurants and a conference centre. Wimbledon's purchase was of room units.

The room units were purchased for investment purposes. To this end, a management company was established to manage the letting of all units, the formation of a rental pool, and the distribution of rentals received to participants according to an agreed formula. After that company was placed in liquidation, its functions were fulfilled by the body corporate. The body corporate's members then agreed to arrange the transfer of the performance of its functions to First Ready Development 249, an association incorporated in terms of section 21 of the Companies Act (no 61 of 1973). First Ready ultimately also assumed the functions of conducting the hotel business, and its objects were amended to record that it conducted its main business on behalf of the owners of the furnished hotel apartments, conference facilities and restaurant facilities. Its main business recorded that it managed, operated, administered, let, marketed and leased furnished hotel apartments, conference and restaurant facilities.

Units comprising the commercial areas had been sold and transferred to various entities and were ultimately sold and transferred to Meridian Bay (Pty) Ltd. Meridian became a member of First Ready, as did Cuninghame, the sole owner of Wimbledon Lodge.

Because the commercial areas did not form part of the common property of the sectional title scheme, rental paid to Meridian was an operating expense in the commercial exploitation of these areas. The result of this was that every increase in the rental for the commercial areas brought about a decrease in the net accommodation revenue available for distribution amongst the rental pool owners.

Cuninghame alleged that Meridian and others who were members of First Ready had caused the company to take on the function of commercial operator of the hotel, and it was conducting the hotel business for the benefit of Meridian Bay and against the interest of the rental pool owners.

Cuninghame contended that First Ready was operating in contravention of section 21(1)(b) and section 21(2)(a) of the Companies Act. He brought an application for an order that the company be wound up on the grounds that it was just and equitable that it be wound up.

THE DECISION

Section 21(1)(b) provides that an association not for gain is a company having as its main object the promotion of religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests.

When First Ready was established, and in the initial stages of its operation, its objects were consistent with those provided for in this section. However, when its main object changed from managing a rental pool on a non-profit basis to the management of the hotel business as a whole, and its actual business effectively changed over time, its objects were no longer consistent with those described

in this section. Whereas the section did not prevent a company incorporated in terms of it from making a profit, it did require that whatever its main object, it should be an object of a kind referred to therein, ie it should be one like that of promoting religion, arts, science and so on. The object adopted by First Ready could not be said to be of such a kind.

The phrase 'association not for gain' also indicates that a company falling within the provisions of the section cannot be one established for commercial or material benefit or advantage. For this reason too, First Ready's commercial hotel business fell outside the ambit of what the object of a section 21 association may lawfully be.

It was also clear that the 'communal or group interests' referred to in the section did not exist in the present case as the interests of the company members were in conflict with each other. The rental received in respect of the commercial units being a subtraction from the net accommodation revenue, Meridian as the owner of these units had interests which were in direct opposition to those of the other members.

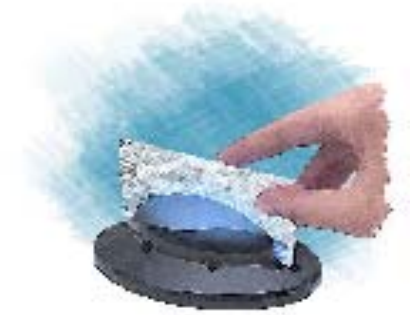
As the objects of First Ready and its business operations were inconsistent with the provision under which it was incorporated, the company had to be wound up on the grounds that this was just and equitable. The application succeeded.

CARTER TRADING (PTY) LTD v BLIGNAUT

JUDGMENT BY VAN DER BYL AJ
EASTERN CAPE HIGH COURT
14 MAY 2009

2010 (2) SA 46 (ECP)

Credit Transactions



An acknowledgement of debt which defers the obligation to make payment to a creditor is a credit agreement subject to the National Credit Act (no 34 of 2005).

THE FACTS

Carter Trading (Pty) Ltd sold goods to Blignaut on credit. Blignaut signed an acknowledgment of debt in which she agreed to pay Carter R107082.30 of her indebtedness by 24 December 2008. She agreed that in the event of default, she would also be liable to pay legal fees and collection commission. After she failed to pay, Carter brought an action against her to enforce payment. Blignaut defended the action on the grounds that the acknowledgment of debt was a credit agreement as provided for in section 8(4)(f) of the National Credit Act (no 34 of 2005) and Carter had failed to comply with sections 129 and 130 of that Act.

Carter contended that the acknowledgement of debt was a settlement agreement, and therefore a novation of the credit agreement originally concluded, and therefore not subject to the Act. It applied for summary judgment.

THE DECISION

Section 8(4)(f) of the Act provides that a credit agreement includes any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of the agreement, or the amount that has been deferred.

The acknowledgement of debt obliged Blignaut to pay a sum of money to Carter. By having signed the acknowledgment of debt, she intended to acknowledge that she was indebted to Carter in the sum of R107 082.30, that she would pay that sum on 24 December 2008, and undertook the obligation to pay legal fees and collection fees in the event of default. Those terms were exactly what the Act envisaged to be a credit agreement, ie an agreement in terms of which payment is deferred and at least a fee or charge is payable in respect of the acknowledgment of debt, and interest and legal fees are payable in the event of a failure by the defendant to pay the amount as agreed therein.

The acknowledgment of debt clearly fell within the ambit of the provisions of section 8 of the Act and therefore constituted a credit agreement as envisaged in the Act.

NELSON MANDELA BAY METROPOLITAN MUNICIPALITY v NOBUMBA N.O.

A JUDGMENT BY PLASKET J
(VAN DER BYL AJ concurring)
EASTERN CAPE HIGH COURT,
GRAHAMSTOWN
5 NOVEMBER 2009

2010 (1) SA 579 (ECG)

The National Credit Act (no 34 of 2005) does not apply to proceedings to enforce the payment of municipal rates. The Act does not apply to a municipality's action to enforce the payment of services only if the service provision agreement falls within the exemption of section 4(6)(b) of that Act.

THE FACTS

The Nelson Mandela Bay Metropolitan Municipality sued the third respondent for R28 708,45 in respect of outstanding rates, and R40 099,21 for outstanding service charges and interest. It applied for summary judgment but the matter was struck from the roll on the grounds that in bringing the action, the municipality failed to comply with sections 129 and 130 of the National Credit Act (no 34 of 2005).

Section 129(1)(b) provides that a credit provider may not institute proceedings to recover a debt before giving notice to the consumer, as provided for in section 129(1)(a). Section 130 provides that a credit provider may only enforce a credit agreement if certain conditions are met, including that the consumer has not responded to the section 129(1) notice or has responded by rejecting the credit provider's proposals.

The municipality appealed on the grounds that these provisions do not apply to a municipality.

THE DECISION

The provisions of sections 4 and 8 of the National Credit Act show that the Act only applies to agreements falling within the definition of a credit agreement. A credit agreement is defined so as to include an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties. A credit agreement is therefore a contract formed by consensus between two or more people.

Rates are a tax imposed by a municipality. Section 2(1) of the Local Government: Municipal Property Rates Act (no 6 of 2004) empowers a municipality to levy rates on property. The obligation on the part of a property owner to pay arises from this source, not from an agreement. As the National Credit Act is only concerned with credit agreements, it consequently does not apply to proceedings instituted by a municipality to recover due but unpaid rates.

Amounts due for services supplied by a municipality cannot however, be treated in the same way as rates. Whether or not the provision of services is subject to the National Credit Act depends on an interpretation of section 4(6)(b) which provides for an exemption from the operation of the Act in the case of the supply of utilities under which the supplier agrees to defer payment by the consumer until the supplier has provided a periodic statement of account for that utility, and will not impose any interest on amounts due unless overdue.

In order to determine whether or not the provision of services by a municipality falls within the exemption created by this provision, it is necessary to examine the bye-laws of the municipality and determine whether or not it is provided interest will be charged on overdue accounts where the due date is at least 30 days after the date on which a periodic statement is delivered to the consumer. Because the municipality had not given any indication of what its standard form service agreement was, it was not possible to determine whether the exemption applied to its provision of services. Therefore, it could not be concluded that the Act did not apply to the municipality's provision of services.

As far as the municipality's claim for interest was concerned,

this was not subject to the Act but to section 14 of the Customer Care and Revenue Management By-laws which provide that interest becomes payable when the due date has passed.

Summary judgment for payment of the outstanding rates was granted.

Does the NCA apply to claims for due but unpaid rates?
[28] It is evident from the provisions of ss 4 and 8 that the NCA only applies to agreements that fall within the definition of a credit agreement. The word 'agreement' is defined in s 1 of the Act to include 'an arrangement or understanding between or among two or more parties, which purports to establish a relationship in law between those parties'. It consequently bears the ordinary meaning of the reaching of consensus by two or more people in such a way that a contract is formed.
...
Scholtz et al take a different view. They say that the section applies to an 'agreement in terms of which the supplier of the utility or continuous service agrees to defer payment by the consumer until the I supplier has provided a periodic statement of account, and not to impose any interest unless the consumer fails to pay the full amount due within the agreed period', provided the consumer is given at least 30 days after the date on which the periodic statement of account is delivered in which to pay. Guide to the National Credit Act *(n 13), para 4.3 (p 4-6).*
[40] I am in agreement with this interpretation of the section, and I conclude that the interpretation of Steytler and De Visser is not correct. It is clear from the structure of the section, the fact that subparas (i) and (ii) are joined by the word 'and' and by the reference back in subpara (ii) to the deferred payment referred to in subpara (iii), that the requirements for exemption created by s 4(6)(b) are cumulative: in order for a supplier of a utility to be exempted, the agreement in terms of which utilities are supplied must comply with both subpara (i) - that payment by the consumer is deferred until periodical statements of account are rendered - and subpara (ii) - that no interest is charged on the deferred payment unless the consumer, having at least 30 days in which to pay, fails to do so. If these conditions are present, then the agreement is neither a credit facility nor an incidental credit agreement, but interest charges in terms of ss (ii) will be incidental credit.

DEMPA INVESTMENTS CC v BODY CORPORATE, LOS ANGELES

A JUDGMENT BY GAUTSCHI AJ
WITWATERSRAND LOCAL DIVISION
27 MARCH 2009

2010 (2) SA 69 (W)

Property

An administrator may be appointed to administer a sectional title scheme in replacement of trustees who have been appointed to do so if it is clear that special circumstances or good cause exist for the removal of the trustees.

THE FACTS

In terms of a court order obtained pursuant to an ex parte application, Messrs Kaye-Eddie and Dibakwane were appointed as joint administrators of the sectional title scheme known as Los Angeles. The order also provided that a general meeting of the body corporate was to take place, at which trustees were to be elected. The meeting took place, and a number of people were elected as trustees. A subsequent court order confirmed the election of the trustees for a period of one year.

The administration of the scheme was conducted chaotically and without proper financial controls. An indebtedness to the municipality in respect of rates exceeded R1m and individual unit owners were asked to pay amounts to the municipality in respect of electricity and water supplied to them. Conflicts between the trustees developed. One the unit owners, Dempa Investments CC, then decided that the appropriate course of action was to apply for the appointment of an administrator to the sectional title scheme in terms of section 46 of the Sectional Titles Act (no 95 of 1986).

THE DECISION

The fact that the trustees were willing and able to act as trustees of the scheme did not prevent the appointment of administrators in terms of the Act. A trustee who is unable to properly control, manage and administer the scheme should not be seen as willing or able to administer the scheme. Therefore, even if the trustees are properly in office, whether duly elected or not, and even if they declare themselves to be willing and able to act, an administrator may still be appointed in terms of section 46 of the Act.

The appointment of administrators once trustees have already been appointed should only be allowed if there have been breaches of duty by the trustees. In the present case, it was clear that special circumstances or good causes warranted the removal of the trustees. The trustees were not managing the affairs of the body corporate in a proper manner, and were acting to the substantial detriment of owners of units. This constituted ground for the appointment of an administrator.

The application succeeded.

MATHENJWA N.O. v MAGUDU GAME CO (PTY) LTD

A JUDGMENT BY KROON AJA (STREICHER ADP, NUGENT JA, LEWIS JA and PONNAN JA concurring)
SUPREME COURT OF APPEAL
28 MAY 2009

2010 (2) SA 26 (A)

Transfer of ownership may be understood to have taken place when it is clear that parties to an agreement intended that ownership would pass upon delivery of the item.

THE FACTS

The Emwokweni Community Trust, representing a community in the Magudu area of Vryheid, became the owner of certain farms which neighboured property owned by Magudu Game Co (Pty) Ltd.

Before the Trust became the owner of the land, the previous owner, a certain Mr Bouwer, had concluded agreements intended to include the land in a game reserve formed from an amalgamation of its neighbouring properties. These agreements conferred Bouwer's right to shares in Magudu and obliged him to allow his property to become part of the game reserve. The fences between Magudu's land and the Trust's land were then removed and this land and game was added to the Magudu property which became a game reserve. Magudu added game to the reserve. Prior to transfer of the land to the Trust, Bouwer alleged that the agreements had become void and he claimed restitution.

Magudu claimed that it was the owner of all game on the Trust's property and was entitled to enter the property for the purpose of removing the game and relocating them to its own property. It sought an order confirming its entitlement.

THE DECISION

Since transfer of ownership does not depend on a valid underlying agreement, the question was whether there was a mutual intention that ownership of the game would be transferred from the Trust to Magudu and delivery thereof had taken place.

The provisions of the agreements concluded between the parties could only be interpreted to mean that Magudu was to acquire ownership of the game. There were no provisions in the agreements inconsistent with Magudu acquiring ownership of the game. They could not be interepreted as conferring merely personal rights to exploit resources found on the land, such as the game.

Magudu acquired ownership of all the game in the reserve in that it and the Trust had the common intention that ownership of the game on its land would pass to Magudu, and subsequently the respondent and Bouwer had the common intention that ownership of the game on the land of Bouwer would pass to the respondent. Actual delivery of the game took place when the internal fences were removed, alternatively constructive delivery took place by virtue of the fences being removed followed by the then possession of game by the landowners on behalf of the respondent. Ownership of the further game introduced into the reserve by Magudu was acquired by it independently. The progeny of the game on the reserve accrued to Magudu.

Magudu was therefore entitled to the order it sought.

MILLS N.O. v HOOSEN

A JUDGMENT BY MASIPA J (BORUCHOWITZ J and LAMONT J concurring)
WITWATERSRAND LOCAL DIVISION
19 DECEMBER 2008

2010 (2) SA 316 (W)

A sale of fixed property does not comply with section 2(1) of the Alienation of Land Act if the agent of one of the parties signs the sale agreement without identifying the principal for which that party signs as agent.

THE FACTS

Mills, the executor of a deceased estate, appointed one Kitshoff as his agent to administer and liquidate the deceased estate. Acting in terms of the written power of attorney which appointed him, Kitshoff instructed Cahi Auctioneers to sell certain fixed property in the estate.

After the failure of the sale of the property by public auction, Kitshoff and Hoosen signed a deed of sale which recorded the sale of the property for R430 000.

Mills repudiated the agreement. He contended that the agreement failed to comply with section 2(1) of the Act, as the true seller of the property, the appellant in his capacity as executor of the deceased estate, was not identified or identifiable from the sale agreement or by admissible evidence. Mills contended that on the face of the agreement, Kitshoff, as the purported executor, is reflected as the seller, and there was nothing to indicate that he accepted the offer in a representative capacity.

THE DECISION

If an agent purports to act on behalf of one of the parties to an agreement, the existence of the agency may be proved by evidence outside of the document recording the agreement. If it is clear from the agreement who the true seller or purchaser is, the fact that the agent has not qualified his signature does not render the document invalid.

In the present case, Mills as executor of the estate and true seller of the property should have been identified in the sale agreement. Although Kitshoff was authorised to enter into and sign the agreement of sale on behalf of the appellant, he did not disclose the fact of such agency. He was obliged to qualify his signature with reference to his principal's name and to indicate that he was signing qua agent. As recourse to parol evidence was necessary in order to establish the identity of the true seller, the agreement of sale did not comply with the provisions of section 2(1) of the Act and was accordingly invalid.

It was not possible to refer to the power of attorney in order to identify the seller because the power of attorney was not referred to in the sale agreement.

PINZON TRADERS 8 (PTY) LTD v CLUBLINK (PTY) LTD

Property

A JUDGMENT BY JONES J
EASTERN CAPE HIGH COURT,
GRAHAMSTOWN
29 JUNE 2009

2010 (1) SA 506 (ECG)

It is permissible to prove one has a right of possession in respect of property by showing that access to that property is inextricably linked to the right of possession of other associated property.

THE FACTS

Pinzon Traders 8 (Pty) Ltd leased premises at a shopping complex owned by Clublink (Pty) Ltd. The lease anticipated future development of the complex including the provision of a new refrigeration room and butchery for use by Pinzon. A loading bay for Pinzon's use was constructed in close proximity to the new developments, and Pinzon began to use the loading bay for this purpose. Pinzon's right to use the loading bay was not expressly provided for in the lease. Access to it was gained through a parking area constructed for use of all tenants of the complex.

Other tenants at the complex complained that Pinzon's use of the loading bay affected their occupation of the premises and complained about the manner of its use specifically in that heavy-duty lorries were accessing the parking area in order to use the loading bay. Clublink constructed a wall to reduce the width of the entrance so as to make it impossible for larger lorries to enter.

Pinzon brought an application for an order that Clublink restore original possession of the parking area by demolishing the extended wall.

THE DECISION

As the thrust of Pinzon's case was that it was entitled to relief under the mandament van spolie, it had to prove that it (i) had been in de facto possession of the loading bay and (ii) had been unlawfully dispossessed.

Pinzon's use and access to the loading bay was inextricably connected to its access to the premises it leased at the supermarket. Access to the loading bay was therefore a part of its right of occupation of the premises leased to it, and was not the subject of any separate contractual right. Pinzon's possession of the loading bay had been demonstrated, as well as its unlawful dispossession.

Pinzon had also shown that it had had a clear right to use of the loading bay, and that the right had been infringed. Accordingly, it was also entitled to an interdict that Clublink restore possession on this basis.

The application was granted.

POCOCK v DE OLIVIERA

A JUDGMENT BY BASHALL AJ (MATHOPO J and JOFFE J concurring)
WITWATERSRAND LOCAL DIVISION
12 NOVEMBER 2008

2010 (1) SA 514 (W)

A restrictive condition that only one of a pair of adjacent properties may have a building constructed on it cannot be construed as a notarial tie agreement entitling the owner of one of the properties to ownership of the other.

THE FACTS

Pocock was the registered owner of erf 5554 situated in Johannesburg, and De Oliviera was the registered owner of erf 5555 which was adjacent to erf 5554. The two properties were originally owned by a certain Alexander in 1907 under separate title. They were transferred from his deceased estate to a certain Venter, at which time a restrictive condition was imposed on the properties by means of a notarial deed. This was to the effect that only one dwelling with stables and outhouses could be built on the pair of erven.

De Oliviera became the owner of the two erven. As a result of failure to pay municipal rates, the local authority brought an action against him for payment thereof and in enforcement of a judgment for payment, erf 5554 was sold in execution. The purchaser sold the property to Pocock and the property was transferred directly to her.

No separate buildings were constructed on erf 5555 and municipal services to that property were not supplied to independently, but through erf 5554. Pocock contended that she was also the owner of erf 5555 because the notarial agreement in effect tied the two properties to each other. She contended that the effect of this was to accede erf 5555 to erf 5554.

THE DECISION

The notarial agreement was not a tie agreement and could not be construed as having tied the two properties to each other in the way that the usual tie agreement does. Even had there been such a tie, this would have been no more than a consensual act and the properties could have been untied by agreement. The consensual nature was evident in the condition relating to the prohibition on alienation to more than one transferee without the necessary consent, and was implicitly recognised in the attachment sale and registered transfer of only erf 5554.

The notarial agreement therefore provided no basis for the contention that Pocock was the owner of erf 5555.

As far as the argument based on accession was concerned, accessio is the basis upon which ownership may be acquired through any of the usual modes of accession. None applied in the present case, and did not apply on the basis of the execution and registration of the notarial agreement.

Pocock was therefore not the owner of erf 5555.

REFLECT-ALL 1025 CC v MEC FOR PUBLIC TRANSPORT, ROADS AND WORKS

A JUDGMENT BY NKABINDE J (MOSENEKE DCJ, CAMERON J, MOKGORO J, NGCOBO J, O'REGAN J, SKWEYIYA J and VAN DER WESTHUIZEN J concurring)
CONSTITUTIONAL COURT
27 AUGUST 2009

2009 (6) SA 391 (CC)

A limitation on the rights of a property owner is not in violation of section 25(1) of the Constitution if it does not amount to an arbitrary deprivation of rights. Even if the effect of such a limitation is extensive, the test for determining whether or not the property owner has been arbitrarily deprived of its rights is whether the means used to achieve the objects of the provision in question is disproportionate. Expropriation of the property owner's rights will not be seen to have taken place if the limitation does not involve a transfer of the owner's property to the State.

THE FACTS

Reflect-all 1025 CC and the other applicants were all owners of land which was to be affected by roads proposed to be constructed by the MEC for Public Transport, Roads and Works. The properties were to be affected either by rezoning restrictions being placed upon them or expropriation to some extent. This was done in terms of notices issued in terms of the Gauteng Transport Infrastructure Act (no 8 of 2001).

The Act, which came into force in 2003, was enacted to consolidate the laws relating to roads and other types of transport infrastructure in Gauteng and to make provision for provincial roads and other transport infrastructure in Gauteng. The Act replaced the Transvaal Roads Ordinance. Section 10(1) provides that any route within the Province which has been accepted as such by the relevant authority under the Ordinance before the commencement of the section shall be deemed to have been determined and published in terms of section 6 as soon as the MEC has published a notice in the Provincial Gazette to the effect that the centre line thereof has been determined, from which date the relevant provisions of sections 5 to 8 apply to such a route as though it has been published in terms of that section.

Section 6 provides for the procedures to be followed prior to the publication of a route, and sections 7, 8 and 9 provide for the implementation of the construction of the route. The effect of these sections is to prevent any use of the affected property other than for its designated purpose as determined by the MEC.

Section 10(3) provides that every preliminary design of a provincial road within the Province accepted as such by the relevant authority under the Ordinance before the commencement of the section shall be deemed to have been accepted by the MEC for implementation in terms of section 8, and section 9 shall be applicable to such preliminary design.

Reflect-all contended that the effect of sections 10(1) and 10(3) was to deprive it of property contrary to section 25(1) of the Constitution and amounted to expropriation without just and equitable compensation contrary to sections 25(2) and 25(3) of the Constitution. Reflect-all applied for an order that sections 10(1) and 10(3) were invalid.

THE DECISION

The effect of sections 10(1) and 10(3) was to prevent the construction of services infrastructure over or below a route, except with the written permission of the MEC or in terms of a registered servitude. Owners can only apply for certain changes to affected land if the application is accompanied by a report by a civil engineer. The sections also prohibit the granting of applications for the establishment of townships or any change of land use in terms of any law or town-planning scheme. This adversely affected the applicants and to some extent, deprived them of the use, enjoyment and exploitation of their properties.

For this to be contrary to section 25(1) it would have to be an arbitrary deprivation. Procedurally however, sections 10(1) and 10(3) were not arbitrary. The historical consultative process undertaken to determine routes under the legislation applicable prior to the enactment of these sections could

not realistically be revisited. To do so would not be in the public interest and would stultify the building of roads for which preliminary work had already been completed. Similarly, the acceptance of preliminary designs under the old legislation could not realistically be reconsidered as this would involve consulting with all affected property owners, an impractical and costly exercise.

As far as their substantive import was concerned, the enquiry had to be whether or not the means employed to achieve the purposes of the Act were disproportionate to those purposes. It was true that the effect of section 10(3) on the rights of property owners was extensive but the means employed to achieve the objects of the Act were not disproportionate. The Act allowed property owners to apply for amendments to the planned routes and did not completely restrict their right to develop and exploit the potential of their properties. Section 10(3) did not amount to an arbitrary deprivation of property in violation of section 25(1) of the Constitution.

The applicants also contended that the sections allowed expropriation of their properties in violation of section 25(2) and 25(3) of the Constitution. However, none of the applicants was faced with an attempt to transfer their properties to the State. Furthermore, it was not certain that the road routing proposals made by the government would be implemented. Given that there was only a potential of limiting their rights as property owners, the means adopted to do so could be considered proportionate.

The application failed.

HIDRO-TECH SYSTEMS (PTY) LTD v CITY OF CAPE TOWN

A JUDGMENT BY IRISH AJ
CAPE PROVINCIAL DIVISION
24 DECEMBER 2008

2010 (1) SA 483 (C)

Contract

Upon receiving a credible complaint that a preference has been obtained on a fraudulent basis, an organ of State must act in accordance with the complaint in terms of Preferential Procurement Policy Framework Act (no 5 of 2000).

THE FACTS

Hidro-Tech Systems (Pty) Ltd competed with the second and third respondents for contracts awarded by the City of Cape Town for the supply and installation of mechanical equipment for water and sewerage treatment works required by the municipality.

Over a period of five years, the second respondent won 80% more contracts arising from tender processes in which both parties participated, than contracts won by Hidro. The reason for this was that the second respondent scored higher than Hidro on points based on the scoring given for members qualifying as historically disadvantaged individuals ('HDI').

Hidro was of the opinion that the second respondent had misrepresented its true HDI status and was operating as a front for the third respondent. Hidro alleged that this was clear from the fact that the remuneration of directors of HDI status was significantly less than white directors, and that managerial and administrative responsibilities were allocated mostly to the latter. In fact, neither of the non-white directors was actively involved in the management of the second respondent or exercised control over it, to an extent commensurate with their respective shareholdings at the time when the second respondent submitted its tenders in 2006 and 2007.

Hidro addressed the municipality with its concerns. It requested a verification agency to determine and report on Hidro's allegations. It confirmed that the second respondent's shareholding was in line with the proof of shareholding which had accompanied its tender-registration form.

Hidro reiterated its contention that the second respondent was involved in fronting practices and demanded that the municipality investigate this. The municipality did not do so. Hidro then brought an application for an order that the municipality act against the second respondent in accordance with section 15 of the regulations promulgated in terms of the Preferential Procurement Policy Framework Act (no 5 of 2000) and that the municipality act against the second respondent in accordance with item 9.4 of the Procurement Policy Initiative of the City of Cape Town

THE DECISION

Regulation 15 provides that an organ of State must, upon detecting that a preference has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.

Although the State could investigate the position before taking action, the action to be taken did not depend on a preliminary investigation having been conducted upon the basis of which the State would satisfy itself that a preference had been obtained on a fraudulent basis. The regulation intends to cast a very wide net, in order to ensure that an organ of State be proactive in responding to the reasonable possibility that a preference has been obtained fraudulently, or that a specific goal of its preferential policy, in terms of which a contract was awarded, is not being pursued. State has no investigative ability in terms of the regulations.

The action to be taken by the organ of State is dependent upon the nature of the information that reaches it. If that information

constitutes a credible complaint, seriously advanced, of the obtaining of a preference by fraudulent means, then the organ of State must act by requiring the tenderer in question to provide proof of its real and operative HDI status. The organ of State might appoint a forensic accountant to analyse any proof furnished on its behalf; or to assist it in calling for such further documentation as might be required.

In the present case, the municipality's investigation never sought to address the actual issue which was, not the overt shareholding in second respondent, but its sham nature and the blurring of the separate corporate identities of the second and third respondents. The investigations carried out by the verification agency were inadequate and did not address the real complaint.

The municipality was therefore ordered to act against the second respondent in accordance with regulation 15 of the regulations promulgated in terms of the Preferential Procurement Policy Framework Act.

MICROSURE (PTY) LTD v NET 1 APPLIED TECHNOLOGIES SOUTH AFRICA LTD

A JUDGMENT BY KOEN J
NATAL PROVINCIAL DIVISION
22 APRIL 2009

2010 (2) SA 59 (N)

A person seeking reinstatement of its contractual rights should not assert its rights under a mandament van spolie but on the basis of the contract under which its rights were established.

THE FACTS

Microsure (Pty) Ltd and Net 1 Applied Technologies South Africa Ltd concluded an agreement which conferred on Microsure the right to possess equipment used in the payment of pensions and access their funds with certain merchants. The agreement entitled Microsure to use a point of sale terminal, a biometric fingerprint scanner and merchant cards supplied to it by Net 1, and entitled it to access Net 1's server at its main place of business by a Telkom line or a GPRS connection. Access to the server was necessary for all transactions as one of the server's functions was to verify and authorise the payment of funds to a beneficiary.

In terms of the agreement, Microsure was given possession of a point of sale terminal, a biometric fingerprint scanner and a merchant card.

At a certain point, Net 1 deactivated Microsure's merchant card at Net 1's premises. This made it impossible for Microsure to access Net 1's computer. Deactivation did nothing physically to Microsure's card, as it only involved a reprogramming of Net 1's server. The effect was that Microsure's card was not recognised or authenticated by the server and Microsure no longer had access to and use of the Net 1's system.

Microsure brought an application for reinstatement of possession (a mandament van spolie).

THE DECISION

The merchant card and all the other equipment held by Microsure in terms of the agreement was still in its possession. What had happened was that Microsure had been deprived of certain rights, which had been exercised through the equipment situated at the respondent's premises. But no dispossession of the equipment held by Microsure in terms of the agreement had taken place.

In accordance with *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (A), the facts of the case showed no possession by Microsure of any item of which it had been deprived. Microsure sought specific performance of contractual obligations it alleged it was entitled to. But this could not be achieved in spoliation proceedings. Its position was indistinguishable from a contract customer in respect of a DSTV contract or a cellphone seeking to comply with continued service provision or access via their cards in circumstances where their right to receive such service may have been validly terminated. Its rights were personal contractual rights and should be asserted on that basis, not on the basis of a right of possession.

The application was dismissed.

What the applicants seek to achieve is specific performance of contractual obligations they were allegedly entitled to, and facilitated by the merchant card. This they cannot achieve in spoliation proceedings. Their position is indistinguishable from a contract customer in respect of a DSTV contract or a cellphone seeking to comply with continued service provision or access via their cards in circumstances where their right to receive such service may have been validly terminated. That debate is one for the law of contract, not property.

MUNICIPAL MANAGER: QAUKENI LOCAL MUNICIPALITY v FV GENERAL TRADING CC

A JUDGMENT BY LEACH AJA
(MPATI P, BRAND JA, CLOETE JA and MAYA AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2009

2010 (1) SA 356 (A)

Contracts concluded with local authority without complying with prescribed competitive processes are invalid, and a procurement contract for municipal services concluded in breach of the provisions of the applicable legislation is invalid and will not be enforced.

THE FACTS

In November 2005, FV General Trading CC submitted a tender to the Qaukeni Local Municipality for the collection of refuse in Lusikisiki and Flagstaff. The tender was accepted, and an oral contract then concluded for provision of the service until June 2006.

During the currency of this agreement, the municipal council, without calling for tenders, resolved to reappoint FV as refuse collector for another year. A written contract was concluded between the parties. It provided for continuation of the service beyond the first year unless notice of termination was given, such notice to be given six months prior to the end of the first period.

In June 2007, the final month of the first period, the municipality gave FV notice that the contract would not be renewed but would terminate at the end of that month.

FV applied for an order that the contract continued for another year, and was of full force and effect for that period as notice of termination provided for in the contract had not been given.

THE DECISION

Section 217(1) of the Constitution provides that an organ of State in the local sphere, such as a municipality, which contracts for goods and services must do so in accordance with a system which is fair, equitable, competitive and cost-effective. This requirement is repeated in more detailed form in both the Local Government: Municipal Systems Act (no 32 of 2000) and the Local Government: Municipal Finance Management Act (no 56 of 2003).

The effect of this legislation is to require that a municipality act openly and in accordance with a fair, equitable, competitive and cost-effective system, and in terms of a supply chain management policy designed to have that effect. The provisions are designed to ensure a transparent, cost- effective and competitive tendering process in the public interest. However, the Qaukeni Local Municipality appeared not to have complied with them, but to have ignored its obligation to do so.

Contracts concluded without complying with prescribed competitive processes are invalid, and a procurement contract for municipal services concluded in breach of the provisions of the applicable legislation is invalid and will not be enforced.

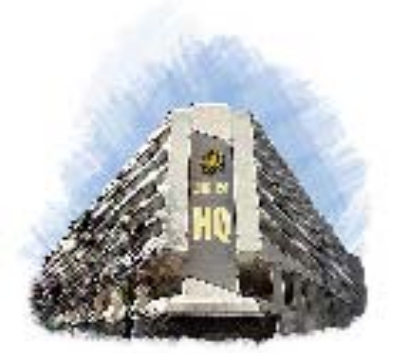
Accordingly, FV was not entitled to the order it sought. The application was refused.

STANDARD BANK OF SOUTH AFRICA LTD v HUNKYDORY INVESTMENTS 188 (PTY) LTD

A JUDGMENT BY ROGERS AJ
WESTERN CAPE HIGH COURT
1 JUNE 2009

2010 (1) SA 634 (WCC)

Companies



The 'disposal' of assets referred to in section 228(1) of the Companies Act (no 61 of 1973) does not refer to the mortgaging of assets.

THE FACTS

Hunkydory Investments 188 (Pty) Ltd passed two mortgage bonds over its fixed property in favour of the Standard Bank of South Africa Ltd. The property over which the bonds were passed was the company's main asset. No resolutions of shareholders as required by section 228(1) of the Companies Act (no 61 of 1973) were procured prior to the passing of the bonds.

Standard Bank sued for repayment of some R2m due by Hunkdory and secured by the bonds. In defending the action, Hunkdory contended that as there had been no proper compliance with section 228(1) of the Companies Act, the bank could not base any claim against it on the bonds.

Standard Bank contended that the passing of the bonds was not a disposal of the company's property as referred to in the section.

THE DECISION

The ordinary meaning of the word 'dispose' is to make over or part with under some transaction such as a sale, or to transfer into new hands or to the control of someone else. However, a transaction under which a debtor agrees to hypothecate its property is not ordinarily described as a disposal of the property to the creditor. Although the creditor may have the right to sell the debtor's property in the event of default, the passing of the mortgage bond in its favour does not constitute the sale of the property. A sale may eventuate should the creditor enforce its rights, but a sale in the enforcement of a creditor's rights may equally take place should the creditor have no security in the form of a mortgage bond.

If one were to interpret the word 'dispose' in the section as including a reference to a mortgage bond, the word would also apply to other transactions which might result in the sale of the company's main asset, such as a loan or the incurring of any other debt. There were no grounds for giving the section such a wide interpretation, even if the word 'dispose' could be given such an interpretation in other contexts.

Hunkydory's defence was rejected.

POLARIS CAPITAL (PTY) LTD v REGISTRAR OF COMPANIES

A JUDGMENT BY STREICHER JA (BRAND JA, SNYDERS JA, LEACH AJA and BOSIELO AJA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2009

2009 SACLR 445 (A)

A company name is undesirable if it creates a probability of confusion in the mind of the public. A company name will be confusing when, in doing business with the company, the public would be confused into thinking that they are doing business with another company or a company associated with the other company.

THE FACTS

Polaris Capital (Pty) Ltd was originally registered as a company under the name African Harvest Growth Asset Managers (Pty) Ltd. It carried on the business of equity manager in South Africa. In 2003, it passed a resolution to change its name to Polaris Capital (Pty) Ltd. The Registrar of Companies changed the name of the company in terms of the resolution.

Polaris Capital Management Inc, the second respondent, a company registered in the United States, objected to the change of name. In support of its objection, it averred that it was the proprietor of a trademark application using the name Polaris, had common-law rights to the name Polaris, was the proprietor of the internet domain name www.polariscapital.com and conducted services identical to those of Polaris Capital (Pty) Ltd. The company had traded in South Africa and had secured the management of the pension funds of Iscor and Oasis. The second respondent had received inquiries from members of the public regarding Polaris, from which it was apparent that they were confused as to whether it was the same as, or associated with, the second respondent.

The Registrar of Companies informed Polaris and the second respondent that he had decided that the second respondent's objection to the name Polaris Capital (Pty) Ltd was well founded and that accordingly the name was undesirable. Pursuant to his powers in terms of section 45(2) of the Companies Act (no 61 of 1973), the Registrar ordered Polaris to change its name within sixty days.

Polaris applied for a review of the Registrar's decision ordering it to change its name.

THE DECISION

The established rule is that a company name is undesirable if there is a serious risk of confusion of the public. This means no more than there is a probability of confusion. A company name will be confusing when, in doing business with the company, the public would be confused into thinking that they are doing business with another company or a company associated with the other company.

The second respondent had acquired a reputation in South Africa as an equity manager. It therefore had acquired vested rights which it was entitled to protect with respect to any other company which carried on the business of equity manager. Although Polaris contended that the second respondent's customer base was a limited and educated group of financial experts, some individuals did invest with the company. Since the name adopted by Polaris was practically identical to that of the second respondent, and both companies conducted business as equity managers, those who knew about the second respondent would probably think there was an association between the two companies.

The fact that some individuals had confused the second respondent with Polaris strengthened the view that a substantial number thought that there was an association between the two. In these circumstances, the name should be considered undesirable.

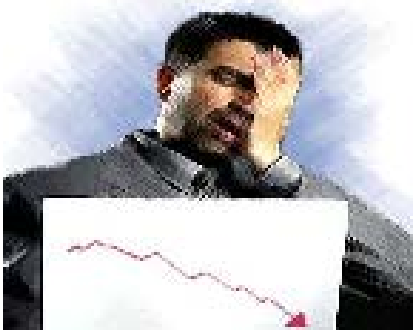
The application was dismissed.

KEBBLE v GAINSFORD

A JUDGMENT BY LEVENBERG AJ
SOUTH GAUTENG HIGH COURT
23 MARCH 2009

2010 (1) SA 561 (GSJ)

Insolvency



A liquidator is normally entitled to conduct an enquiry into the affairs of an insolvent company in order to determine facts necessary for instituting proceedings in the name of the company. The fact that a potential debtor has concluded a settlement agreement with the company's sole or main creditor does not prevent the liquidator from proceeding with an enquiry.

THE FACTS

Kebble and his late son were directors of BNC (Pty) Ltd until the company was placed in final liquidation in April 2006. The only proven creditor in the company was Randgold Ltd, with a claim of R169 500 000.

The Master signed an order appointing the fifth respondent as commissioner of an enquiry to be conducted into the affairs of the company. Kebble signed a settlement agreement with Randgold in which he agreed to pay R30m to Randgold and R5m to JCI Ltd. Randgold agreed to stop funding the enquiry to the extent that Kebble might be called as a witness to it. A second settlement agreement was later concluded by the same parties in which Randgold agreed to request that the liquidators take no further action against Kebble and certain other parties. Kebble acquired the right to purchase Randgold's claim against the company for R100 000.

The liquidators of the company declined to be parties to the settlement agreements. They wished to interrogate Kebble at the enquiry and issued a summons calling on him to attend and testify. Kebble applied for an order that the summons be set aside. He contended that the enquiry was an abuse of process because the only proven creditor, Randgold, had no interest in its continuation as it had settled its claim, and the liquidators would gain nothing from the enquiry necessary for the winding up of the company.

THE DECISION

Kebble's position rested on the contention that the effect of the settlement agreements was to compromise Randgold's claim against BNC. However, there was no indication that this was the effect of the settlement agreements. The evidence pointed the opposite way because the retention of the right to purchase Randgold's claim for R100 000 showed that its claim against BNC was not affected, but could be enforced should Kebble choose to do so.

Kebble's position that he had assumed BNC's liability toward Randgold also depended on BNC having participated in the agreement, because an assumption of liability is a tripartite agreement involving the consent of all three parties. BNC had not been a party to the settlement agreement and therefore no enforceable delegation of liability had taken place.

Since Randgold's claim remained and was not affected by the settlement agreements, BNC's insolvency continued irrespective of those agreements, even if their effect was to reduce its indebtedness to creditors.

Kebble also contended that pursuing a potential claim against him personally in terms of section 424 of the Companies Act (no 61 of 1973) would have the effect of conferring on Randgold greater rights against him than it obtained under the settlement agreements. However, the enquiry would also be directed at the determination of whether or not BNC had claims against other parties which could be pursued. There were also other potential creditors of the company which might benefit from an enquiry.

There is nothing improper in a liquidator instituting an enquiry in order to obtain as much information as possible prior to proceeding with the enforcement of a claim. Taking into account all the relevant factors, it could not be said that the enquiry

instituted by the liquidators in this case were an abuse of process, especially given the fact that a fraud had been committed with BNC being a vehicle in the commission of the fraud. The liquidators were therefore entitled to investigate to conduct the enquiry.

The application was dismissed.

There is no language in either of the settlement agreements that suggests that Kebble assumed the company's liability to Randgold or that it was ever the intention of the parties to extinguish the company's liability to Randgold .
On the contrary, the language of both settlement agreements negates this contention. The first settlement agreement affords Kebble an option to purchase Randgold's claim against the company for R100 000. If it was the intention of the parties that the Randgold claim against the company would be extinguished, then it could not thereafter have been assigned to Kebble.
...
There is another obstacle to Kebble's contention. An 'assumption of liability' is a delegation. That is a tripartite agreement pursuant to which one party agrees to assume the liability of another with the consent of the creditor. In the present case the liquidators (ie the representatives of the alleged delegating company) were not party to the 'assumption' agreement. Therefore, no legally enforceable assumption or delegation occurred.

LASKARIDES v GERMAN TYRE CENTRE (PTY) LTD

A JUDGMENT BY BHIKA J
WITWATERSRAND LOCAL DIVISION
27 FEBRUARY 2009

2010 (1) SA 390 (W)

The Master may issue a subpoena to attend an interrogation in terms of section 151 of the Insolvency Act (no 24 of 1936) only after applying his mind to whether or not the evidence may be lawfully required of the interogee. A mere letter from a liquidator requesting the issue of a subpoena is insufficient for this purpose.

THE FACTS

The liquidators of German Tyre Centre (Pty) Ltd requested the Master of the High Court to issue a subpoena against Laskarides in order to enable them to make an informed decision on the prospects of actions brought by certain creditors of the company against Bandag Inc of SA (Pty) Ltd. Laskarides was the managing director of Bandag. One of the creditors, having a claim of some R2m, had ceded its rights to the proceeds of its action to the liquidators and indemnified the liquidators for the costs of the enquiry.

The liquidators based their request on these facts, which were set out in their letter to the Master, accompanied by a cheque for R75 in respect of witness fees.

On the basis of this, the Master considered that Laskarides might be able to give information material to the protection of the interests of creditors. Accordingly, he issued the subpoena.

Laskarides brought an application in terms of section 151 of the Insolvency Act (no 24 of 1936) to review and set aside the Master's decision to issue the subpoena. He contended that the subpoena was invalid as it did not specify the documents he had to bring to the enquiry, and was directed at an action not between German Tyre Centre and Bandag but between a creditor of the insolvent company and Bandag, a party unrelated to it. They contended that the cession of the rights to the proceeds of the action was a contrivance, and this was evident from the fact that the claim itself had not been ceded but only the rights to the proceeds of the claim.

THE DECISION

In deciding whether or not to issue a subpoena for the purposes of interrogation of a person, the Master must must apply his mind to what may lawfully and relevantly be required of a proposed interrogee by way of oral evidence and delivery of books and records and other documentation. However, the letter motivating the issue of the subpoena did not sufficiently set out this required basis, nor did it deal with the relevance or ambit of the documents required, nor did it afford an explanation as to how the documents requested would assist the liquidators. Since the Master based his decision on the letter, it could not have been made on the proper basis required of the Master in making the decision.

It was also clear that although an interrogation could range widely in subject matter, it was not to include irrelevant matter, which is what the litigation between the creditor and Bandag was.

Laskarides also contended that the amount of R75 paid for witness fees was insufficient since the documentation required was so extensive, he might incur R525 000 in photocopying expenses alone. There was no reason in principle why witness fees should not include so-called reasonable out-of-pocket costs and expenses, including the cost and expenses, both material costs and time expended, in the production, compilation, copying, printing and collation of all documents.

As the subpoena had been issued without proper basis, it was set aside. The application was granted.

MOMENTUM GROUP LTD v VAN STADEN N.O.

JUDGMENT BY VAN HEERDEN JA (FARLAM JA, MLAMBO JA, GRIESEL AJA and BOSIELO AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2009

2010 (2) SA 135 (A)

Cession

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 R750040 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, an 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, it was clear that she did have this authority as she had been appointed to act for Momentum in the solicitation of policies. Upon the basis of her actions, and the impression given by them, it was entirely reasonable for Boland to have relied on her 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.

LOMBARD INSURANCE CO LTD v LANDMARK HOLDINGS (PTY) LTD

A JUDGMENT BY NAVSA JA
(NUGENT JA, LEWIS JA, JAFTA JA and PONNAN JA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2009

2010 (2) SA 86 (A)

Construction

Once it is shown that the event conditional for liability to arise under a construction guarantee has taken place, the guarantor's obligations arise, irrespective of the merits of any dispute which may have arisen between employer and contractor.

THE FACTS

Lombard Insurance Co Ltd issued a construction guarantee in favour of the South African Maritime Training Academy. It related to a construction contract concluded between the Academy as employer and Landmark Holdings (Pty) Ltd as contractor. In terms of the guarantee, Lombard undertook to pay a guaranteed sum upon default by Landmark resulting in cancellation or a liquidation order being granted against Landmark. The construction guarantee expressly provided that it did not intend to created an accessory obligation or a suretyship obligation.

Prior to the issue of the final certificate of completion, Landmark was placed in liquidation. The Academy then asserted its rights under the construction guarantee and called for payment of R241 429,77, being the value of work done after the issue of the final certificate of completion.

Three years prior to the issue of the construction guarantee, Landmark and others had signed a Reciprocal Indemnity and Suretyship in favour of Lombard in which they indemnified Lombard against all claims incurred as a result of executing any guarantees. They undertook to pay on demand any amount Lombard may have been called upon to pay under the guarantee.

Lombard paid the amount demanded by the Academy. It then demanded payment of the same amount from Landmark and the others. Landmark refused to pay on the grounds that the Agent Principal which had issued the certificate of practical completion had perpetrated a fraud on it when issuing that certificate.

THE DECISION

The rights and obligations of Lombard and the Academy were to be found in the construction guarantee. That agreement was similar to the letters of credit issued by banks for use in international trade: its rights and obligations existed independently of the underlying contract in relation to which it was issued. So in the case of Lombard, its obligation to pay depended only on the satisfaction of the conditions for payment as provided for in the construction guarantee. With the liquidation of Landmark, these conditions had been fulfilled. Lombard did not participate in the alleged fraud. It had therefore been obliged to pay Academy in terms of the construction guarantee.

Lombard's payment to Academy had the effect of bringing about fulfilment of the condition for the payment obligation provided for in the suretyship signed by Landmark and the others. They therefore became liable to make payment in terms thereof.

ABSA BROKERS (PTY) LTD v RMB FINANCIAL SERVICES

JUDGMENT BY MHLANTLA JA AND NUGENT JA (MLAMBO JA, LEACH JA AND BOSIELO AJA concurring)
SUPREME COURT OF APPEAL
20 AUGUST 2009

2009 SACLR 456 (A)

Banking

A joint wrongdoer should be joined in an action in which its joint and several liability to the plaintiff may be relevant, even if the plaintiff has made no allegations as to the joint wrongdoer's liability.

THE FACTS

The Claasen Family Trust brought an action against Absa Brokers (Pty) Ltd claiming damages arising from the investment of some R1m in an investment product known as the RMB Guaranteed Cashflow Investment. Absa settled the action by paying the Trust R585 686.56.

Absa then brought an action against RMB Financial Services and the other respondents claiming that they were joint wrongdoers and liable to pay a contribution in respect of the damages paid to the Trust.

RMB excepted to the claim on the grounds that section 4 of the Apportionment of Damages Act (no 34 of 1956) applied and no notice of the Trust's action had been given to it in terms of section 2. Section 2 provides that where it is alleged that two or more persons are jointly or severally liable in delict to a third person for the same damage, such persons may be sued in the same action. Section 4 provides that if a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him, the plaintiff shall not thereafter sue him except with the leave of the court.

Absa contended that notice of the Trust's action need not have been given to RMB because in that action, it had not been alleged that RMB and the other respondents were jointly and severally liable in delict to Absa for the same damage, as provided for in section 2.

THE DECISION

It was true that no allegation was made in the Trust's action that others were jointly or severally liable in delict to the Trust in respect of the loss it had suffered. However, the allegation referred to in section 2 need not be an allegation actually made at some time. The provision allows for the bringing of an action against a joint wrongdoer on the basis that that party either is in fact a joint wrongdoer, or is alleged to have been one. It is a procedural provision and does not impose conditions for the bringing of actions against joint wrongdoers.

The purpose of the Act as a whole is to avoid the bringing of a multiplicity of actions. Where joint wrongdoers, alleged or actual, are relevant to a matter, they are to be sued in the same action. In the event that this has not taken place, they are to be notified of the action in order to be given an opportunity of joining in it.

Absa was given leave to amend its particulars of claim in order to comply with the Act.

SPEARHEAD PROPERTY HOLDINGS LTD v E&D MOTORS (PTY) LTD

A JUDGMENT BY HURT AJA (MPATI P, MTHIYANE JA and LEWIS JA concurring, MAYA JA dissenting)
SUPREME COURT OF APPEAL
1 JUNE 2009

2010 (2) SA 1 (A)

Property

A tenant's collateral rights under a lease agreement such as an option to purchase the leased property do not by the operation of the huur gaat voor koop rule, apply to a purchaser of the property.

THE FACTS

Quantum Leap Investments 230 (Pty) Ltd leased its property to E&D Motors (Pty) Ltd. The lease contained an option entitling E&D to purchase the portion of the property which it occupied, upon subdivision, within two years at a price of R2m.

Quantum Leap sold the property to Spearhead Property Holdings Ltd. The sale agreement referred to the existence of the option. E&D then exercised its rights under the option. Its attorney notified Spearhead by letter that it did so, and tendered to pay the purchase price of R2m.

Spearhead contended that it was not obliged to honour the option, and refused the offer. E&D brought an action for specific performance of the agreement.

THE DECISION

The rule *huur gaat voor koop* is a rule designed to protect a tenant occupying a property which has been sold, and preserves the tenant's right of occupation in terms of its lease following a sale. However, the rule does not extend to all of the tenant's rights in terms of the lease. The equitable object of the rule is not served by extending it to a tenant's rights established by an option contained in the lease.

The rights conferred by an option are purely personal to the grantee. Assuming that the option is granted in respect of the leased property, then it would be possible for the landlord to circumvent the agreement by selling to a purchaser. The common law would not permit this, because in terms of the common law, if the purchaser had notice of the existence of the option prior to purchasing, he must be taken to have bought the property subject to the tenant's personal right against the landlord to exercise it. If the purchaser did not have notice of the option, there is no rule in the common law which would bind him to an obligation of which he was unaware. The only basis upon which a purchaser might be so bound would be on the basis of a development of the *huur gaat voor koop* rule. However, no such development had taken place.

The obligations arising from an option to purchase the leased property, granted by the lessor, are not, by the operation of the rule huur gaat voor koop , transferred by operation of law to the purchaser of the property. Therefore a lessee, seeking to exercise such an option must do so as against the grantor and not against the purchaser, but may do so against the purchaser if there has been a transfer of the property to the purchaser with notice of the option.

In the present case, whereas the doctrine of notice would operate in favour of E&D in respect of the portion of the property it occupied, its claim to transfer of the property was dependent on proof of an extant agreement of sale complying with the Alienation of Land Act. This would involve proof that the sale to Spearhead included an assignment of Quantum Leap's obligations under the option. However, the reference to the option in the sale agreement was insufficient to prove this.

The action was dismissed.

PAPPALARDO v HAU

A JUDGMENT BY HURT JA
(STREICHER JA, HEHER JA,
LEACH AJA and GRIESEL AJA
concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2009

2009 SACLR 482 (A)

An owner of higher-lying property is entitled to drain rain water onto lower-lying adjoining property but no more than would have been possible prior to development of the properties.

THE FACTS

Pappalardo and Hau owned adjoining properties in Sandton in a development known as Waterford Estate. Pappalardo's property was approximately one metre lower than Hau's. Pappalardo built a house on his property, and in the process, constructed a boundary wall between the two properties. Some time later, Hau built a house on his property. In 2003, Hau noticed that rainwater was collecting at the base of the boundary wall. He took the view that the best method of draining the water was to install a series of drainage pipes at the base of the wall to allow the water to flow away and onto Pappalardo's property. Pappalardo refused consent to the installation of the drainage pipes. Hau brought an action for a declaratory order that Hau was entitled to construct a series of drain pipes in the boundary wall to allow the flow of rainwater onto Pappalardo's property.

THE DECISION

The basic principle is that expressed in the actio aquae pluviae arcendae: the lower lying owner must accept excess natural water on the higher-lying owner's property. This basic principle applies to property in its original and undeveloped state. When development takes place, the pattern of flow of the water changes and this means that the owner of the higher-lying property cannot simply depend on this principle, and oblige the owner of the lower-lying property to accept the flow of water in a concentrated pattern onto his property, but must also show that the water would have flowed onto the lower-lying property in the same amount, even if no development had taken place. There is furthermore, a rule of the common law that if the owner of the higher-lying property can discharge the water onto a street, then he must do so, unless the situation has made it impossible to do so. In the present case, Hau had given no evidence of the amount of water which would have constituted the natural flow of water prior to the development of the properties. It was therefore impossible to determine that the construction of the boundary wall had prevented the flow of water which Papparlardo would have been obliged to accept. The action failed.

ROCKBREAKERS AND PARTS (PTY) LTD v ROLAG PROPERTY TRADING (PTY) LTD

A JUDGMENT BY TSHIQI AJA (HEHER JA, PONNAN JA, HURT AJA and WALLIS AJA concurring)
SUPREME COURT OF APPEAL
18 SEPTEMBER 2009

2010 (2) SA 400 (A)

An addendum to a sale of fixed property must be counter-signed by the offeree in order to bring about binding obligations between the parties.

THE FACTS

Rockbreakers and Parts (Pty) Ltd sold its fixed property to Rolag Property Trading (Pty) Ltd. The agreement of sale included an addendum in manuscript added by Rockbreakers. It provided that the offer was accepted subject to the seller obtaining registration of the subdivision of the property. The addendum was not initialled and was not counter-signed by Rolag.

In the course of preparing for registration of transfer, the local authority approved the subdivision of the property, and imposed a condition that no development was to take place on the property prior to promulgation of a township. Rockbreakers considered this to be an unexpected onerous condition and took the view that the offer was not unconditionally accepted with the result that no valid sale agreement had been concluded.

Rolag claimed specific performance of the agreement. Rockbreakers defended the claim on the grounds that the addendum constituted a counter-offer which was not accepted by Rolag by its signature in accordance with section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE DECISION

If the manuscript insertion embodied a material alteration to the contractual terms and thus constituted a counter-offer that was never accepted in writing, then the contract would be unenforceable.

The contract as initially signed by the respondent made no mention of subdivision. In the absence of the subdivision the property as described in the agreement of sale would not be separated from the rest of the property and consequently could not be transferred to the respondent. This would affect Rockbreakers' material obligations, which would still be obliged to perform its obligations under the agreement. The insertion of the clause in manuscript therefore served to protect Rockbreakers from an action for damages in the event that the subdivision did not take place. There was therefore no doubt that the manuscript insertion was material and amounted to a counter-offer.

The counter-offer required acceptance in order for it to be binding on the parties. It was not accepted by Rolag and therefore no binding agreement was concluded. The claim was dismissed.

SWANEPOEL v NAMENG

A JUDGMENT BY MTHIYANE JA (NUGENT JA, PONNAN JA, SNYDERS JA and GRIESEL AJA concurring)
SUPREME COURT OF APPEAL
18 SEPTEMBER 2009

2010 (3) SA 124 (A)

A sale of fixed property which incorrectly describes the property sold does not fail to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981) merely for that reason as the sale agreement may be rectified to reflect the common intention of the parties.

THE FACTS

Swanepoel sold certain fixed property to Nameng for R470 000, subject to the suspensive condition that Nameng obtain a loan. Nameng obtained a loan. It was then discovered that the property was incorrectly described. The parties amended the agreement to record the property correctly. Nameng applied for a new loan for the purchase of the correctly described property.

Despite having obtained all signatures necessary for transfer of the property, there was a delay in transfer. Swanepoel asserted his right to cancel the agreement due to the delay. Nameng contended that Swanepoel was not entitled to cancel the agreement, and brought an application for specific performance of the agreement.

Swanepoel opposed 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 had incorrectly described the property sold, alternatively on the grounds that the suspensive condition had not been fufilled within the time allowed for its fulfillment in the agreement.

THE DECISION

Section 2(1) requires that the sale of land must be contained in a deed of alienation signed by the parties thereto. In the present case, the only question was whether the sale agreement properly complied with this section in its description of the property sold. All the essential elements for the conclusion of a valid agreement for the sale of land were present. The agreement was in writing and signed by the parties thereto as required by the subsection, and it identified property, albeit in error. Standing alone, the agreement sufficiently described the subject-matter sold to enable identification of it. There was certainty on all the formal elements required by the subsection. On the face of it therefore, the agreement of the parties complied with the subsection.

The section creates no bar to rectification of an incorrect agreement. The parties had rectified their agreement. Once rectified, it properly reflected their intention and constituted a valid and binding agreement.

As far as the alleged non-fulfilment of the suspensive condition was concerned, when Nameng's application for a loan was approved and the bank furnished its guarantee in relation to the incorrectly described property, the suspensive condition was fulfilled. This was the necessary step to render the agreement complete, and once that had occurred the agreement was valid and enforceable. The only remaining obstacle to the enforcement of the agreement was the incorrect description of the property. But the parties dealt with that by amending the agreement. The suspensive condition was not revived by the granting of a home loan in respect of the correctly described property.

The application was granted.

GIBBS v VANTYI

A JUDGMENT BY JANSEN J
EASTERN CAPE HIGH COURT
28 MAY 2009

2010 (2) SA 606 (ECP)

If the terms of a sale of fixed property by auction provide for offers to be made after the completion of the auction, the separate process of bargaining thereby provided for must result in a written agreement of sale if the sale is to be valid in terms of section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE FACTS

Vantyi put up erf 9182, Motherwell, for sale on auction. The property was knocked down to Gibbs for R1.6m. Gibbs paid R225 920 as required by the terms of sale. This amount was made up of the auctioneer's commission and a deposit of R80 000. The terms of sale provided that the purchase was subject to approval by Vantyi by noon on 19 September 2005.

Prior to this time, higher offers for the property were made, and referred to Gibbs, as required by the terms of sale. Gibbs made an offer orally to increase the price to R3.95m. Vantyi's representatives accepted this offer.

Vantyi cancelled the sale. Gibbs contended that the sale was invalid in that, as it was not concluded in writing but orally, it failed to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981). Vantyi contended that the sale was valid as section 3(1) of that Act applied and the oral offer made by Gibbs formed part of the public auction at which the property was originally knocked down. Section 3(1) of the Act provides that the provisions of section 2(1) requiring the sale of land to be in writing do not apply to the sale of land by public auction.

THE DECISION

The terms of sale provided for a separate process of bargaining subsequent to the conclusion of the auction. No restriction was placed on the bidders entitled to make an offer for a higher purchase price: any bidder who made a higher offer might not have been present at the original public auction at all. It was not known whether or not the improved offer made to Vantyi after the auction was made by a person who was present at the auction. It was also not known whether or not the party making the improved offer was aware of the terms of sale. It was therefore not true that all parties concerned agreed that the auction sale could be extended beyond the day on which the auction was held.

Since the process of bargaining subsequent to the conclusion of the auction was entirely different to and separate from the auction, it could not be considered as part of the earlier process. It followed that any sale of the land concluded pursuant to that process had to comply with the formalities for the sale of immovable property, as provided for in section 2(1) of the Act. Section 3(1) did not apply.

No valid agreement was concluded between the parties. Vantyi was accordingly not entitled to receive the moneys which he did, and was liable to reimburse this to Gibbs.

YST PROPERTIES CC v ETHEKWINI MUNICIPALITY

A JUDGMENT BY SISHI J
DURBAN AND COAST LOCAL DIVISION
19 MARCH 2008

2010 (2) SA 98 (D)

Payment made under protest is not a conditional payment but a payment which discharges a debt.

THE FACTS

Ninsix Shareblock (Pty) Ltd owned the remaining extent of Portion 13 of Erf 793, Dunns Grant, a property situated at 1295/1301 South Coast Road, Mobeni, Durban. Ninsix was placed in liquidation. The liquidators concluded a deed of abandonment with Fedbond Nominees (Pty) Ltd which entitled Fedbond to take transfer of the property, and which obliged Fedbond to pay whatever was owing to Ethekwini Municipality and to obtain the necessary rates clearance certificate

Fedbond sold the property to YST Properties CC. The sale agreement provided that YST was liable for all transfer costs, arrear rates and taxes on the property. The municipality assessed the rates liability in the sum of approximately R400m. YST disputed its liability in this amount but paid it to the municipality through the conveyancers attending to transfer of the property. The covering letter accompanying the cheque in payment was marked 'paid under protest'.

The municipality refused to issue a rates clearance certificate on the grounds that the outstanding rates had not been fully paid because payment was made 'under protest' by a company that was not liable for them.

THE DECISION

A payment made under protest is not a conditional payment but constitutes full payment of the debt owed. In order to recover an amount paid under protest, a person who has paid under protest would have to establish in other proceedings that the amount paid was not in fact owing and should be repaid. Until a court gives judgment in favour of the person paying, the party paid is in the same position as any other person who receives money in discharge of a debt. This was the position of the municipality in the present case.

YST made payment because there was a possibility of cancellation of the sale agreement, but it did not abandon its right to reclaim over-payment. The municipality had always been aware that the amount paid to it in respect of the property has been in dispute and that the dispute remained unresolved. It therefore could not force YST to abandon its right to claim money overpaid by refusing to issue a rates clearance certificate.

The municipality was therefore obliged to issue a rates clearance certificate to YST.

VOSAL INVESTMENTS (PTY) LTD v CITY OF JOHANNESBURG

A JUDGMENT BY MAKHANYA AJ, JAJBHAY J and BEASLEY AJ
SOUTH GAUTENG HIGH COURT
17 JUNE 2009

2010 (1) SA 595 (GSJ)

A municipality's claim for rates and services rendered in respect of a property must specify these claims separately and should not state them as a single claim.

THE FACTS

The City of Johannesburg brought an action against Vosal Investments (Pty) Ltd to recover unpaid rates of R348 000 which it alleged was owing on a property owned by Vosal. It obtained default judgment against Vosal for payment of this sum, and then proceeded to sell the property in execution.

Vosal did not receive notice of the action and sale in execution, but when it came to its notice that the sale had taken place, it brought an application to rescind the judgment taken against it. It based its application on the contention that the City's claim for R348 000 was not solely in respect of unpaid rates, but included claims for services rendered in the form of electricity, water, refuse removal and sewerage services.

After 1998, accounts rendered in the years preceding the institution of action by the City specified amounts owing in respect of rates as well as these services. As at date of summons, rates charges amounted to R1 772 per month.

Vosal contended that it had a bona fide defence to the claim because the amount of R348 000 included amounts owing in respect of services rendered to the property. The summons however, had alleged that the claim was solely in respect of rates. Judgment given on the strength of the summons was therefore incorrectly given.

THE DECISION

All of the claims brought by the City were charges on the property. This however, did not mean that these claims were effectively merged into one when summons was issued. They remained separate and independent causes of action. As such, they needed to be separately quantified and claimed under various heads applicable to them.

It was clear from the figures involved, that the sum of R348 000 could not have related solely to unpaid rates which would have amounted to a much lesser sum. The sum of R348 000 therefore included claims for the various services rendered to the property, but the summons did not state that these claims were for anything other than unpaid rates.

It followed that the judgment given was given erroneously and Vosal had a bona fide defence to the claim. Rescission of judgment was granted.

KIEPERSOL POULTRY FARM (PTY) LTD v PHASIYA

A JUDGMENT BY MPATI P (VAN HEERDEN JA, JAFTA JA, MAYA JA and SNYDERS JA concurring)
SUPREME COURT OF APPEAL
25 SEPTEMBER 2009

2010 (3) SA 152 (A)

An occupier of premises protected by the Extension of Security of Tenure Act (no 62 of 1997) may be evicted only if it is shown that the grounds for eviction are just and equitable.

THE FACTS

In terms of his employment contract with Kiepersol Poultry Farm (Pty) Ltd, Phasiya's father had the right of occupation of a house situated on the farm leased to the company for its business operations. Phasiya and his wife and children also resided at the house.

In 2004, Phasiya's father's employment with the company came to an end as he retired on pension. Kiepersol's representative gave Phasiya notice to vacate the house. He had not done so by the extended notice date of April 2005. Kiepersol then issued notice of intention to obtain an order of eviction in terms of section 9(2)(d) of the Extension of Security of Tenure Act (no 62 of 1997).

Phayisa opposed the application then brought for his eviction on the grounds that he held his right of occupation under his father, and not in his own right, and his father had never lost the right of occupation.

THE DECISION

Phasiya's father was no longer an occupier of the house, but Phasiya was. The question therefore was whether his right of residence had been terminated in accordance with section 8(1) of the Act on any lawful ground provided that the eviction is just and equitable. This required a determination of all relevant factors referred to in that section, in particular to the fairness of any agreement on which the company relied, the conduct of the parties giving rise to the termination, the interests of the parties, the existence of a reasonable expectation of the renewal of the agreement from which the right of residence arose and the fairness of the procedure followed by the company.

A person who has to vacate land as a result of the right of residence having been terminated almost always experiences hardship. But the hardship must be balanced against the hardship suffered by the owner or person in charge of the land. Phasiya occupied the house without paying any rental while the company was unable to house one of its employees in terms of its policy. This was a clear case where the interests of the owner should take precedence.

The application was granted.

THEART v MINNAAR N.O.
SENEKAL v WINSKOR 174 (PTY) LTD

A JUDGMENT BY BOSIELO JA (MPATI P, BRAND JA, SNYDERS JA and MALAN JA concurring)
SUPREME COURT OF APPEAL
3 DECEMBER 2009

2009 SACLR 497 (A)

Notice of intention to evict in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) may be effectively given in magistrates' court proceedings for eviction by including such notice in the notice of motion or by simultaneously issuing such a notice with the notice of motion.

THE FACTS

Theart occupied premises owned by Minnaar until the right of occupation was lost through default by Theart. Minnaar gave Theart notice to vacate. Minnaar issued a notice in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) and on the same day, issued a notice of motion out of the magistrates' court for an order that Theart be evicted from the premises.

Theart opposed the application, but after hearing argument, the magistrate issued an order that Theart be evicted.

Senekal occupied premises owned by Winskor 174 (Pty) Ltd. Winskor claimed it was entitled to evict her from the premises and issued a notice of motion out of the magistrate's court for an order that she be evicted. No separate notice in terms of section 4(2) of the Act was issued but notice in terms of section 4(2) was contained in the notice of motion.

Senekal opposed the application, but after hearing argument, the magistrate issued an order that she be evicted.

Theart and Senekal appealed the orders of eviction on the grounds that proper notice in terms of the Act had not been given. Theart contended that notice in terms of the Act should not have been served on him simultaneously with the notice of motion. Senekal contended that the notice in terms of the Act should have been served on her separately from the notice of motion.

THE DECISION

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

In *Cape Killarney Property Investments (Pty) Ltd v Mahamba*(4) SA 1222 (A) it was decided that a notice in terms of section 4(2) was to be given in addition to notice of the application to evict. However, this judgment applied to proceedings brought in the High Court. In the magistrates' court, an application proceeds with the respondent being informed from the start of the relief sought against the respondent, and the date and time when the order for this will be sought in court. There is no procedure for the set-down of the hearing of the matter subsequent to the issue of the notice of motion. Furthermore, section 4(2) does not expressly require that additional notice of the eviction proceedings should be given. The essential requirement of the section is that notice should be given at least 14 days before the hearing of proceedings, and this does not necessarily mean that separate or additional notice must be given.

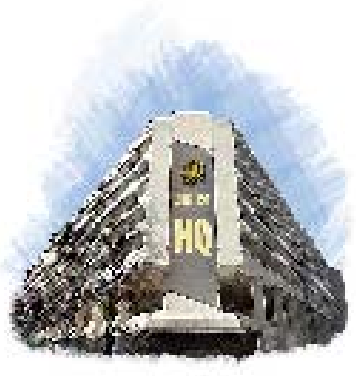
In the present cases, the respondents received notice of the eviction proceedings at least 14 days before the applications were heard. There was therefore effective compliance with section 4(2) of the Act.

MANITOBA INVESTMENT HOLDINGS LTD v LIPCHIN

A JUDGMENT BY PRINSLOO J
NORTH GAUTENG HIGH COURT
8 OCTOBER 2009

2010 (2) SA 612 (GNP)

Corporations



An external company may conclude a valid agreement for the acquisition of fixed property even though it is not yet registered as an external company in South Africa.

THE FACTS

Manitoba Investment Holdings Ltd was incorporated in the British Virgin Islands. In 2000, it was registered as an external company in South Africa. In 2005, unbeknown to Manitoba, the company was deregistred as an external company in South Africa.

In 2008, Manitoba purchased from Lipchin fixed property in South Africa for R5.4m. It paid a deposit of R400 000. Its attorney then discovered that Manitoba had been deregistered as an external company in South Africa. It took the view that as a result, the sale agreement was void. Lipchin took the view that the sale agreement was not void and called for execution of the sale. Later, Lipchin notified Manitoba he was cancelling the sale in view of breach of certain unremedied breaches of contract by Manitoba.

Manitoba brought an application for an order that the sale agreement be declared null and void and that Lipchin repay the deposit of R400 000.

THE DECISION

Section 324(2) of the Companies Act (no 61 of 1973) provides that no external company shall be capable of acquiring the ownership of immovable property in South Africa unless its memorandum has been or is deemed to be registered under section 322 of the Act. With regard to external companies, the scheme of the Act is that such a company first establishes a place of business, which it may do by acquiring fixed property, and then becomes registered as such in order to acquire ownership of that property. The conclusion to be drawn from this is that Manitoba had been entitled to acquire Lipchin's fixed property and was not prohibited by section 324(2) from doing so. It could then apply the process of registration as an external company in order to acquire ownership of the property.

The correct interpretation of the word 'acquisition' in this context was a right to obtain ownership, as opposed to the obtaining of ownership itself.

In any event, the deregistration of Manitoba did not have the effect that it lost its legal capacity to act. The company remained a duly registered foreign company with separate legal persona.

The application was dismissed.

EX-TRTC UNITED WORKERS FRONT v PREMIER, EASTERN CAPE PROVINCE

A JUDGMENT BY VAN ZYL J
EASTERN CAPE HIGH COURT,
BISHO
4 JUNE 2009

2010 (2) SA 114 (ECB)

An unincorporated association does not have the right to sue for rights held by its members if its members do not obtain their rights by virtue of their membership of the association.

THE FACTS

The Ex-TRTC United Workers Front (the TRTC) was a voluntary association formed by 572 people to represent their interests in relation to their employment by and the closure of the Transkei Road Transport Corporation. It did not have a written constitution.

The TRTC and the 572 people brought an action for damages for breach of contract. It alleged that the contract was entered into between the Premier, Eastern Cape Province and the Transport and General Workers Union which represented the persons who were employed by the said corporation prior to its dissolution.

The Premier raised an objection to the locus standi of the TRTC. It contended that the TRTC was not able to sue in its own name. The TRTC contended that it had locus standi to sue and that it was able to do so under Rule 14(2) of the Rules of Court. That Rule states that a partnership, firm and an association, which is defined as any unincorporated body of persons, not being a partnership, may sue or be sued in its own name.

THE DECISION

The mere fact that the TRTC had no written constitution did not mean that it had no locus standi.

There were two possibilities: either the TRTC was a universitas or it was an unincorporated association. A universitas is a separate legal entity that has perpetual succession with rights and duties independent from the rights and duties of its members, and it may sue in its own name. Whether or not the TRTC is a universitas had to be decided by having regard to its nature, object and activities. The object of the first plaintiff was to represent its members with regard to their rights and interests arising from their previous employment with the Transkei Road Transport Corporation and to jointly institute legal proceedings to achieve that objective. The rights and interests referred to are those that arose from the contract alleged by the TRTC. It was therefore clear that the TRTC was formed for a very limited purpose and that, once that purpose was achieved, there would be no further need for it and it would cease to exist. Its very object negated an intention that it would be a separate legal entity having perpetual succession with rights and duties separate from its members. This was not necessary for the achievement of its purpose. The TRTC consequently lacked the requisites for a universitas.

As far as the second possibility was concerned, in order to comply with this, it was necessary for the TRTC to show that it was an association of people who had an interest as a body or organisation. However, this was not the case. The TRTC did not propose to enforce the rights of its members which they possess by reason of their membership of the association. The right to claim damages from the Premier for the alleged breach of contract was a personal right vesting in each one of the members of the association individually. The right which they pursued in the action therefore existed independently of their membership of the TRTC, and arose from the fact that they were the beneficiaries of a contract between the Premier and the trade union. It did not arise by virtue of their membership of the TRTC. It was also not a right which they could only pursue as members of the TRTC because if

any one of them had decided to act alone in enforcing his claim against the defendant, any order that may have been granted would not have affected the rights of any of the other members.

The TRTC did not have locus standi to sue.

ESPAG v HATTINGH

A JUDGMENT BY LEACH AJA
(STREICHER JA and WALLIS AJA concurring)
SUPREME COURT OF APPEAL
27 SEPTEMBER 2009

2010 (3) SA 22 (A)

A partner who acts contrary to the obligations of a partner as provided for in a partnership agreement in a manner that amounts to gross misconduct is obliged to withdraw from the partnership in terms of a partnership provision requiring dissolution of the partnership in the event of such misconduct arising.

THE FACTS

Espag, the second appellant and Hattingh formed a partnership for the purpose of conducting the practice of a law firm. They concluded a partnership agreement. Clause 13.4 of the agreement provided that if a partner made himself guilty of gross misconduct, or did something constituting grounds for dissolution of the partnership by order of court, then the partnership could be dissolved by written notice given by three quarters of the remaining members within a stipulated time period.

It came to Espag's notice that Hattingh had performed professional services for a client for ten years without charging fees. It also came to his notice that Hattingh had acted in property transactions involving the acquisition of property from the State and the re-sale thereof to the State at a large profit, and had made payments to his client in respect thereof. In respect of one of the transactions, he held an interest in one of the parties concerned through his shareholding in a family trust. Hattingh had also obtained executor's fees in deceased estates he was winding up without first obtaining the permission of the Master of the High Court, and had issued a certificate in terms of section 42(1) of the Administration of Estates Act (no 66 of 1965) in which he affirmed that the proposed transfer of the a farm was in accordance with the final liquidation and distribution account of the estate which had lain open for inspection without objection, a statement which he knew to be false.

Espag and the other partners took the view that Hattingh's conduct amounted to gross misconduct as envisaged in clause 13.4 and requested him to withdraw from the partnership. Hattingh alleged that the request amounted to a repudiation of the partnership agreement entitling him to cancel, which he did.

Hattingh contended that the effect of his cancellation of the agreement was that the partnership should be liquidated and its assets divided in accordance with the common law. Espag contended that the agreement had not been cancelled but dissolved in terms of clause 13.4 and accordingly, the assets should be divided in accordance with the provisions of the agreement.

THE DECISION

Espag was not obliged to invite Hattingh to answer the allegations made against him before invoking the provisions of clause 13.4. It was true that partners were to act toward each other in good faith, but this did not mean that Espag had to defer enforcement of the provisions of the clause until such time as he had discussed the matter with Hattingh. The essential question was whether or not enforcement had been permissible in the circumstances.

By doing work for clients without charging fees over an inordinately long period, Hattingh put himself in a position of conflict of interest. It was in the partnership's interest for fees to be both charged and collected. Hattingh failed to act in that interest by not charging fees. Furthermore, by reason of his interest in his family trust's shareholding, it was in his personal interest to postpone the payment of fees for as long as possible. The amount concerned could not be regarded as trifling. Hattingh thus clearly acted in conflict with the best interests of the partnership.

The cumulative effect of his actions amounted to gross misconduct entitling Espag to invoke the provisions of clause 13.4 and terminate the partnership. The partnership assets were therefore to be divided in accordance with the provisions of the partnership agreement.

LOGISTA INC v VAN DER MERWE

A JUDGMENT BY MOOSA J
WESTERN CAPE HIGH COURT
23 APRIL 2009

2010 (3) SA 105 (WCC)

Contract

All parts of a restraint of trade clause must be interpreted as a whole and with a view to giving effect to the intention of the parties.

THE FACTS

Van der Merwe was the founding and principal member of Logista Inc, a firm of accountants. In November 2007, he sold his shares in Logista to three parties, the other applicants.

The sale agreement contained a restraint of trade clause. The first part of the clause provided that Van der Merwe would do everything in his power to ensure that existing clients of the company would remain with the company and he would not do business in competition with the company. The clause then provided that Van der Merwe would remain a registered chartered accountant but until December 2009, would not perform any other function. The clause specified clients who might use Van der Merwe's services in preference to those offered by Logista. Van der Merwe was disallowed from actively marketing his services before December 2009 or from carrying on business in competition with Logista. Upon breach of this restriction, Van der Merwe would lose the right to use Logista's training area and offices free of charge.

Logista alleged that Van der Merwe was in breach of the restraint of trade clause, and brought an application to interdict him from performing auditing work in contravention of it.

THE DECISION

In the first instance, it was necessary to interpret the restraint clause. Van der Merwe contended that its first part was merely preamble and did not provide for substantive obligations which would be applicable to him. However, it was clear from the language and the intention of the parties as embodied in the language of the clause that the first part constituted an integral part of the restraint of trade clause. The clause had to be read as a whole to give effect to its true intent. Reading it thus, the first part could be seen as equally embodying the rights and obligations of the parties.

If one then examined the nature and scope of the entire clause, it was clear that the restraint of trade embodied in it was clear and unambiguous. It restrained Van der Merwe from doing business in competition with Logista and he was required to do everything in his power to ensure that Logista's clients remained with it. Van der Merwe was permitted to remain registered as a chartered accountant, but he was not permitted to perform any auditing functions up to December 2009. For the duration of the trade restraint period, he could consult and give advice, provided it was at the instance of the consulting parties. He could also provide accountancy services to those parties specified in the clause and he could render accountancy services to those third parties as well as existing clients if the conditions specified were met.

An order interdicting Van der Merwe from doing business in competition with Logista was granted.

JACOBS v IMPERIAL GROUP (PTY) LTD

A JUDGMENT BY MLAMBO JA (MTHIYANE JA, LEWIS JA, HEHER JA and MHLANTLA JA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2009

2009 SACLR 508 (A)

A party displaying a disclaimer notice may rely on the disclaimer if in so displaying the notice, it acts sufficiently reasonably in bringing to the attention of its customers the existence of the notice.

THE FACTS

Jacobs took his motor vehicle for repairs to a service centre of the Imperial Group (Pty) Ltd, the Potchefstroom Cargo Service Centre. When he handed the vehicle over to the Service Centre, a notice was displayed prominently at three different locations stating that vehicles were left at the owner's risk. Jacobs did not pay any attention to the notices.

When the vehicle was at the premises, it was stolen. Jacobs brought an action for damages. He contended that the disclaimer stated in the notice did not apply to the service agreement concluded between the parties when he brought his vehicle in for repair.

THE DECISION

The approach to the question whether Imperial could rely on the disclaimer stated in the notices was that established in *Durban's Water Wonderland (Pty) Ltd v Botha*1999 (1) SA 982 (A): if Imperial acted sufficiently reasonably in bringing to the attention of its customers in general, and to Jacobs in particular, the existence of the owner's risk notice, then it would be entitled to rely on them.

The owner's risk notice was prominently displayed, in clear and unambiguous terms, on notice boards at the service centre. It was displayed in such a manner and at such locations on the premises to inform any customer leaving a motor vehicle there that its terms applied. This was more than sufficiently reasonable. The fact that Jacobs said he did not see it did not assist him. Imperial was entitled to assume, having displayed the notice in this manner, that any of its customers would notice it.

The action failed.

This brings me to the question whether the owner's risk notice in this case could be successfully relied upon by the respondent to escape liability for the loss of the motor vehicle given that it was found that Jacobs did not see it. The approach to this question is to enquire whether the respondent acted sufficiently reasonably in bringing to the attention of its customers in general, and to Jacobs in particular, the existence of the owner's risk notice: Durban's Water Wonderland (Pty) Ltd v Botha 1999 (1) SA 982 (SCA) at 991H-I
'The answer depends upon whether in all the circumstances the appellant did what was "reasonably sufficient" to give patrons notice of the terms of the disclaimer.' See also King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N) at 643H.
The evidence is that the owner's risk notice was prominently displayed, in clear and unambiguous terms, on notice boards at the respondent's passenger vehicle office, at the entrance to the reception and at the cashier's window.

NICOR IT CONSULTING (PTY) LTD v NORTH WEST HOUSING CORPORATION

A JUDGMENT BY LEVER AJ
NORTH WEST HIGH COURT
21 MAY 2009

2010 (3) SA 90 (NWM)

Whether or not an entity is to be considered an organ of state is determined by reference to the Constitution and the legislation under which that entity was constituted. A debt may be confined to a claim for damages and not a claim for specific performance under a contract.

THE FACTS

Nicor IT Consulting (Pty) Ltd brought an action against North West Housing Corporation, claiming R2m which it alleged was the balance due under certain agreements concluded between the parties.

North West raised the special plea that Nicor had failed to give notice that it intended to bring the action against it, as required by section 3(1) of the Institution of Legal Proceedings against certain Organs of State Act (no 40 of 2002). The section provides that no legal proceedings for the recovery of a debt may be instituted against an organ of State unless, within six months of the debt having become due, the creditor has given the organ of State in question notice in writing of its intention to institute the legal proceedings in question or the organ of State in question has consented in writing to the institution of the legal proceedings without such notice.

Nicor excepted to the plea on the grounds that North West was not an organ of State and Nicor's claim against it was not for a debt due but for specific performance under the agreements.

THE DECISION

The Act contained a definition of 'organ of state' which was more restrictive than that contained in the Constitution in that it did not include any functionary or institution performing a public power or performing a public function in terms of any legislation. Therefore, in order to determine if North West was an organ of state one had to determine whether it was an institution performing a public power or performing a public function in terms of the Constitution.

Applying the provisions of the Constitution, the identity of the institution and the power it exercised had to be seen as arising directly from the Constitution itself. North West however, did not derive its powers from the Constitution but from its enabling Act, the North West Housing Corporation Act. It was therefore not an organ of state as defined in the Institution of Legal Proceedings against certain Organs of State Act.

As far as the exception based on the nature of the claim was concerned, one had to look to the definition of 'debt' contained in the Act. This provides that a debt is any debt (a) arising from any cause of action which arises from delictual, contractual or any other liability, and (b) for which an organ of State is liable for payment of damages.

It is clear that para (b) qualifies para (a) as a whole. This is the ordinary and natural meaning of the words as they are set out in the definition of debt in the Act. This meaning does not offend against the purpose of the Act. It makes fewer inroads into the rights of access to courts and equality enshrined in the Bill of Rights in the Constitution. As such, it was a meaning to be preferred, and consequently a 'debt' for the purposes of the Act is confined to a claim for damages, howsoever such claim arose.

The exception was upheld.

ROBCON CIVILS/SINAWAMANDLA 2 JOINT VENTURE v KOUGA MUNICIPALITY

Contract

A JUDGMENT BY EKSTEEN J
EASTERN CAPE HIGH COURT
4 MARCH 2010

2010 (3) SA 241 (ECP)

A public body which fails to disclose relevant details of a tender process to a tenderer in disregard of its constitutional obligations may have a costs order awarded against it.

THE FACTS

Robcon Civils acting in joint venture with Sinawamandla 2 submitted a tender for for the construction of an access road in Oceanview, Jeffreys Bay. Aurecon South Africa (Pty) Ltd was appointed by Kouga Municipality to act as its consultants in the management and execution of the tender.

Aurecon informed Robcon that Kouga had awarded the tender to African Bulk Earthworks. Robcon then addressed Kouga with the request that it furnish particulars of the facts and circumstances upon which the award was made. Aurecon requested agreement to the extension of the tender period to 6 July 2009, and Robcon accepted this. Aurecon responded that the extended period would allow time for the matter to be resolved.

Kouga then responded to Robcon's request for information by advising Robcon to follow the procedures prescribed in the Promotion of Access to Information Act Act (no 2 of 2000).

It was then advertised that Kouga had awarded the tender to African Bulk Earthworks. Robcon sought the same information it had sought when first advised that African Bulk Earthworks had been awarded the tender, but Kouga failed to respond to this. Robcon applied for an order compelling Kouga to supply the information it had requested.

It later transpired that the original award of the tender to African Bulk Earthworks had never been retracted, and a contract between it and Kouga was concluded based on that award. Robcon then decided that the application it had brought had been rendered largely nugatory by the award of the tender, and sought an order for costs against Kouga.

THE DECISION

At all relevant times up to the launching of the application Kouga knew of Robcon's intention to appeal the decision to award the contract to African Bulk Earthworks. By its requests for an extension of the tender validity period and ambiguous correspondence with Aurecon, it gave Robcon the impression that the award of the tender to it was still possible. It nevertheless proceeded to conclude a final contract with African Bulk Earthworks on the very day that it had been requested to give an undertaking that it would not so do. Kouga's conduct in the procurement process was not fair, not equitable and not transparent.

In view of Kouga's conduct and its flagrant disregard for its constitutional obligations, it was appropriate that a costs order be given against it on the attorney and client scale.

MOOSA N.O. v HASSAM N.O.

A JUDGMENT BY SWAIN J
KWAZULU NATAL HIGH COURT
20 NOVEMBER 2009

2010 (2) SA 410 (KZP)

A party relying on a written agreement in a claim brought on the basis of that agreement must annex the written agreement to its particulars of claim. If it is unable to do so, it must give reasons why it cannot do so.

THE FACTS

Hassam and others, representing certain trusts, concluded a written share sale agreement with Moosa and the other applicants. Hassam brought a claim against Moosa based on the agreement. In the particulars of claim, various terms of the agreement were alleged, but the agreement itself was not annexed. Hassam alleged that the written agreement was not in his possession but was in the possession of one of the defendants.

Moosa objected to the particulars of claim as not complying with Rule 18(6) in that the agreement was not annexed. He brought an application for an order setting aside the particulars of claim as an irregular proceeding, alternatively directing Hassam to annex the agreement.

THE DECISION

There is no authority for the proposition that if a party who relies upon a written agreement cannot attach a copy thereof to its pleadings, because it is not in possession of a true copy of the signed agreement, it is sufficient to allege such lack of possession to excuse non-compliance with the provisions of rule 18(6).

Hassam based its cause of action on a written agreement. The written agreement was an essential link in the chain of its cause of action. In order for that cause of action to be properly pleaded, it was necessary for the written agreement relied upon to be annexed to the particulars of claim. In the absence thereof, the basis of the cause of action did not appear ex facie the pleadings.

In answer to the application brought by Moosa, Hassam could have been expected to have given reasons why it was not in possession of the written agreement. He had not done so, and therefore provided no answer to the application which had been brought.

STRATGRO CAPITAL (SA) LTD v LOMBARD N.O.

Contract

A JUDGMENT BY MPATI P (MTHIYANE JA, SNYDERS JA, LEACH AJA and BOSIELO AJA concurring)
SUPREME COURT OF APPEAL
23 NOVEMBER 2009

2010 (2) SA 530 (A)

A valid attachment of movable property requires notice to the party whose property was attached. Failure to give such notice means that any sale in execution following such attachment may be set aside.

THE FACTS

Stratgro Capital (SA) Ltd brought an action against Lombard in his capacity as trustee of the Lombard Family Trust for payment of R1m being money alleged to be due under an agreement relating to the sale of fixed property. The Trust sought and obtained an order that Stratgro provide security for costs of the action and was awarded costs for that application. Costs were taxed in the sum of R27 431.24. Stratgro failed to pay this sum. The Trust then issued a writ of execution directing the sheriff to attach and take into execution Stratgro's movable property.

The sheriff executed the writ at Stratgro's registered address but found that the premises were occupied by a party unknown and unrelated to Stratgro. The Trust then instructed the sheriff to execute the writ against Stratgro's right of action at the same address. The sheriff did so by affixing a copy of the writ to the principal door of the occupier of the premises which were closed at the time.

A sale in execution was advertised, and Stratgro's right of action against the Trust was bought by the fourth respondent for R1 500. When it came to Stratgro's notice that the writ had been issued and executed and the sale in execution had taken place, it brought an application to set aside the attachment and sale in execution.

THE DECISION

Rule 45(8)(c)(i)(a) of the Rules of Court provides that an attachment shall only be complete when notice of the attachment has been given in writing by the sheriff to all interested parties,and where the asset consists of incorporeal immovable property or an incorporeal right in immovable property, notice shall also have been given to the registrar of deeds in whose deeds registry the property or right is registered.

By reason of this rule, an attachment of the right, title and interest of a litigant in an action will only be complete once the sheriff has given notice of the attachment in writing to all interested parties. This rule is stated in wide terms. There appeared to be no reason to regard Stratgro, whose claim in the main proceedings was attached, as not being an interested party as contemplated therein. The subrules require notice to be given to the execution debtor whose incorporeal property or right is the subject of an attachment in order for such attachment to be complete.

As Stratgro was clearly an interested party as envisaged by Rule 45(8)(c)(i)(a) in regard to its claim against the Trust. The failure to give it notice resulted in the attachment being incomplete. The subsequent sale in execution was therefore null and void.

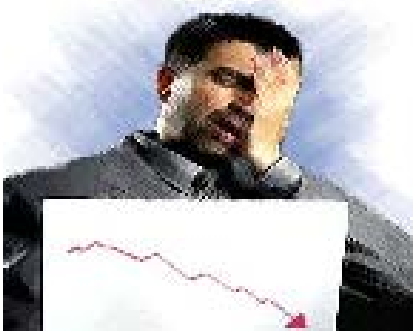
The application succeeded.

RONBEL 108 (PTY) LTD v SUBLIME INVESTMENTS (PTY) LTD

A JUDGMENT BY STREICHER JA (NUGENT JA, VAN HEERDEN JA, HURT AJA and GRIESEL AJA concurring)
SUPREME COURT OF APPEAL
18 SEPTEMBER 2009

2010 (2) SA 517 (A)

Insolvency



The decision not to submit a claim against an insolvent company amounts to the abandonment of that claim if procedures for the continuation of an action earlier brought to enforce that claim have not been followed in terms of section 359 of the Companies Act (no 61 of 1973).

THE FACTS

Absa Bank Ltd brought an action against Sublime Investments (Pty) Ltd. Shortly before the trial was due to begin, by special resolution, Sublime resolved that it be voluntarily wound up. The winding-up began upon the registration of the resolution, in terms of section 352(1) of the Companies Act (no 61 of 1973). In consequence, the action was suspended in terms of section 359(1)(a) pending the appointment of a liquidator.

Absa decided not to submit a claim against the company in liquidation because it anticipated that a contribution would become payable by creditors of the company. Some two years later and 16 months after the appointment of a liquidator, it ceded its claim to Ronbel 108 (Pty) Ltd, and Ronbel submitted a claim against the company in liquidation.

The company contended that the action brought by Absa should be considered to have been abandoned by it in terms of section 359(2)(b) of the Act, and accordingly the claim should be rejected.

THE DECISION

Section 359(2)(a) provides that a person has begun legal proceedings against a company in liquidation must give notice to the liquidator before continuing with those proceedings. The consequence of not doing so provided for in section 359(2)(b) is that those proceedings are to be considered to have been abandoned.

Because no notice of continuation of the legal proceedings was given to the liquidator, the liquidator was not given an opportunity to consider and assess the validity of the claim. In consequence, information available to Absa concerning the assets and liabilities of Sublime were not made available to the liquidator at that time. Absa made a conscious decision not to proceed with its claim and, since it knew of the provisions of section 359, must be understood to have abandoned its action.

The claim was properly rejected.

McCARTHY LTD v ABSA BANK LTD

A JUDGMENT BY NUGENT JA (LEWIS JA, VAN HEERDEN JA, LEACH AJA and TSHIQI AJA concurring)
SUPREME COURT OF APPEAL
3 SEPTEMBER 2008

2009 SACLR 456 (A)

Banking

A paying bank may be shown to be negligent in paying a cheque drawn by its customer if in its capacity as collecting bank, it knows the identity of the payee and facts in respect of the payee account which ought to have put it on inquiry as to whether the payment was properly made.

THE FACTS

McCarthy Ltd held a cheque account at the Pretoria branch of Absa Bank Ltd. Between 1994 and 2003, non-transferable cheques payable to Fourie were drawn by McCarthy and deposited to an account in the name of Fourie, another customer with a cheque account at the bank.

The cheques were drawn in favour of Fourie, Leathertek. They came about as a result of a fraud perpetrated by a McCarthy employee who had created fictitious debts in the accounts of the company and secured signatures to the cheques by authorised signatories in supposed payment thereof. The cheques were deposited to Fourie's account by Mrs Fourie, at the request of the McCarthy employee who then received the amount of the cheques from Mrs Fourie. Upon depositing a cheque, Mrs Fourie drew on the account and paid the McCarthy employee a similar amount. In total, cheques to the value of some R15m were deposited in this manner.

After the fraud was discovered, McCarthy brought an action for damages against Absa, basing its claim on breach of contract. It alleged that Absa's breach consisted in a failure to exercise reasonable care to ensure that Fourie was entitled to payment and had collected the cheques on behalf of Fourie even though he was not the named payee. It also alleged that the breach consisted in a failure to react to suspicious features of the transactions of deposit and withdrawal.

Absa successfully applied for absolution from the instance, it being held that there was no evidence that as collecting bank, Absa was obliged in contract to act without negligence toward McCarthy. McCarthy appealed.

THE DECISION

As paying bank only, Absa would not be in a position to know to whom the cheques were being paid, and would therefore not be liable if it made payment to a party not entitled to them. So much was also confirmed by section 79 of the Bills of Exchange Act (no 34 of 1964).

However, since Absa was also the collecting bank in this case, it knew the party to whom the cheques were being paid. The true enquiry was therefore not whether Absa was liable for negligence in collecting the cheques, but whether, in view of its knowledge of the payee, acquired in the course of accepting the cheques for collection, Absa was negligent in paying them.

Given that employees of the bank were aware of facts that should have led them to suspect that Fourie might not be entitled to the cheques, and that they knew that the cheques had been drawn by their customer McCarthy who would have to pay them, on the evidence so far presented, it was possible that a court might find that Absa ought to have made further enquiry before it paid the cheques, and that its failure to do so was negligent.

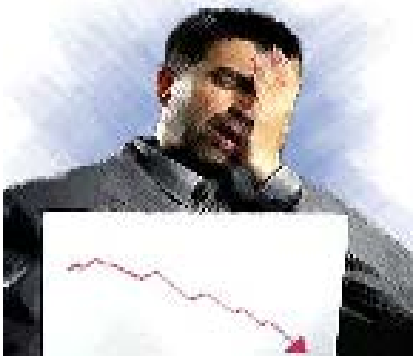
Absolution from the instance was therefore incorrectly ordered. The appeal was upheld.

CONSOLIDATED NEWS AGENCIES (PTY) LTD v MOBILE TELEPHONE NETWORKS (PTY) LTD

A JUDGMENT BY NAVSA JA and HURT JA
(NUGENT JA and MHLANTLA JA concurring, HEHER JA dissenting)
SUPREME COURT OF APPEAL
29 SEPTEMBER 2009

2010 (3) SA 382 (A)

Insolvency



A party relying on section 33(1) of the Insolvency Act is not obliged to show that it abandoned substantial property in order to fall within the terms of that section. It is sufficient for it to show that there was reciprocity between itself and the insolvent party in the disposition alleged to have been made.

THE FACTS

In April 1999, Consolidated News Agencies (Pty) Ltd (CNA) and Mobile Telephone Networks (Pty) Ltd (M-Tel) concluded an agreement in terms of which CNA was to stock and sell products of M-Tel for a period of three years. M-Tel warranted that by the sale of the products, CNA would earn discounts to specified amounts. If the earnings were less than these amounts, M-Tel would pay CNA the difference between them and the warranted amounts. CNA also undertook certain warranties the purpose of which was to ensure that minimum targets were reached, and the agreement provided that material or persistent breach of the warranties which materially prejudiced the achievement of the warranties would entitle M-Tel to terminate the agreement.

In the first year, there was a shortfall of the warranted amount, and M-Tel paid CNA the difference, an amount of R9.4m, as required by the agreement. In the second year, a shortfall of approximately R40m was expected, but before the end of this year, the parties concluded an amended agreement which absolved M-Tel of the responsibility of paying CNA any shortfall. The amended agreement was concluded because during the second year, CNA's holding company, Wooltru Ltd, sold its shares in CNA to Gordon Kay & Associates (Pty) Ltd. That company had been unable to meet its commitments under the sale agreement, and had requested M-Tel to provide the guarantees required of it in favour of Wooltru. M-Tel did so, and in the amended agreement, provided that it would be entitled to recover any amount it would have to pay under the guarantees from a trust fund into which CNA would be obliged to pay all discounts accruing to it under the initial agreement.

M-Tel paid Wooltru what became due in terms of the guarantees, a sum of R86m. The following month, CNA was provisionally wound up.

M-Tel and associated companies brought an action against the liquidators claiming that CNA was liable as co-principal debtor with Gordon Kay & Associates, to pay the amount it had paid to Wooltru. The liquidators defended the action on the grounds that the provisions of the amended agreement obliging CNA to make payments were voidable dispositions.

M-Tel's replication to this defence was that it made the payments to Wooltru in good faith and that section 33(1) of the Insolvency Act (no 24 of 1936) applied, absolving it of any liability to restore any benefits received under the amending agreement.

The liquidators brought an action against M-Tel and associated companies alleging that provisions of the amended agreement were dispositions not for value in terms of section 26 of the Insolvency Act. The provisions referred to were (1) the waiver of the second income warranty, (2) the undertaking to pay money into the trust account, (3) the undertaking to reimburse M-Tel, (4) the issuing of an undertaking as surety and co-principal debtor in favour of M-Tel,and (5) a cession of the funds in the trust account in favour of M-Tel.

M-Tel's defence to this claim was also based on section 33(1) of the Act.

Section 33(1) provides that any person who, in return for any disposition liable to be set aside under the Act, has parted with

any property or security shall, if he acted in good faith, not be obliged to restore any property or other benefit received under such disposition unless the liquidator has indeminifed him for parting with such property or security for losing such right.

THE DECISION

Assuming that the dispositions alleged to have been made were dispositions as referred to in the Act, and were liable to be set aside, the essential question was whether or not M-Tel (i) acted in good faith, (ii) in parting with property or security or in losing a right; and (iii) such parting or loss took place in return for the impugned disposition.

CNA's position was that in concluding the amended agreement, M-Tel gave up no right and parted with no property, and so could not fall within the provisions of section 33(1). However, it was clear that M-Tel had concluded the amended agreement because of substantial dissatisfaction with the way in which CNA had implemented the initial agreement. In concluding the amended agreement it relinquished any rights it might have had against CNA under the initial agreement. This was sufficient to show that M-Tel did part with property or security as referred to in section 33(1). M-Tel was not obliged to show that it abandoned substantial property - it merely had to show that there was some reciprocity in the agreement that was concluded. The fact that an associated company, and not M-Tel itself, had undertaken obligations in terms of the amended agreement did not detract from the fact that M-Tel made them in association with that company.

M-Tel was therefore entitled to rely on section 33(1). The appeal failed.

If two parties negotiate in their corporate interest, as members of a group of companies, for (what afterwards turns out to be) an impugnable disposition, but only one of them has parted with property or lost a right in return for that disposition, can the other rely on the parting or loss to invoke s 33(1)? I think the answer must be 'no'.

BLAKES MAPHANGA INC v OUTSURANCE INSURANCE CO LTD

A JUDGMENT BY MALAN JA (NAVSA JA, SHONGWE JA, TSHIQI JA and MAJIEDT AJA concurring)
SUPREME COURT OF APPEAL
19 MARCH 2010

2010 (4) SA 232 (A)

Contract

An attorney's account becomes liquidated upon taxation of the account. In the event of a dispute as to the amount of the attorney's account, set off of any amount owing to the attorney cannot be applied against amounts owed by the attorney.

THE FACTS

Outsurance Insurance Co Ltd instructed Blakes Maphanga Inc to act as its attorneys in various litigation matters. Accounts for services rendered as attorneys were payable thirty days after they were raised.

In March 2005, Outsurance terminated Blakes' mandate. At this time, a number of accounts were in arrears for 180 days. Blakes asserted that it was entitled to set off what was owing on these accounts against money collected for Outsurance, a sum of R300 471.34. Outsurance contended that this was an inflated figure because Blakes had not adhered to the fee structure and tariff applicable to the accounts, and that it should have been R66 794.78. Blakes accepted that Outsurance was entitled to have its accounts taxed

Outsurance disputed Blakes' claim that it was entitled to apply set off against money collected on its behalf. It sued for payment of the balance of the money held by Blakes and collected for Outsurance on its behalf.

THE DECISION

Set off can be applied if two persons are mutually indebted to each other. The debt in each case must be liquidated, and subsist between the two in their personal capacities. In the present case, this meant that for set off to operate, the fees debited by Blakes and transferred to its business account had to be liquidated.

Although an attorney may sue for payment of his fee, the client may always insist that the account by taxed. Upon taxation, the attorney's claim becomes liquidated. In the present case, there was a dispute about the amount owing by Outsurance, and Blakes was aware of the dispute, having agreed that Outsurance was entitled to taxation of its accounts. It followed that Blakes' claim was not for a liquidated amount, and set off could not apply.

Outsurance's claim succeeded.

KING v ATTORNEYS FIDELITY FUND BOARD OF CONTROL

Contract

A JUDGMENT BY MPATI P (BRAND JA, CACHALIA JA, MHLANTLA JA and BOSIELO AJA concurring)
SUPREME COURT OF APPEAL
12 MAY 2009

2010 (4) SA 185 (A)

Money paid to a firm of attorneys for the purpose of its investment is not protected by the Attorneys Act (no 53 of 1979).

THE FACTS

King and the other appellants paid money to Van Schalkwyk's Attorneys of Port Elizabeth in order to participate in a factoring scheme. The scheme involved paying estate agents from the money so paid to the attorneys, a discounted amount of the commissions due to the agents from arranging the sale of properties. Van Schalwyks would later repay participants in the factoring scheme the money they had deposited into its account, together with interest.

King alleged that the money paid to Van Schalkwyks was paid into its trust account and was misappropriated by attorneys who were members of the firm. He and the other appellants brought an action against the Attorneys Fidelity Fund Board of Control for recovery of the money so misappropriated. The action was based on section 26(a) of the Attorneys Act (no 53 of 1979) which provides that the fund shall be applied for the purpose of reimbursing persons suffering pecuniary loss as a result of theft committed by a practitioner of money entrusted to the practitioner in the course of his practice.

The Fund defended the actions on the grounds that the payments were not entrusted to Van Schalkwyks, and were not effected in the course of practice of Van Schalkwyks. It alleged that the plaintiffs' instructions were that Van Schalkwyks receive the money in trust for the purpose of investing it on their behalf as envisaged in section 47(1)(g) of the Act. The section provides that the fund shall not be liable in respect of any loss suffered by any person as a result of theft of money which a practitioner has been instructed to invest on behalf of such person.

THE DECISION

All the plaintiffs in the actions who testified and who made their moneys available to Van Schalkwyks, did so in the expectation that they would receive a return. They therefore paid the money for the purpose of its investment.

It was true that the profits and losses made in the discounting transactions did not affect the amounts which Van Schalkwyks had to pay to the plaintiffs at the end of the transaction periods. There was no condition that, if there were no factoring during the investment period, then no interest would be paid. However, this was of no consequence. What mattered was the purpose for which the moneys were paid into Van Schalkwyks' trust account, which was for investing in the factoring scheme.

Section 47(1)(g) therefore applied. The Fund was entitled to rely on it in defence of the actions brought against it.

MEC FOR ECONOMIC AFFAIRS, ENVIRONMENT AND TOURISM, EASTERN CAPE v KRUIZENGA

A JUDGMENT BY CACHALIA JA (HARMS DP, NUGENT JA, LEACH JA and SERITI AJA concurring)
SUPREME COURT OF APPEAL
1 APRIL 2010

2010 (4) SA 122 (A)

An attorney who concludes a settlement agreement on behalf of his client at a Rule 37 conference binds his client, unless the other party was aware of some restriction on the ability of the attorney to conclude such an agreement.

THE FACTS

Kruizenga brought an action for damages against the MEC for Economic Affairs arising from an alleged negligent failure of the provincial government's employees to take preventative measures to contain a fire.

In a pre-trial conference held in terms of Rule 37 of the Rules of Court, the parties's representatives agreed that the MEC had conceded the merits of Kruizenga's case, but certain heads of damages claimed remained in dispute. On the first day of trial, the agreement was placed before court and an order was given in favour of Kruizenga in respect of the admitted liability. The hearing of the outstanding heads was postponed.

The MEC then applied for the rescission of the order on the grounds that, in accordance with general practice, the State attorney had needed his express authorisation for the settlement of the matter. Kruizenga resisted the application.

THE DECISION

The issue was whether the MEC could resile from an agreement made by his attorney, without his knowledge, at a rule 37 conference.

Attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. The courts will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests. The office of the State attorney, by virtue of its statutory authority as a representative of the government, has a broader discretion to bind the government to an agreement than that ordinarily possessed by private practitioners, though it is not clear just how broad the ambit of this authority is.

Accepting that by agreeing to the settlement, the State attorney not only exceeded his actual authority, but did so against the express instructions of his principal, this could not assist the MEC in raising an estoppel against the claim. The proper approach to the matter was to consider whether the conduct of the party attempting to resile from the agreement had led the other party to reasonably believe that he was binding himself. If the attorney acting for the principal exceeds his actual authority, or does so against his client's express instructions, this makes no difference. The consequence for the other party, who is unaware of any limitation of authority, and has no reasonable basis to question the attorney's authority, is the same.

The application was dismised.

BP SOUTHERN AFRICA LTD v MAHMOOD INVESTMENTS (PTY) LTD

Contract

A JUDGMENT BY LEWIS JA (HARMS DP, MLAMBO JA, MAYO JA and HURT AJA concurring) SUPREME COURT OF APPEAL 27 NOVEMBER 2009

2010 SACLR 1 (A)

A contractual provision may be interpreted in the light of the circumstances known to the parties at the time of contracting and with a view to giving the provision a commercially sensible meaning. Agreements simultaneously concluded may be relevant in interpreting such a provision.

THE FACTS

Mahmood Investments (Pty) Ltd bought certain fixed property from BP Southern Africa Ltd, and then took transfer of the property on which it began to conduct the business of a petrol filling station. Mahmood concluded a supply agreement with BP in terms of which it was to sell exclusively BP products. It then leased the property to Argyle Umgeni Service Station CC with the intention that Argyle would assume the rights an obligations of the supply agreement. Argyle did so, and BP began supplying its products to Argyle in terms thereof. A third agreement was concluded in which BP loaned certain storage and dispensing equipment to Mahmood for the purpose of supplying petrol at the filling station.

Clause 10.1 of the sale agreement provided that the property was not to be used for any purpose other than that of a petrol filling station. This restriction was registered as a servitude over the property upon registration of transfer.

It came to BP's attention that products other than its own were being sold by Argyle. It then addressed Mahmood and demanded that it remove Argyle from operating at the premises, failing which it would terminate the supply agreement.

BP then removed its pumps from the property. Mahmood took the view that this constituted a repudiation of the supply agreement. BP tendered their return on condition that Mahmood undertake that it would comply with its obligations. Mahmood rejected the tender. BP then cancelled the agreements and notified its intention to apply for Mahmood's eviction and re-transfer of the property to it.

BP brought an application for Mahmood's eviction and transfer of the property.

THE DECISION

BP would have the right to cancel the agreements and apply for consequent relief if Mahmood was in breach of the agreements. Mahmood had taken the view that it was not in breach because there was no positive obligation upon it to conduct the business of a petrol filling station at the property, and the only breach was that of BP in removing the pumps.

Mahmood's position however, depended on an interpretation of clause 10.1 to the effect that it imposed on Mahmood only the obligation not to conduct a business other than that of a petrol filling station, and did not impose the obligation to actually conduct the business of a petrol filling station.

However, interpreting the clause in the light of the circumstances known to the parties at the time of contracting, and giving it a commercially sensible meaning, the provision did impose on Mahmood a positive obligation to conduct the business of a petrol filling station. This was also apparent from the fact that the other agreements simultaneously entered into contemplated that BP had invested a substantial amount of capital for the purpose of exploiting the property as a petrol filling station over the longer term.

Given that Mahmood had failed to properly observe the obligations imposed on it in clause 10.1, this constitued repudiation entitling BP to cancel the agreement. BP had done so and was accordingly entitled to Mahmood's eviction from the property and re-transfer thereof to itself.

VIKING PONY AFRICA PUMPS (PTY) LTD v HIDRO-TECH SYSTEMS (PTY) LTD

A JUDGMENT BY HEHER JA (MPATI P, MLAMBO JA, BOSIELO JA and SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2010

2010 (3) SA 365 (A)

Upon receiving a credible complaint that a preference has been obtained on a fraudulent basis, an organ of State must act in accordance with the complaint in terms of Preferential Procurement Policy Framework Act (no 5 of 2000).

THE FACTS

Hidro-Tech Systems (Pty) Ltd competed with Viking Pony Africa Pumps (Pty) Ltd for contracts awarded by the City of Cape Town for the supply and installation of mechanical equipment for water and sewerage treatment works required by the municipality.

Over a period of five years, Viking won 80% more contracts arising from tender processes in which both parties participated, than contracts won by Hidro. The reason for this was that Viking scored higher than Hidro on points based on the scoring given for members qualifying as historically disadvantaged individuals ('HDI').

Hidro was of the opinion that Viking had misrepresented its true HDI status and was operating as a front for Bunker Hill Pumps (Pty) Ltd, the second appellant. Hidro alleged that this was clear from the fact that the remuneration of directors of HDI status was significantly less than white directors, and that managerial and administrative responsibilities were allocated mostly to the latter. In fact, neither of the non-white directors was actively involved in the management of Viking or exercised control over it, to an extent commensurate with their respective shareholdings at the time when Viking submitted its tenders in 2006 and 2007.

Hidro addressed the municipality with its concerns. It requested a verification agency to determine and report on Hidro's allegations. It confirmed that Viking's shareholding was in line with the proof of shareholding which had accompanied its tender- registration form.

Hidro reiterated its contention that Viking was involved in fronting practices and demanded that the municipality investigate this. The municipality did not do so. Hidro then brought an application for an order that the municipality act against Viking in accordance with section 15 of the regulations promulgated in terms of the Preferential Procurement Policy Framework Act (no 5 of 2000) and that the municipality act against Viking in accordance with item 9.4 of the Procurement Policy Initiative of the City of Cape Town

THE DECISION

Regulation 15 provides that an organ of State must, upon detecting that a preference has been obtained on a fraudulent basis, or any specified goals are not attained in the performance of the contract, act against the person awarded the contract.

The word 'detect' connotes the discovery or awareness of a certain state of affairs not previously known to the person who so detects, and it would be wrong to unduly limit it to a conclusion reached at the end of a process of investigation. In everyday speech 'detect' bears the sense of a provisional or unilateral opinion as to the given state which is open to contradiction rather than carrying the force of a final judgment on the matter.

Although the State could investigate the position before taking action, the action to be taken therefore did not depend on a preliminary investigation having been conducted upon the basis of which the State would satisfy itself that a preference had been obtained on a fraudulent basis. The regulation intends to cast a very wide net, in order to ensure that an organ of State be proactive in responding to the reasonable possibility that a preference has been obtained

fraudulently, or that a specific goal of its preferential policy, in terms of which a contract was awarded, is not being pursued. State has no investigative ability in terms of the regulations.

The range of action open to an organ of State is limited only by its appropriateness to the proper addressing of the fraud detected by it. The clearer the fraud the more decisive the action is likely to be. The action to be taken by the organ of State is dependent upon the nature of the information that reaches it. If that information constitutes a credible complaint, seriously advanced, of the obtaining of a preference by fraudulent means, then the organ of State must act by requiring the tenderer in question to provide proof of its real and operative HDI status. The organ of State might appoint a forensic accountant to analyse any proof furnished on its behalf; or to assist it in calling for such further documentation as might be required.

In the present case, the municipality's investigation never sought to address the actual issue which was, not the overt shareholding in Viking, but its sham nature and the blurring of the separate corporate identities of Viking and Bunker Hill. The municipality had in fact diverted Hidro-Tech's attorney to the Department of Trade and Industry, rather than take a meaningful decision.

The order that the municipality act against Viking in accordance with regulation 15 of the regulations promulgated in terms of the Preferential Procurement Policy Framework Act was therefore correctly given..

Irish AJ undertook a careful analysis of reg 15(1) with particular regard to its place in the promotion of the process established by Parliament in order to satisfy the constitutional imperatives.
I do not think I can improve on it. He examined the possible meaning and scope of the phrase 'upon detecting' in the context that he had thus identified. I agree with both the process of his reasoning and his conclusion that:

'In my view, in employing the participle detecting, the Minister intended to cast a very wide net, precisely to ensure that an organ of State be proactive in responding to the reasonable possibility that a preference has been obtained fraudulently, or that a specific goal of its preferential policy, in terms of which a contract was awarded, is not being pursued.'

SOUTHERNERA RESOURCES LTD v FARNDELL N.O.

A JUDGMENT BY MPATI P (MTHIYANE JA, LEWIS JA, MHLANTLA JA and Hurt AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 2009

2010 SACLR 24 (A)

An agreement becomes complete as soon as all suspensive conditions have been fulfilled.

THE FACTS

In September 1995 Farndell, in his capacity as executor in the deceased estate of Marjorie Dent, sold mineral rights in the farm Duitschland situated in the Northern Province to Southernera Resources Ltd for R1 792 269. In terms of the agreement, Southernera was obliged to furnish bank guarantees for payment of the purchase price within 30 days. Southernera delived the guarantees but these were later returned to it because Farndell was experiencing difficulties identifying the heirs to the estate.

In December 2001, the parties concluded an addendum to the agreement which provided that Southernera would be obliged to deliver a bank guarantee within 14 days of the Master of the High Court issuing a certificate in terms of section 42(2) of the Administration of Estates Act consenting to the sale of the mineral rights.

The certificate was issued in April 2004, but Southernera failed to deliver the guarantee.

Within the 14-day period, section 3(1)(m) of the Deeds Registries Act (no 47 of 1937) was repealed. The section provided, inter alia, that the Registrar of Deeds was empowered to register cessions of mineral rights.

Farndell alleged that Southernera was in breach of the agreement and brought an application against Southernera for an order that it pay the purchase price. Southernera opposed the application on the grounds that as a result of the repeal of section 3(1)(m) it had become legally impossible to effect registration of cessions of mineral rights, in consequence of which the agreement had lapsed due to supervening impossibility of performance.

THE DECISION

The essential question was whether or not the agreement was complete (perfecta) by the time the repeal of section 3(1)(m) had taken place. Since that event had the effect of rendering the agreement impossible of performance, if it took place before the agreement was complete, the agreement would indeed have lapsed with the result that Southernera would not have been obliged to perform in terms thereof.

Southernera contended that the furnishing of the bank guarantee was a suspensive condition in that it deferred operation of the agreement until the guarantee was delivered, and that this meant the agreement was not complete. However, the obligation to furnish the guarantee was itself dependent on a suspensive condition, ie that the Master issue a certificate in terms of section 42(2). That condition was fulfilled. Accordingly, the agreement became complete when that certificate was issued.

The application was granted.

BEDFORD SQUARE PROPERTIES (PTY) LTD v LIBERTY GROUP LTD

Contract

A JUDGMENT BY WILLIS J
GAUTENG SOUTH HIGH COURT
10 DECEMBER 2009

2010 (4) SA 99 (GSJ)

In order to show that there should be a deviation from the basic rule that agreements are to be honoured, it is necessary to show that circumstances exist warranting a departure from the basic rule.

THE FACTS

In 2001, Bedford Square Properties (Pty) Ltd entered into a notarial deed of restraint with Liberty Group Ltd and the second respondent in terms of which Bedford undertook not to conclude a lease agreement giving either Woolworths or Mica Hardware occupation of any space on its property. The restraint was registered as a servitude on all the properties concerned.

Bedford Square sold a portion of its property. On the portion which it retained, it wished to conclude a lease with Woolworths. It applied for an order declaring that the servitude created by the notarial agreement was contrary to public policy and unenforceable.

THE DECISION

The basic rule is that agreements are to be observed, expressed in the maxim pacta sunt servanda. It was for Bedford Square to show that the basic rule was not applicable because in the circumstances, the application of it would be contrary to public policy in that Liberty had no interest in the agreement warranting protection, or a weighing of the respective interests of the parties could not justify it, or the agreement was inherently unreasonable, or there was an imbalance in the bargaining position of the parties raising concerns of oppression of one against the other.

Bedford had not demonstrated that any of these circumstances existed. There was therefore no warrant for relaxing the basic rule. The application was dismissed.

It is indeed well known that it is a regular feature of commercial life that, when it comes to shopping centres, there are restrictions as to who may or may not be tenants in particular buildings. It is also well known that certain tenants are attracted by the presence or absence of other tenants. These are legitimate concerns for a landlord such as the second respondent. It has a legitimate interest in taking steps to protect these concerns. I do not profess any skills in the fascinating world of the marketing of commercial buildings and, in any event, it would be wrong for me to take too much judicial notice of the intricacies of this world. Nevertheless, in broad outline, the practice of carefully crafted commercial tenancy agreements is a well-established feature of our commercial landscape. I do not intend to upset the apple-cart. The parties to the agreement were both landlords and not, in their relationship with one another, employers or employees or business partners. The applicant, as a landlord, is not, in general terms, restricted in its business of leasing out its premises. It is free to do so. It is restricted merely in leasing its premises to certain named tenants for a limited period of time.

NYANDENI LOCAL MUNICIPALITY v HLAZO

A JUDGMENT BY ALKEMA J
(PILLAY J and NDENGEZI J concurring)
EASTERN CAPE
12 NOVEMBER 2009

2010 (4) SA 261 (ECM)

A non-variation clause may not operate in a manner which is contrary to public policy or constitutional values.

THE FACTS

The Nyandeni Local Municipality employed Hlazo as its municipal manager. In terms of clause 16 of the employment contract, all disputes arising from the conditions of service and/or any municipal policy and/or code of conduct was to be resolved by means of arbitration. It was specifically recorded that where disciplinary proceedings were initiated against the municipal manager such disputes were to be resolved through pre-dismissal arbitration under the auspices of the Commission for Conciliation Mediation and Arbitration.

In terms of clause 14, no variation, modification or waiver of any provision of the agreement, or consent to any departure therefrom, would be of any force or effect unless confirmed in writing and signed by the parties, and then such variation, modification, waiver or consent was to be effective only in that specific instance.

Following a report on financial irregularities concerning Hlazo, the municipality addressed a letter to him calling on him to show cause why he should not be suspended as the accounting officer of the municipality. Thereafter, it gave him notice to appear at a disciplinary hearing to answer charges relating to various instances of financial irregularity. A verdict of guilty was handed down against him following the hearing. The municipality's council then confirmed the findings of the hearing and dismissed Hlazo with immediate effect.

Hlazo's attorney addressed a letter to the municipality in which she complained of various defects in the procedures of the disciplinary hearing. Four days later, the attorney addressed the muncipality declaring that a dispute existed between it and Hlazo and demanding that the dispute be referred to arbitration.

Hlazo applied for an order that an arbitrator be appointed to decide on the complaints made against him, as provided for in clause 16.

THE DECISION

It was clear from the history of the matter, the Hlazo had consented to a variation of the procedures provided for in clause 16. However, the question was whether this could have any binding effect, given the provisions of clause 14.

By his conduct, Hlazo agreed to a variation of clause 16, but it did not necessarily follow that, in law, his implied agreement to vary the terms had the lawful result of a variation. An agreement by conduct may be prohibited by application of the principle, established in *Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A), that a non-variation clause is valid and effectively entrenches both itself and all the other terms of the contract against an oral variation.

This principle may however, be overriden by public policy considerations. In the present case, it could not be said that clause 14 of itself offended against public policy, but the question was whether the application of it in the circumstances of the cases did. It was clear that Hlazo did not have a defence to the charges which were brought against him. In balancing the principle of pacta sunt servanda as expressed in Shifren against the right to engage the due process of law under the Constitution, and to be protected against an abuse thereof, the appropriate conclusion was that public policy favoured the rule of law as a

foundational cornerstone of the Constitution, and accordingly the facts and circumstances of the case justified a departure from the *Shifren* principle.

The application for the appointment of an arbitrator was dismissed.

I therefore have no hesitation, on the facts of this case, to support the finding of the court a quo that he, by his conduct, agreed to a variation of clause 16.2 in the respects mentioned. Of course, it does not necessarily follow that, in law, his implied agreement to vary the terms had the lawful result of a variation. An agreement by conduct may be prohibited by the Shifren *principle, and this is what the municipal manager argued in the court below and in this court, and this is what the court below held.*

It follows that the contention that the municipal manager by his conduct also consented to a waiver or variation of the entrenchment clause 14 under consideration in this case, cannot prevail. For such a variation or waiver to be effective, it must be in writing.

Therefore, and subject to what follows, a contract does not necessarily offend public policy merely because it may operate unfairly. Like the concept of good faith (bona fide), fairness may be regarded as an ethical value 'that underlies and informs the substantive law of contract' (Prof Hutchison (supra)), but it is not an independent constitutional or contractual principle in terms of which contracting parties may escape their obligations, including obligations arising from the Shifren *principle (* Brisley *(supra) in paras 12 - 22). It follows that a court does not have a general discretion to decide what is fair and equitable and then to C determine public policy with reference to its views on fairness.*

ICS PENSION FUND v SITHOLE

A JUDGMENT BY RABIE J
TRANSVAAL PROVINCIAL DIVISION
13 JANUARY 2009

2010 (3) SA 419 (T)

The Financial Services Board of Appeal may not take into account irrelevant considerations when determining whether or not the provisions of section 15 of the Pension Funds Act (no 24 of 1956) have been adhered to by a pension fund.

THE FACTS

Prior to 1 November 1996, the ICS Pension Fund was a defined benefit fund, but after that date adopted a defined contribution section which enabled employees to take an alternative option for their pension fund entitlements. The former benefit fund is one whose pension benefits are underwritten by the employer whereas a defined contribution benefit fund is one whose pension benefits are determined by the financial performance of the pension fund.

At the time, the Fund had built up an actuarial surplus. A decision was made that some of this would be used to enhance the benefits of those members who decided to transfer to the defined contribution section of the fund, and that some would be allocated for the benefit of other members of the Fund as well as the employer.

In December 2001, the Pension Funds Act (no 24 of 1956) was amended to make provision for the treatment of an actuarial surplus. Section 15B provides that the board of trustees of a pension fund must submit to the registrar a scheme for the proposed apportionment of any actuarial surplus, which actuarial surplus must include any surplus utilised improperly by the employer. Section 15F provides for the transfer to the employer surplus account of all or some of the credit balance which existed in a reserve account of the fund prior to December 2001 and which had been earmarked for the benefit of the employer.

As a result of the amendments to the Act, the Fund applied to the registrar to authorise the transfer of some of the credit balance in its existing reserve account, which had earlier been allocated to the employer, to the employer surplus account. The registrar rejected the application. The Fund appealed to the Financial Services Board of Appeal. Its appeal was dismissed. It then applied for an order reviewing and setting aside this decision.

THE DECISION

The purpose of section 15F is to allow in appropriate circumstances a surplus allocated to the employer in terms of the rules of the fund to be excluded from the surplus to be distributed in terms of the other provisions of the surplus legislation. The question was whether or not the Fund would act within the ambit of this section were it to effect the proposed transfer.

The board of appeal held that it is implicit in the provisions of section 15F(2) that the issue of fairness and equal treatment of members and the employer in respect of the distribution of the surplus was a relevant consideration. It also held that there was no informed choice made by the members who elected to remain in the defined benefit section since they had not been given sufficient information regarding the making of such a choice and had not been informed that their benefits were underwritten by the employer which itself had been allocated an amount. The board held that there was no proof of any negotiations between the applicant and the members or the member representatives and that the enhancement of benefits of members who chose to join the defined contribution section, indirectly also benefited the employer due to the transfer of risk from the employer to the members. In this regard the board of appeal found that when one group or class of members is discriminated against or is

disadvantaged, such unfair treatment is a factor that impacts upon the registrar's discretion in terms of section 15F(2) of the Act, and that the registrar ius entitled to take this ground into account in the interest of fairness.

However, the decision of the board of appeal was materially influenced by an error of law, in particular in respect of what section15F of the Act entails. This resulted in the board of appeal taking into account irrelevant considerations and not considering relevant ones. The findings of the board of appeal were also not rationally connected to the information before it.

The decision of the board was reviewed and set aside.

The last part of the above extract from the Coca-Cola matter reads as follows:

'Naturally a negotiation envisages an understanding on the part of the negotiators of the relevant facts in order for them to reach an informed J conclusion. Accordingly one of the principles underlying ss 15B and 15C is that the members and pensioners must be in possession of A sufficient information of what it is proposed to allocate to the employer reserve account to enable them to enter into meaningful debate on such allocation should they hold a view that differs from that of the board.'

As a general proposition the aforesaid holds true. It goes without saying that in order for negotiations to take place, the negotiators should understand the relevant issues and possess the necessary facts. Furthermore, in a situation of collective bargaining, where representatives negotiate on behalf of a larger membership, the membership should ideally have a full understanding of the issues at stake as well as the relevant facts in order for them to contribute meaningfully in the interaction between themselves and their representatives, and to give their representatives a mandate in respect of the relevant issues at stake. In the classical situation of two bargaining entities being represented by representatives, it is the responsibility of each side to ensure that the aforesaid knowledge and understanding exist in the ranks of its own membership. It is not uncommon, however, that in cases where, for example, facts relating to bargaining issues or to members of the one side, fall peculiarly within the knowledge of the other side, such other side has the obligation to make known the relevant information to the first side.

BONHEUR 76 GENERAL TRADING (PTY) LTD v CARIBBEAN ESTATES (PTY) LTD

A JUDGMENT BY VAN EEDEN J
SOUTH GAUTENG HIGH COURT
10 DECEMBER 2009

2010 (4) SA 298 (GSJ)

Property

A co-owner is ordinarily entitled to deal freely in the undivided share of his property and is not obliged to obtain the consent of the other co-owner in doing so.

THE FACTS

Bonheur 76 General Trading (Pty) Ltd was the co-owner of a 54% undivided share in Portion 3 of Erf 1543, Morningside Extension 12. The other co-owner, Caribbean Estates (Pty) Ltd, sold its 46% undivided share in the property to Wedgeport (Pty) Ltd. After transfer of this undivided share, without the knowledge or consent of Bonheur, Wedgeport mortgaged the property to the two individuals who controlled Caribbean.

Bonheur contended that it held a right of pre-emption which would have entitled it to a right of first refusal of an offer of sale made by Caribbean in respect of its undivided share. It also contended that any sale to Wedgeport should have required that Wedgeport become a member of the Morningside Wedge Office Park Owners Association, thereby obliging it to abide by the rules of the association. Bonheur's contended that these obligations were formed in the course of various transactions entered into between the parties over the years.

Bonheur applied for an order setting aside the sale of the property to Caribbean Estates and the registration of the mortgage bond.

THE DECISION

A co-owner may ordinarily alienate or encumber his share of the jointly owned property. Only if some additional consideration applies would this right be affected. This might be the case if the co-owners have agreed to limit their rights or if they have entered into a partnership agreement. However, in the present case, no such agreement was apparent. Caribbean had therefore been entitled to alienate its share of the property and Wedgeport had been entitled to encumber it with a mortgage bond.

This right is also recognised in section 34(1) of the Deeds Registries Act (no 47 of 1937) which provides that once a co-owner has obtained a certificate of registered title reflecting his undivided share in a piece of land, the transfer of a fraction only of the undivided share may be registered upon production thereof to the registrar of deeds. The hypothecation or lease of the whole or any fraction of the undivided share may equally be registered.

In the present case, there was nothing to indicate that the knowledge or consent of any other co-owner was necessary for the registration of such transfer, hypothecation or lease to be valid, nor that such knowledge or consent was necessary in respect of the underlying contract. The mortgage bond did not encumber the property in issue, nor Bonheur's 54% undivided share in the property, but was limited to binding Wedgeport's 46% undivided share in the property. The mortgage bond evidenced an incorporeal right, conferring on the holder no more rights than any other co-owner of an undivided share in immovable property has or may exercise, and was not dissimilar to the conglomerate of personal rights exercised by the holder or owner of a share in a company.

The application failed.

NORTHVIEW SHOPPING CENTRE (PTY) LTD v REVELAS PROPERTIES JOHANNESBURG CC

A JUDGMENT BY LEWIS JA
(HEHER JA, MLAMBO JA,
MALAN JA and THERON AJA
concurring)
SUPREME COURT OF APPEAL
18 MARCH 2010

2010 (3) SA 630 (A)

A person signing a contract on behalf of a close corporation who is not a member of the close corporation must be authorised in writing to sign such a contract in cases where there is a substantive rule of law requiring that an agent's written authority is required for the conclusion of such contracts.

THE FACTS

Northview Shopping Centre (Pty) Ltd concluded a sale agreement as purchaser of the property of Revelas Properties Johannesburg CC. The agreement was signed by a certain Mr Christelis for Revelas. Christelis was not a member of Revelas and was not authorised in writing to conclude the sale agreement.

Northview claimed specific performance of the agreement. Revelas defended the action on the grounds that Christelis did not have authority to bind it, in consequence of which, no binding sale agreement had been concluded. Revelas contended that Christelis did not have authority to bind it because no authorisation in writing had been given to him as agent, as required by section 2(1) of the Alienation of Land Act (no 68 of 1981). The section provides that no alienation of land shall be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

THE DECISION

An established principle of our law is that in the case of non-natural persons, the requirement that authority to act must be in writing does not apply when a functionary of such a person signs a contract for the sale of land. The principle is based in practicality, because a non-natural person, such as a company, cannot give written authority but must act through officers appointed to act for it. The question in the present case was whether or not the principle applies to an agent of a close corporation who is not a member.

In the case of companies, the position is regulated by section 69 of the Companies Act (no 61 of 1973). There is no equivalent of this provision in the Close Corporations Act (no 69 of 1984) which, in section 54, provides only for the authority of members to bind a corporation. The position is therefore different for close corporations in that only members have the automatic power to bind their corporation.

In view of this, in order to show compliance with section 2(1) of the Alienation of Land Act, there would have to be evidence that Christelis was authorised in writing to conclude the sale agreement on behalf of Revelas.

SP & C CATERING INVESTMENTS (PTY) LIMITED v THE BODY CORPORATE OF WATERFRONT MEWS

A JUDGMENT BY HURT AJA (HARMS DP, NAVSA JA, MTHIYANE JA and PONNAN JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2009

2010 SACLR 34 (A)

A developer of a sectional title development which has stipulated the time period for completion of a development in terms of a certificate of registered title may not extend the time period under section 25(13) of the Sectional Titles Act (no 95 of 1986).

THE FACTS

SP & C Catering Investments Ltd was the developer under a sectional title scheme known as Waterfront Mews. The scheme was initially registered in August 1998 under a certificate of registered title. In terms of section 25(1) of the Sectional Titles Act (no 95 of 1986), the certificate recorded that the developer was the registered holder of the right to erect a building on the property within ten years

Section 25(6) of the Act provides that if no right is reserved in terms of subsection (1) at inception of the scheme or if a right has been reserved but has lapsed, the right to extend the scheme will vest in the body corporate.

SP & C applied for an order extending the period in which to erect the building. It contended that the court could order an extension in terms of section 25(13) of the Act. The section provides that a developer which exercises a reserved right referred to in subsection (1) shall be obliged to erect and divide the building into sections strictly in accordance with the documents referred to in subsection (2), due regard being had to changed circumstances which would make strict compliance impracticable, and an owner of a unit in the scheme who is prejudiced by his failure to comply in this manner, may apply to the court, whereupon the court may order proper compliance

THE DECISION

SP & C contended that upon a proper interpretation of section 25(13), if a developer has been delayed through circumstances beyond its control, its reserved right does not lapse as provided for in the certificate of registered title, but may be extended upon application to court. This ensures that its constitutional property rights are not infringed.

This contention could not be accepted. No constitutional property rights were infringed by 'deprivation' of property because the developer itself stipulated the period for which its rights would subsist, the limit being chosen by the developer itself and not imposed. In any event, the right to erect the building was not to be confused with the obligation to perform the work. Section 25(13) referred to the obligation to perform the work, not the right to complete it. No interpretation of the sub-section allowing the developer an extension of rights could be drawn from it.

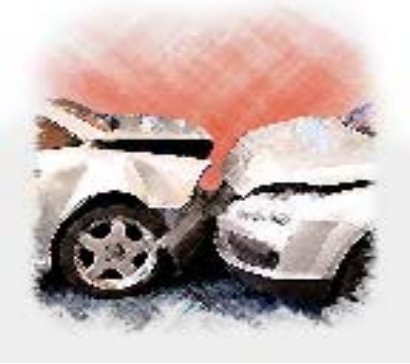
The application was dismissed.

ST PAUL INSURANCE CO SA LTD v EAGLE INK SYSTEM (CAPE) (PTY) LTD

A JUDGMENT BY CLOETE JA (FARLAM JA, LEWIS JA, MHLANTLA JA and TSHIQI AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2010

2010 (3) SA 647 (A)

Insurance



An exclusion of liability clause that excludes liability to indemnify for claims arising out of liability caused by contamination entitles an insurer to repudiate liability in cases where contamination of the product has taken place.

THE FACTS

St Paul Insurance Co SA Ltd insured Eagle Ink System (Cape) (Pty) Ltd against legal liability to pay compensation for claims first made against it in respect of injury and/or damage arising out of the performance of its business.

An exclusion in the policy provided that St Paul would not indemnify the insured in respect of any liability caused by or arising from claims for products sold or supplied by it, or from claims arising out of liability directly or indirectly caused by seepage pollution or contamination, provided that this exclusion would not apply where such seepage pollution or contamination was caused by a sudden unintended and unexpected event.

A product liability extension clause excluded liability arising from defective or faulty design formula plan or specification, treatment or advice by or on behalf of the insured, or arising from inefficacy or failure to perform or conform to specification or fulfil its intended function as specified or guaranteed.

Eagle Ink supplied ink to Nampak Products Ltd, assuring it that the inks it supplied were heavy metal free. Some of the ink actually supplied had lead content. When this came to Nampak's notice, it claim return of the price it had paid for the ink, as well as damages. Eagle Ink claimed indemnity from St Paul. St Paul repudiated liability on the grounds that the exclusion of liability applied, in that the claim arose from contamination.

THE DECISION

'Contamination' was not simply a reference to contamination by the ink but could also mean contamination of the ink. The exclusion provided for, and on which St Paul depended, was therefore applicable, and the insurer was not liable to indemnify in the circumstances of the case.

As far as the exclusion in the product liability extension clause was concerned, while it was possible that this did not apply, the fact that it did not, did not mean that the earlier exclusion could not apply.

St Paul was entitled to depend on the exclusion of liability and was not bound to indemnify.

THE MIEKE
CLASSIC SAILING ADVENTURES (PTY) LTD v REPRESENTATIVE OF LLOYD'S

A JUDGMENT BY CLEAVER J
CAPE OF GOOD HOPE PROVINCIAL DIVISION
27 FEBRUARY 2009

2010 SACLR 41 (C)

An insurer which repudiates a claim must show that the information given to it by the insured was insufficient to put it on inquiry as to the extent of the risk it accepted.

THE FACTS

Classic Sailing Adventures (Pty) Ltd owned the motorised yacht the *Mieke*, and insured it with a syndicate at Lloyds represented by the first defendant.

The Mieke had been constructed as a long line fishing vessel and was used as such for a period of five years. It was then converted into a luxury charter yacht. The skipper, a certain Mr Hennop remained as skipper of the yacht thereafter.

When the insurance cover for the Mieke was renewed, Classic's broker informed the Lloyds representative, through intermediaries, that Classic was experiencing difficulties obtaining certification for Hennop as skipper from the South African Maritime Safety Authority (SAMSA).

After the *Mieke*'s conversion, SAMSA inspected the vessel and granted interim approval of its stability book valid until 15 April 2004. On 19 October 2004, after a hull survey had been conducted, a Local General Safety Certificate in respect of the vessel was issued. This reflected the vessel as a class II sailing vessel undertaking charter excursions or unlimited voyages in the Indian ocean carrying 12 or less passengers, and contained a certificate to the effect that the ship had been inspected in accordance with the requirements of various applicable regulations.

In September 2005, the Mieke sank off the coast of Mozambique. Classic claimed the sum insured in terms of the insurance policy issued by the underwriters. The underwriters repudiated on the grounds that there was material non-disclosure of the fact that Hennop was not qualified as a skipper and that stability information was not accurate and not in the required form. They also relied on the allegation that Classic had misrepresented the nature of the dispute with SAMSA and had carried out the adventure in an unlawful manner.

THE DECISION

There was insufficient evidence to show that the stability book showed discrepancies significant enough to have warranted a repudiation of the policy by the underwriters. There had therefore been no non-disclosure in respect of the information shown in the stability book.

As far as Hennop's qualification as skipper was concerned, disclosure of the difficulties being experienced with SAMSA had been made. This should have alerted the underwriters to the questions concerning his qualification and gave them an opportunity to investigate further. The fact that they did not do so could not result in them being entitled to repudiate on this ground.

As far as the allegation of misrepresentation was concerned, the information conveyed to the underwriters gave a fair presentation of the risk to be undertaken. Although their main concern was that Hennop was not properly qualified as a skipper, they had insured the vessel for a number of years before the sinking took place and they knew at that time that Hennop was in command of the vessel and there were difficulties relating to his qualification which related to SAMSA's ability to properly assess his qualifications. This too, gave them an opportunity to investigate further.

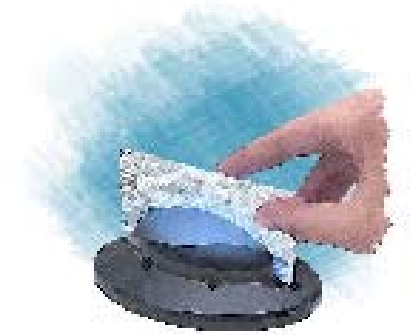
There were therefore no grounds for repudiation of the claim. The claim succeeded.

STARITA v ABSA BANK LTD

A JUDGMENT BY GAUTSCHI AJ
GAUTENG SOUTH HIGH COURT
28 SEPTEMBER 2009

2010 (3) SA 443 (GSJ)

Credit Transactions



A creditor is entitled to depend on delivery of a valid notice in terms of section 129 of the National Credit Act (no 34 of 2005) by service on the debtor's domicilium address.

THE FACTS

Absa Bank Ltd gave a loan to Starita for the purchase of certain fixed property. She was unable to meet her financial commitments under the loan, and as a result, Absa began proceedings to assert its rights under the loan agreement. It sent a notice to Starita in terms of section 129 of the National Credit Act (no 34 of 2005) addressing it to her chosen domicilium citandi et executandi by registered mail. Starita alleged that she did not receive this notice.

Absa issued summons against Starita. As a result of an administrative relating to a duplicate case number issued by the registrar, the bank could not obtain default judgment under that action. It therefore issued a second summons against Starita. The summons was served at her domicilium address but not forwarded to her by the person then in occupation of the premises. The bank took default judgment against Starita. After the issue of the first summons and before the issue of the second summons, Starita applied for a debt review in terms of section 86 of the Act.

Starita then applied for rescission of the judgment on the ground that the bank could not proceed against her in the second action when it had already done so in the first (lis pendens), and on the ground that the notice given in terms of section 129 could not be applicable in the second action but only in the first.

THE DECISION

The Act provides for no time period for the validity of a notice given in terms of section 129. Its validity is therefore not constrained by the effluxion of time and in the present case, the notice remained valid at the time Starita had applied for debt review and thereafter when the second summons was issued.

The only question was what the effect of delivery of the notice at the domicilium address was, given the contention that Starita did not actually receive the notice. Section 96 of the Act provides that the creditor must deliver a notice to the address stipulated in the relevant agreement, or the address most recently given by the recipient. It is not contrary to the provisions and purpose of the Act to permit a credit provider to send a section 129(1) notice by registered mail. The creditor is required only to prove, if necessary, that it duly sent the notice in that manner, and that it sent it to the exact address chosen by the consumer for that purpose. The Act requires no more than this of the credit provider. This is also so where the consumer has chosen a domicilium citandi et executandi. The purpose of choosing a domicilium address for the giving of a prescribed notice under a contract, which is the same as it is for the service of process, is to relieve the party giving the notice of the burden of proving actual receipt of the notice.

It followed that that the section 129(1) notice need not actually have been received by Starita. It was sufficient that it was sent by registered post to the domicilium address. The application for rescission failed.

LEEUW v FIRST NATIONAL BANK

A JUDGMENT BY SNYDERS J (STREICHER JA, HEHER JA, MALAN JA AND LEACH AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2009

2010 SACLR 14 (A)

Banking

An estoppel defence depends on proof that a party negligently made a representation upon which the defendant relied to his prejudice. A bank which assures a customer that a cheque to be deposited is regular on the face of it does not represent that the cheque will be paid and may be treated as good for cash.

THE FACTS

Leeuw sold liquor to Mofokeng for R48 598.69, and deposited a cheque given to him in this amount to his account at First National Bank on 14 May 1999. Before depositing the cheque, he received confirmation from a bank clerk, that the cheque was not post-dated, that the amount in words and figures corresponded correctly and there was no stop-payment on the cheque. The bank allowed him to draw R48 000 against the cheque three days later. At that point, Leeuw requested that the bank confirm that funds were available in his account for the withdrawal. A week later, Leeuw received another cheque from Mofokeng in payment for liquor sold to him, and deposited this to his account at the bank. This cheque was for R89 000.

The cheques were drawn by General Food Industries Ltd. On 24 May 1999, that company notified the bank that both cheques bore forged signatures. The bank reversed the credits in Leeuw's account and then brought an action against Leeuw for repayment of the R48 000 then owing by him, basing its claim on the allegation that Leeuw was enriched at its expense and consequently liable to it under the condictio indebiti.

Leeuw defended the action on the grounds that the condictio indebiti is not competent as a ground of action by a bank against its customer, and on the grounds that the bank was estopped from asserting its claim against him. Leeuw supported his defence based on estoppel on the allegation that the bank had represented to him that the cheque paid by Mofokeng was good, and he had relied on the representation when accepting the cheque.

Leeuw also counterclaimed for payment of R89 000.

THE DECISION

There was no indication that the assurances requested by Leeuw when he brought the cheque for R48 598.69 for deposit were any different from those requested on previous occasions. There were therefore no grounds for accepting that Leeuw had asked for a guarantee that the cheque would be paid or that the bank had confirmed the cheque was good for cash.

Subsequent events showed that Leeuw had not relied on the bank's confirmation at the time of deposit of the cheque for an assurance that the cheque was good for cash. Leeuw had later obtained the bank's assurance that he could withdraw money from his account, and this indicated that his understanding of the earlier confirmation related to the regularity of the cheque rather than a confirmation that it would be paid.

It followed that Leeuw had not established an estoppel against the bank's claim.

BAYLY v KNOWLES

A JUDGMENT BY HEHER JA (HARMS DP, NUGENT JA, LEACH JA and SERITI AJA concurring)
SUPREME COURT OF APPEAL
18 MARCH 2010

2010 (4) SA 548 (A)

Corporations

A shareholder seeking relief in terms of section 252 of the Companies Act (no 61 of 1973) cannot rely on any allegation of unequal treatment in circumstances where that shareholder has rejected an offer for the purchase of his shares by other shareholders and has not given any reason for the rejection.

THE FACTS

Bayly and Knowles were co-shareholders in South African Electronic Tracking Systems Ltd, a company established to market a vehicle tracking system. They invested in the company in equal amounts and held an equal number of shares in the company. They concluded a shareholders' agreement which recorded their purchase of their shares in the company and made provision for various aspects of their relationship as co-shareholders. The intention of the parties was that each would participate in the management of the company.

In due course, the relationship between the two deteriorated and the mutual trust and confidence between Bayly and himself was destroyed beyond the possibility of restoration. Bayly submitted a draft offer for the purchase of Knowles' shares. Knowles made a counter-offer. Neither offer was accepted.

Knowles then applied for an order in terms of section 252 of the Companies Act (no 61 of 1973) for the sale to him of Bayly's shares in the company, alternatively an order in the terms of the counter-offer which he had made to Bayly.

THE DECISION

Knowles' rejection of Bayly's offer, while possibly justified, had important consequences for him when seeking an application in terms of section 252. Since his rejection of the offer was made without reasons, he could not rely on any inequity inherent in his exclusion from participation in the management of the company. Knowles could have protected and redeemed his investment in the company before he approached the court, but because he insisted on his right to retain his shares, he chose not to do so, and thereby abrogated his right to rely on the inequity inherent in the conduct complained of.

It was also significant that the effect of the order sought by Knowles would be to make him the majority shareholder in the company. This would affect other shareholders whose existing position, together with that of Bayly, was that of majority shareholders. Since Knowles had been forced out of management of the company, the effect of making him majority shareholder in the company might have had negative consequences for the company.

The application was dismissed.

HENDRICKS N.O. v CAPE KINGDOM (PTY) LTD

A JUDGMENT BY SHOLTO-DOUGLAS AJ
WESTERN CAPE HIGH COURT
7 DECEMBER 2009

2010 (5) SA 274 (WCC)

In the winding up of a company, strict compliance with the service requirements of section 346 of the Companies Act (no 61 of 1973) is not necessary, provided that the method of service used ensures that the purpose of the Act is achieved.

THE FACTS

In 2008, Hendricks, a trustee of the Cape Biotech Trust which had provided funding for the Cape Kingdom (Pty) Ltd, brought an application for the winding up of the company. When the first attempt to serve the application on the company was made, the company premises were found locked and unoccupied. When the next two attempts at service were made, the application was served on a total of three employees of the company.

A provisional winding up order was given, and this was served by the sheriff by delivery thereof to a director of the company, and by sending a copy by registered post to the employees of the company.

Cape Kingdom opposed the winding up application on the grounds that section 346(4A)(a)(ii) of the Companies Act (no 61 of 1973) had not been properly complied with. This section provides that when a winding up application is presented to court, the applicant must furnish a copy of the application to the employees of the respondent company. The section provides that this may be done by affixing a copy of the application to a notice board to which the applicant and employees have access, or if there is no access, by affixing a copy of the application to the front gate or front door of the company's premises.

The company also opposed the winding up application on the grounds that section 346A of the Act had not been properly complied with. This section provides that a provisional winding up order must be served on the employees of the company in the same manner as the application for winding up.

THE DECISION

Given the fact that the premises were locked and unoccupied, any attempt to serve the application in the precise terms set out in the section would have been futile. The question was whether or not in these circumstances, strict compliance with the requirements of section 346 had to be adhered to.

The employees of the company no longer attended the premises of the company. The application for winding up was nevertheless served on a number of the employees. To require that service be effected on all the employees in these circumstances would promote no legitimate purpose of the statute.

As far as service by the sheriff was concerned, his return of service on the employees recorded that he made three unsuccessful attempts at service before ultimately serving the order on the director. As he confirmed that there were no employees at the given address, the sheriff did not affix the order to a notice board at the premises or to the front gate thereof, but handed the order to that director. Furthermore, a copy of the order was sent by registered post to all of the employees and service of the application papers was effected. The purpose of the section had therefore been met and the section complied with.

A winding up order was granted.

BURNETT v DELOITTE & TOUCHE

A JUDGMENT BY BOZALEK
WESTERN CAPE HIGH COURT
20 APRIL 2010

2010 (5) SA 259 (WCC)

A determination made pursuant to an arbitration award must be set aside by an aggrieved party before that party can establish a right of action against a party alleged to have caused loss as a result of that determination. Prescription of any claim against the party alleged to have so caused loss does not begin to run until that determination has been set aside.

THE FACTS

Burnett bought the shares and loan account in a company for R1m from Mr A Fyfe. A dispute arose between them in which Burnett alleged that certain misrepresentations had been made regarding the company's financial position by Fyfe's auditors, Deloitte & Touche. The dispute was settled by arbitration and an ensuing settlement agreement which provided that an independent valuation of the company's financial position as at the date of the sale would be effected.

In November 2004, the valuation was effected, but Burnett contended that it was unreasonable, irregular and wrong. The following month, he brought an action to set it aside. In 2007, the action was settled, the parties agreeing that the valuation would be set aside and conducted again by a second valuer. In June 2007, the second valuation was made. This was R900 000 less than the first valuation. Fyfe disputed this valuation. The parties concluded a third settlement agreement and in October 2007, Fyfe paid Burnett R1.5m in terms thereof.

In March 2008, Burnett began an action against Deloitte & Touche claiming damages. The claim was based on the allegation that Deloitte & Touche failed to effect the first valuation correctly, and as a result Burnett had been unable to recover from Fyfe the full amount he would have been owed had the firm effected the first valuation corectly.

Deloitte & Touche raised the defence that Burnett's claim had prescribed in November 2007, three years after the first valuation had been made, or at the latest in December 2007, three years after Burnett brought his action to set it aside.

THE DECISION

It was true that by December 2004, Burnett had knowledge of the alleged breach of the underlying agreement. However, until such time as Burnett set aside the first valuation, it continued to bind him and Fyfe. The continuing existence of the binding valuation would have been a complete answer to any action for damages instituted by Burnett. It was an essential element of his cause of action that the first valuation complained of had first to be set aside.

The plea of prescription focussed solely on Burnett's rejection of the first valuation, based upon the alleged breaches of the underlying agreement. But the fact remained that Burnett had to have the first valuation set aside as it was made in terms of an arbitral award which remained valid until set aside. In the absence of sufficient grounds to set aside the award it remains final and binding on the parties and either party aggrieved by it could not have simply treated the other's alleged malperformance of any ensuing agreement as a repudiation and terminated the contract. That option was not open to Burnett in December 2004.

Prescription therefore did not commence running until, at the earliest, the first valuation or arbitration award was set aside in 2007. The special plea of prescription therefore had to fail, since the present action was instituted within a period of three years from that date.

SIMCHA PROPERTIES 6 CC v SAN MARCUS PROPERTIES (PTY) LTD

A JUDGMENT BY MLAMBO JA (LEWIS JA, HURT AJA, GRIESEL AJA and SERITI AJA concurring) SUPREME COURT OF APPEAL 31 MARCH 2010

2010 SACLR 215 (A)

Authority given by a company for the conclusion of a specific transaction in terms of section 228 of the Companies Act (no 61 of 1973) may be understood to have been given for any amendment or reinstatement of such a transaction.

THE FACTS

Simcha Properties 6 CC bought fixed property from San Marcus Properties (Pty) Ltd. The property was the sole asset of the company.

Prior to signature, San Marcus passed a resolution in terms of section 228 of the Companies Act (no 61 of 1973) that the company dispose of the property and authorise Mr D.M. Harris to sign documents required to give effect thereto. Following signature, the company ratified the sale and authorised Harris to sign all documents necessary for implementation.

The agreement lapsed due to non-fulfilment of a suspensive condition, but the parties reinstated it by a later agreement.

Simcha Properties later contended that the agreement was void because Harris did not have the authority to conclude it on behalf of San Marcus, the resolution having related only to the first agreement and not the second. Simcha also contended that because section 228 of the Companies Act had been amended prior to conclusion of the second agreement, the resolution passed in terms of that section was ineffective in respect of the second agreement. San Marcus brought an application for an order compelling Simcha to implement the agreement and take transfer of the property.

THE DECISION

(per Mlambo JA)

The resolution passed by the company prior to signature of the first agreement provided that Harris was authorised to sign all such documents and do all such acts and things as were required to give effect to that transaction. The ambit of this resolution was wide enough to include the transaction under which the first agreement was reinstated. As the latter was not a new transaction, but the same one that Harris had concluded on behalf of the company at the earlier stage, the resolution applied to it and provided the necessary authorisation for its conclusion.

(per Hurt JA)

As far as section 228 was concerned, this provision applied to the transaction, but the resolution required by the section was given. To hold that the effect of the amendment of section 228 was to render compliance with it in its unamended state ineffective would be to give the section retrospective effect. The amended section could not be interpreted so as to allow it to apply retrospectively.

The application was granted.

DUET AND MAGNUM FINANCIAL SERVICES CC (IN LIQUIDATION) v KOSTER

A JUDGMENT BY NUGENT JA (HEHER JA, VAN HEERDEN JA, THERON AJA and SERITI AJA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2010

2010 (4) SA 499 (A)

Prescription

Prescription begins to run against a claim which is conditional on proof that the debtor is liable under some statutory provision as soon as the creditor is aware of the identity of the debtor and the facts giving rise to the claim, and not when the creditor has proved the condition.

THE FACTS

The liquidators of Duet and Magnum Financial Services CC brought an action against Koster to set aside a disposition of R459 446,71 made to him.
Koster defended the action on the grounds that the claim had prescribed, the disposition having been made, at the latest, by March 2002. Summons was served in July 2005.
The court was asked to determine whether or not the disposition was correctly characterised as a 'debt' and accordingly a claim to which prescription did apply, it being contended that the debt could only arise after an order for the setting aside of the disposition had been made.

THE DECISION

A claim founding a cause of action does not arise only once a court has given judgment on the claim. It arises once all the conditions necessary for its existence have been fulfilled. The question only is whether those conditions have been fulfilled.
The liquidators' claim against Koster arose upon their appointment as liquidators. It was not dependent on a declaration by a court that the claim existed. However, the liquidators sought an order that Koster was a debtor as from the date on which such a declaration was to be made. To grant such an order would be to misconstrue the nature of the right conferred in the Insolvency Act entitling liquidators to sue in circumstances where a voidable disposition has been made. While that Act created a new remedy, it did not also provide that the remedy would only arise once a judgment affirming that remedy in a particular case had been given.
Prescription began to run from the date of the liquidators' appointment, and had therefore run by the time summons was issued.

I agree with the conclusion of Nel J in Burley , *and with his reasons for that conclusion. The same conclusion was reached by Goodey AJ in* Barnard NO v Bezuidenhout en Andere , *but for different reasons and in my view they apply as much in this case. I think it is clear that the sections of the Insolvency Act with which we are concerned give a right to a liquidator, in prescribed circumstances, to have a person declared to be a debtor of the estate, and its complement is a 'debt' for purposes of prescription, in that the person concerned is liable to have such a declaration made. This case is distinguishable from* Burley *only in this respect, that under the Insolvency Act the right accrues only in a winding-up. Whether the relevant date for the commencement of prescription is the date that the winding-up commences, or the date that a liquidator is appointed, is not a matter with which we need concern ourselves - the effect of s 12(3) of the Prescription Act is that that question will never arise. It is sufficient to say that prescription ordinarily commences to run no later than the date upon which a liquidator is appointed. Whether the commencement of prescription has been delayed in this case under the provisions of s 12(3) of the Prescription Act is not a matter that we are called upon to decide.*

FIRSTRAND BANK LTD v DHLAMINI

A JUDGMENT BY MURPHY J
NORTH GAUTENG HIGH COURT
18 NOVEMBER 2009

2010 (4) SA 531 (GNP)

Credit Transactions

Compliance with section 129(1) of the National Credit Act (no 34 of 2005) requires that notice of any default by the consumer be brought to his or her actual attention, and that failure on the part of the credit provider to do so will bar the institution of legal proceedings, with the result that any action instituted before then will be premature.

THE FACTS

Firstrand Bank Ltd brought an action against Dhlamini claiming that he was in default of the terms of a mortgage bond by having failed to pay instalments due thereunder.

Dhlamini defended the action on the grounds that the bank had not given him prior notice of his default in terms of section 129(1) of the National Credit Act (no 34 of 2005). This section provides that if a consumer is in default under a credit agreement, the credit provider may not commence any legal proceedings to enforce the agreement without first providing the consumer with a notice of default as provided for in the Act.

The bank had despatched a registered letter to Dhlamini's chosen domicilium address giving prior notice of his default in terms of section 129(1), but Dhlamini had not received the letter because the post office to which it was sent did not send him a notice that the letter was awaiting collection.

The bank took the view that because it despatched the letter to Dhlamini's domicilium address, this constituted sufficient compliance with section 129(1) and it was irrelevant that the letter did not come to Dhlamini's attention.

THE DECISION

The question to ask when determining whether or not a credit provider has complied with section 129(1) is not whether or not the notice has been delivered to the consumer, but whether the credit provider has drawn the default to the notice of the consumer in writing. The conditions for proper delivery of a notice to a consumer should not be the determinant of whether or not notice of the default has been drawn to the consumer.

The cumulative effect of section 129(1) is to require of the credit provider more than that it merely effect delivery in the manner prescribed by the Act. The credit provider must ensure that its notices to a consumer are served on the consumer in a manner which brings to the consumer an awareness of the alleged default. The wording of the section indicates that mere delivery without notice to the consumer will be insufficient - 'draw the default to the notice of the consumer in writing' is to be distinguished from deliver in a technical sense. Furthermore, to hold that delivery in that sense is sufficient would be to defeat the purpose of the Act, which is to provide for a consistent and accessible system of consensual resolution of disputes arising from credit agreements by means of a consistent and harmonised system of debt restructuring, enforcement and judgment that places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

Compliance with section 129(1) of the Act requires that notice of any default by the consumer be brought to his or her actual attention, and that failure on the part of the credit provider to do so will bar the institution of legal proceedings, with the result that any action instituted before then will be premature.

ROSSOUW v FIRSTRAND BANK LTD

A JUDGMENT BY MAYA JA
(MPATI P, NAVSA JA, CLOETE JA and EBRAHIM AJA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2010

UNREPORTED

If a consumer chooses an address at which to accept notices by a credit provider, then the despatch of such a notice to the consumer will be considered sufficient compliance with the delivery requirements of the National Credit Act.

THE FACTS

Firstrand Bank Ltd brought an action against Rossouw claiming repayment of a loan due to default by Rossouw. It alleged that it had delivered a notice of default in terms of section 129(1)(a) of the National Credit Act (no 34 of 2005) by despatching the notice to the domicilium address chosen by Rossouw.

Clause 21.3 of the parties' agreement provided that a certificate signed on behalf of the bank, stating that a notice had been given, would be sufficient proof thereof. The bank annexed such a certificate to its summons. One of the defences raised by Rossouw to the bank's action was that he had not received the notice.

The bank applied for summary judgment.

THE DECISION

Section 65 of the Act allows for delivery of notices by mail, and if a consumer chooses to accept delivery of notices in this manner, as Rossouw had, then despatch in this manner will constitute sufficient compliance with the Act, whether or not the notice is actually received.

One may conclude from the wording of section 168 of the Act that sending a document by registered mail is proper delivery. The certificate issued by the bank was however, insufficient to establish that delivery was effected as it merely alleged that the notice was issued.

It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility and it is after all within a consumer's sole knowledge which means of communication will reasonably ensure delivery to him. It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice in the manner chosen by the appellants in this matter sufficient for purposes of s 129(1)(a) and that actual receipt is the consumer's responsibility.

STANDARD BANK OF SOUTH AFRICA LTD v KRUGER

A JUDGMENT BY KATHREE-SETILOANE AJ
SOUTH GAUTENG HIGH COURT
23 APRIL 2009

2010 (4) SA 635 (GSJ)

A credit provider is not entitled to terminate debt review proceedings which have been referred to a magistrates' court in terms of section 86(8)(b) of the National Credit Act (no 34 of 2005).

THE FACTS

Kruger applied for a debt review in terms of section 86 of the National Credit Act (no 34 of 2005). The debt review was then referred to the magistrates' court in terms of section 86(8)(b) of the Act. In terms of section 86(10) of the Act, the Standard Bank of South Africa Ltd terminated the debt review due to default in terms of the mortgage bond on which Kruger was indebted to it. Section 86(10) provides that a credit provider may give notice to terminate a credit agreement that is being reviewed at least sixty business days after the date on which the consumer applied for debt review.

The bank then brought an action against Kruger for repayment of the debt. In summary judgment proceedings, Kruger contended that as the debt review proceedings had been referred to the magistrates' court and had not yet been finalised in that court, the action against him was premature.

THE DECISION

Section 86(10) refers to a credit agreement that is being reviewed in terms of that section. A credit provider's right to terminate therefore depends on whether or not such a review is being conducted. If the review has been referred to the magistrates' court, then such a review is not being conducted, because then the review will be subject to section 87 of the Act. Any termination of such a review by a credit provider will then be ineffective.

The only debt review which may be terminated by a credit provider is one which is undertaken by a debt counsellor. Were it possible for a credit provider to terminate a debt review referred to the magistrates' court, proceedings in that court could be brought to an end before completion, thus rendering ineffective the protective measures provided for in the Act. A credit provider is obliged to wait until a magistrate has made a determination in terms of section 87 of the Act before proceeding to enforce its claim.

Summary judgment was refused.

NAIDOO v ABSA BANK LTD

A JUDGMENT BY CACHALIA JA (MTHIYANE JA, HEHER JA, SHONGWE JA and TSHIQI JA concurring)
SUPREME COURT OF APPEAL
27 MAY 2010

2010 (4) SA 597 (A)

Section 130(3) of the National Credit Act (no 34 of 2005) does not apply to sequestration proceedings and accordingly no notice to the debtor as referred to in section 129(1)(a) of the Act is necessary prior to the bringing of such proceedings against a debtor.

THE FACTS

Naidoo's estate was sequestrated at the instance of Absa Bank Ltd, to which Naidoo owed money in terms of two home loans and six instalment sale agreements. The sequestration proceedings were not preceded by a notice of default in terms of section 129(1)(a) of the National Credit Act (no 34 of 2005).

Naidoo contended that a notice of default should have been delivered to him as the bank's claim was based on a credit agreement as referred to in section 130(3) of the Act. He contended that even though sequestration proceedings are not legal proceedings to enforce an agreement, this section includes sequestration proceedings within its ambit.

THE DECISION

A sequestration order is a species of execution, affecting not only the rights of two parties, but also affecting third parties. It involves the distribution of the insolvent's property to creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent. It is not an ordinary judgment entitling a creditor to execute against a debtor.

It follows that an order for the sequestration of a debtor's estate is not an order for the enforcement of the sequestrating creditor's claim, and sequestration is thus not a legal proceeding to enforce an agreement. It is therefore not a proceeding to which the National Credit Act applies.

Even though I have held that a credit provider need not comply with the procedure provided for in s 129(1) (a) *before instituting sequestration proceedings against a consumer (the s 129 notices are therefore immaterial to the outcome of this appeal), it should be borne in mind that when the High Court granted leave to appeal to this court there was no decided case on this question. The* Mutemeri *judgment was delivered after the High Court granted the appellant leave to appeal on this point. So, given the uncertainty on this legal issue, the respondent in my view acted reasonably by attempting to place this evidence before this court. The appellant's opposition to the application on the other hand was not based on whether the evidence sought to be admitted on appeal was relevant. Instead he attempted, without any factual basis, to impugn the respondent's motives in bringing the application. However, because of the view I have taken on how s 129(1) and s 130(3) should properly be interpreted, the further evidence has no bearing on the outcome of the appeal. In the circumstances I think it is appropriate for each party to pay its own costs on this aspect.*

STANDARD BANK OF SA LTD v ROCKHILL

A JUDGMENT BY EPSTEIN AJ
SOUTH GAUTENG HIGH COURT
11 MARCH 2010

2010 (5) SA 252 (GSJ)

If a credit provider brings an action for enforcement of a credit agreement prematurely, it may be given an opportunity to comply with the conditions necessary for an action against the consumer before proceeding with the action.

THE FACTS

Standard Bank of SA Ltd brought an action against Rockhill for repayment of a loan. Clause 14.3 of the mortgage bond upon which the bank's action was based provided that Rockhill chose an address to which notices could be delivered and accepted that any notices posted to the address by registered post would be regarded as having been received within fourteen days of posting.

Section 130(1)(a) of the National Credit Act provides that a credit provider may approach a court for an order to enforce a credit agreement if at least 10 business days have elapsed since the credit provider delivered a notice to the consumer in terms of the Act.

The bank despatched a notice to Rockhill on 25 November 2009, and issued summons against him on 17 December 2009. In opposing summary judgment proceedings, Rockhill alleged that he had not received the notices and that any action against him was therefore precluded.

THE DECISION

Section 129(1)(a) of the Act does not require that the consumer actually receive the notice of default. However, in clause 14.3, the parties had provided for the delivery of notices, and these terms had to be complied with in order for the bank to succeed in its action against Rockhill.

By virtue of this provision, the 10 business days provided for in s 130(1)(a) would only commence after the fourteenth day from the date of posting of the letters. As the notices are deemed to have been received fourteen days after they were posted, the 10 business days provided for in section 130(1)(a) had not elapsed by the time the summons was issued. The action was therefore premature.

This did not establish a bona fide defence to the action for summary judgment purposes, but did result in the application for summary judgment being postponed to a later date pending compliance with the contractual terms.

GROENEWALD NO v M5 DEVELOPMENTS (CAPE) (PTY) LTD

A JUDGMENT BY LEACH JA (NAVSA JA, CLOETE JA, LEWIS JA and MHLANTLA JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2010

2010 (5) SA 82 (A)

Contract

An appeal by an unsuccessful tenderer to a municipality must be assessed in relation to that tenderer only and does not entitle other unsuccessful tenderers to an assessment of their failed tenders as well.

THE FACTS

In 2007, the Overstrand Municipality invited tenders for the provision of low-cost housing within its area of jurisdiction. It received sixteen tenders, including that of M5 Developments (Cape) (Pty) Ltd and of another company known as ASLA.

A firm of consulting engineers evaluated the tenders, and allocated points to each of them in accordance with the Preferential Procurement Policy Framework Act (no 5 of 2000). M5's points were the greatest of all the tenderers, and slightly higher than that of ASLA. The municipality's tender adjudication committee accepted the recommendation of the consulting engineers and the municipality awarded the tender to M5.

ASLA lodged an appeal three weeks after the deadline for submission of an appeal. A newly appointed municipal manager, Groenewald, decided to reassess the merits of the various tenders. Groenewald determined that the municipality's evaluation committee had incorrectly accepted the consulting engineer's points assessment of the various tenderers, readjusted the allocated points by increasing those allocated to ASLA, and awarded the tender to ASLA.

M5 applied for a review of this decision.

THE DECISION

The essential question was whether the municipality had been entitled to award the contract to the unsuccessful tenderer, ASLA, which had not appealed against the initial decision to award it to M5.

Section 62(1) of the Systems Act (no 32 of 2000) provides that a person whose rights are affected by a decision taken by a municipality may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision. The assessment of an appeal is made in the context of the appeal actually brought under this section and not in the context of any other potential complaint. It therefore authorises no assessment of an appeal which might have been brought by other parties such as ASLA in the present case. The appeal which was before the municipality was that of another party and not ASLA and there was therefore no basis in this section upon which the municipality could have awarded the tender to ASLA.

The review of Groenewald's decision was confirmed.

MOSEME ROAD CONSTRUCTION CC v KING CIVIL ENGINEERING CONTRACTORS (PTY) LTD

A JUDGMENT BY HARMS JA (NUGENT JA, CLOETE JA, LEWIS JA and THERON AJA concurring)
SUPREME COURT OF APPEAL
15 MARCH 2010

2010 (4) SA 359 (A)

In considering an application to set aside the award of a tender where there are no allegations of fraud or corruption, a court must take into account the possible consequences of a declaration of invalidity of the award.

THE FACTS

The Gauteng Department of Public Transport invited tenders for the construction of a section of a dual carriageway. The advertisement specified the category of civil engineering contractors who could tender, ie those capable of performing contracts having a value in excess of R100m.

King Civil Engineering Contractors (Pty) Ltd submitted a tender. When the Department first advertised for tenders, it was not eligible to do so as it did not fall within the category of civil engineering contractors required. However, the tender documents were later amended so as to allow for tenders from other categories of contractors which included King.

King scored the highest points under the Preferential Procurement Policy Framework Act (no 5 of 2000) but Moseme Road Construction CC was awarded the contract because it was considered unfair that the original advertisement had excluded contractors which might have been unaware of the later change of tender conditions. Moseme had fallen within the category of civil engineering contractors required, as originally advertised.

Moseme began work on the construction of the carriageway, and this work proceeded to the point where there were three more months to run before completion.

King brought an application to set aside the award of the tender to Moseme, and asked that the court award the contract to itself.

THE DECISION

When deciding whether or not a tender award should be declared invalid, a court must consider the possible consequences of such a declaration. In the present case, the most important factor was that when tenders were originally called for, Moseme and not King, qualified to make the tender. The effect of revoking the tender in favour of Moseme and awarding it to King would therefore be that an innocent party would be affected.

It was contended that the contract in question was one in which the respective performances were remeasurable, and that this meant that each contractor's work could be assessed to the extent that it had been performed, or would need to be performed, and remunerated appropriately after King had taken over the work which it was entitled to do. However, this too did not take into account the fact that Moseme was an innocent party and would be unfairly affected by having the award of the tender taken from it.

King was therefore not entitled to an order setting aside the award. The application failed.

FEDBOND PARTICIPATION MORTGAGE BOND MANAGERS (PTY) LTD v INVESTEC EMPLOYEE BENEFITS LTD

Contract

A JUDGMENT BY MLAMBO JA (HARMS DP, MTHIYANE JA, CAHALIA JA and SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2010

2010 SACLR 173 (A)

A manager under a participation mortgage bond scheme is obliged to honour obligations undertaken in terms of investments made by investors. No common understanding not reduced to writing entitling a manager to extend investments longer than their stated period is binding on the investor.

THE FACTS

Fedbond Participation Mortgage Bond Managers (Pty) Limited was the manager of a mortgage participation mortgage bond scheme. As manager, it accepted funds invested for participation in mortgage bonds, the investor's funds being allocated to lending on the security of identifiable mortgage bonds over a period of five years. This was originally done under the provisions of the Participation Bonds Act (no 55 of 1981), and then under the provisions of the successor Act, the Collective Investment Schemes Control Act (no 45 of 2002).

The terms and conditions of investment were provided for in these Acts, as well as in regulations promulgated in terms of them, and in Rules issued by Fedbond in relation to the investments. They included the provisions that an investment was to be for a minimum of five years and that withdrawal of the investment was permitted upon three months' notice being given.

In 1997, Fedsure Life Assurance Ltd agreed to invest funds in Fedbond's participation bond scheme. From that year and until 2002, Fedlife invested a total of R46 030 000 in the scheme.

In 2001, Fedlife was acquired by the Investec Group and its name was changed to Investec Employee Benefits Ltd (IEB). In 2006, IEB gave three months' notice of withdrawal of the total investment under the scheme. The following year, IEB transferred to Capital Alliance Life Ltd and Channel Life Ltd portions of the investment. Those three parties then demanded payment of the investment made with Fedbond.

Fedbond refused to repay the investments on the grounds that when they were originally made, there was a common understanding of members of the Fedsure Group that investment would not be called up simultaneously, but withdrawals would be gradual and individual notices would be required at intervals not shorter than those at which those investments had initially been made.

An alternative reason for refusing to repay the investments was that no debtor-creditor relationship between the parties existed because the investors' debtor was not Fedbond but the nominee company under which the mortgage bonds were registered. The nominee company was Fedbond Nominees (Property) Ltd. It had been formed and registered for the purpose of holding participation bonds, included in the scheme, in trust as nominee for or representative of participants in the scheme.

IEB, Capital Alliance and Channel applied for an order that Fedbond repay the total investment made.

THE DECISION

(per Mlambo JA)

The terms of the common understanding contended for by Fedbond implied that the investment was to be for a period longer than five years and there could be no lump sum withdrawal. They therefore directly contadicted the terms provided for in the legislation and in the Rules published by Fedbond itself. They were inconsistent with the agreement so recorded and were therefore inadmissible as evidence of the investment agreement.

It was also evident from Fedbond's initial reaction to the notice of withdrawal that no common understanding existed. At that stage, it did not raise the objection that a withdrawal

could not be effected contrary to any such common understanding, the contention having been raised only in its answering affidavit after the litigation had begun.

As far as the contention based on the lack of a debtor-creditor relationship was concerned, Fedbond relied on the terms of section 6(1) of the Participation Bonds Act, which was not altered by its repeal in the Collective Investment Schemes Control Act. This provides that the debt secured by a participation bond shall to the extent of the participation granted to any participant be a debt owing by the mortgagor to such participant and not to the nominee company, and the rights conferred by the registration of any such bond shall, notwithstanding the registration of the bond in the name of the nominee company, be deemed to be held by the participants.

This section however, does not detract from the fact that when Fedbond took investments as manager of the scheme, it also undertook certain obligations toward investors, including the obligation to repay the investment except in circumstances where the mortgagor in question had not itself repaid the funds lent to it. (per Harms DP)

Fedbond's contention that it was entitled to rely on the common understanding was an attempt to show that it fell within Rule 22(2)(a) of the Collective Investment Scheme Control Act , which provides that a manager may withhold consent to the withdrawal of an investment subject to the manager furnishing reasons for withholding such consent. However, the Rule applies where there has been no agreement concerning the investment. In any event, the reason given by Fedbond - that there was a common understanding of the kind alleged - was not in fact a reason, but an excuse.

As far as the contention bases on absence of a debtor-creditor relationship was concerned, it was an over-simplification to say that the investor's debtor was the nominee company only. The manager of the scheme also understook to manage and structure the investment so that if an investor gave notice of withdrawal, the bond could be called up for that purpose. This created an obligation on the manager that it would be liable to repay the funds to the investor if the nominee company had not acquired the funds from the mortgagor to do so.

The application was granted.

I am of the view that the relationship created when an investment is made in such a scheme is tripartite in nature. Whilst the respondents, as investors, are in fact creditors vis a vis *the mortgagor(s), Fedbond remains in the picture as the administrator of the investment scheme. Whilst it is further correct conceptually that Fedbond as manager of the scheme does not become a debtor to a participant, the agreement between them provides for certain obligations by either. The agreement encompasses a relationship between Fedbond and the respondents in terms of which once they have complied with the agreement and the rules in terms of notice and payment of the relevant fees and charges, Fedbond as manager must honour the withdrawal notice, unless it contends that the funds are not available which will kick-start the process envisaged in rule 15 and 16. Those rules essentially provide for the procedure to be followed by a participant regarding the enforcements of its injusts against a defaulting mortgagor.*

MAREE v BOOYSEN

A JUDGMENT BY NAVSA JA
(MLAMBO JA and BOSIELO JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2010

2010 (5) SA 179 (A)

Insurance

The protective provisions of the Long Term Insurance Act (no 52 of 1998) and rules and regulations promulgated thereunder apply to insurer, intermediary and insured, and their effect cannot be avoided by concluding any agreement attempting to do so.

THE FACTS

Booysen was Maree's insurance broker and financial consultant. In July 2006, Booysen advised Maree to have his life insurance policy with Sanlam paid up and replace it with a Momentum life policy. Maree did so.

Thereafter, Maree took the view that Booysen had advised him wrongly and had been motivated by a commission which would be due to him upon Maree taking up the policy with Momentum. He therefore cancelled the policy with Momentum and terminated Booysen's services as his broker.

The effect of Maree's cancellation of the policy was that Booysen lost a commission of R47 738,27 which would have been due to him from Momentum Life. Booysen contended that he and Maree had agreed that Booysen would be compensated for the advice he gave Maree, from the commission due to him from Momentum Life.

In terms of rule 6.1 of the Policyholder Protection Rules promulgated in terms of the Long Term Insurance Act (no 52 of 1998) a new policyholder is entitled to cancel any policy during a cooling-off period. This period subsisted at the time Maree cancelled the policy with Momentum Life. Section 49 of the Act provides that no consideration shall be offered or provided by a long-term insurer or a person on behalf of the long-term insurer or accepted by any independent intermediary for rendering services as intermediary other than commission contemplated in the regulations and otherwise than in accordance with the regulations.

Booysen brought an action against Maree for payment of the lost commission. Maree defended the action on the grounds that no commission was due to Booysen as he had cancelled the policy in circumstances that did not entitle Booysen to payment of commission in terms of the Act.

THE DECISION

The agreement concluded between Maree and Booysen was not exempt from the provisions of the Act and the Rules. The Act and the Rules apply to all agreements and arrangements concluded between parties, whether they be insurer, intermediary or insured. Section 49 is not ambiguous in this regard, and would apply to the agreement concluded between Maree and Booysen.

The effect of section 49 was to limit the consideration to be offered by a long-term insurer, to persons such as intermediaries, to commission as contemplated in the regulations. Furthermore, it restricts the consideration that may be accepted by an independent intermediary, for rendering services as such, to commission as contemplated by the regulations. Since the cancellation of the policy took place within the cooling off period, no commission was payable to Booysen, and no agreement between him and Maree could change this. If enforcement of Booysen's claim was to be permitted, the effect of this would be to penalise a consumer financially for exercising the statutory right to cancel a policy within the cooling-off period.

The action was dismissed.

MITCHELL v BEHEERLIGGAAM RNS MANSIONS

A JUDGMENT BY MURPHY J
NORTH GAUTENG HIGH COURT
4 JUNE 2010

2010 (5) SA 75 (GNP)

Property

A body corporate of a sectional title scheme may charge compound interest on arrear levies due from the owner of a sectional title unit.

THE FACTS

Mitchell bought a sectional title unit in the sectional title scheme RNS Mansions at a sale in execution. The terms of sale recorded that the purchaser would be liable to pay all outstanding levies due to the body corporate. Shortly after the sale, the body corporate delivered its account of oustanding levies to Mitchell. This reflected an amount owing of R180 579.26. This amount included interest which had been capitalised.

Mitchell contended that as the capital amount outstanding was only R55 061.75, the interest claimed was unlawful in that it was contrary to the in duplum rule. He contended that the body corporate was not entitled to charge compound interest on the arrear levies, and brought an application for an order declaring that it was only entitled to charge simple interest.

THE DECISION

It would not be necessary for specific authorisation for the charging of compound interest to be given in the Sectional Titles Act before the body corporate would be entitled to charge such interest.

Section 37(2) of the Act provides that any contributions levied shall be due and payable on the passing of a resolution to that effect by the trustees of the body corporate, and may be recovered by the body corporate by action in any court of competent jurisdiction from the persons who were owners of units at the time when such resolution was passed. Rule 31(5) of the standard rules applicable to sectional title schemes provides that an owner shall be liable for and pay all legal costs, including costs as between attorney and client, collection commission, expenses and charges incurred by the body corporate in obtaining the recovery of arrear levies, or any other arrear amounts due and owing by such owner to the body corporate, or in enforcing compliance with the rules, the conduct rules or the Act.

It is clear from the rule, specifically in its reference to 'other arrear amounts' , that it refers to a broader category of unpaid debts than arrear levies and therefore would include interest on unpaid levies. The following sub-rules authorises the body corporate to charge interest on arrear amounts. On a literal interpretation, this would include compound interest.

The body corporate was therefore not prevented from charging compound interest by the Act, and it was entitled to do so.

MKHIZE v UMVOTI MUNICIPALITY

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT
21 MAY 2010

2010 (4) SA 509 (KZP)

If the right to housing is not in issue in a sale in execution of fixed property, then the requirement of judicial oversight of a court order that property be attached and sold in execution falls away.

THE FACTS

In 2003, Mkhize's house was attached and sold in execution. The plaintiff was Umvoti Municipality, the cause of action being unpaid rates and other charges due to the municipality. Mkhize did not live in the house at any stage, but resided at separate property he owned.

The attachment and sale of the property and its transfer took place prior to the judgment handed down in the case of *Jaftha v Schoeman* 2005 (2) SA 140 (CC). The effect of this judgment was to require that when implementing the sale in execution of a debtor's fixed property in terms of terms of section 66(1)(a) of the Magistrates' Courts Act (no 32 of 1944), a court must make an order for the sale in execution, after considering all relevant circumstances.

Mkhize contended that although the judgment in *Jaftha* had been handed down after the sale in execution of his property, the failure to comply with the strictures contained in it rendered the sale void.

THE DECISION

The judgment handed down in the case of Jaftha v Schoeman took effect from the date on which the new Constitution began, not from the date of the judgment, because *Jaftha* interpreted the effect of the new Constitution from its inception. It was therefore no answer to Mkhize's claim to contend that it sought relief in respect of events that had taken place prior to that judgment.

However, if *Jaftha* were to be applied to the attachment and sale in execution of Mkhize's property, those events would not be affected. If the question was asked whether the sale in execution of the property infringed Mr Mkhize's existing right to adequate housing in terms of the Constitution, the answer would be in the negative. On a proper construction of the judgment and the orders granted under it, there was no ground for concluding that the Constitutional Court considered or contemplated the result for which Mr Mkhize contended, nor was there the slightest indication that the court was intending to invalidate every sale in execution of immovable property in terms of s 66(1)(a) from the date of commencement of the Constitution until the date of its judgment.

The *Jaftha* judgment is ambiguous to the extent that it is not clear whether it applies to all sales in execution which had hithterto taken place without judicial oversight, or to the case before it in which the right to housing was in question. In these circumstances, the proper approach to adopt is to focus on the issue that was raised in Jaftha and to construe its judgment and the orders it made in the light of that issue. Doing so means that if the right to housing is not in issue in the particular case, then the requirement of judicial oversight falls away.

As the right to housing was not in question in the case of Mkhize, there were no grounds for avoiding the sale in execution.

OFFIT ENTERPRISES (PTY) LTD v COEGA DEVELOPMENT CORPORATION (PTY) LTD

Property

A JUDGMENT BY WALLIS AJA
(HARMS DP, LEWIS JA, MAYA JA and HURT AJA concurring)
SUPREME COURT OF APPEAL
15 FEBRUARY 2010

2010 SACLR 150 (A)

It is not impermissible for expropriation of property to take place in order to achieve the aims of a private company which has been established to achieve a public purpose.

THE FACTS

Offit Enterprises (Pty) Ltd owned three properties situated in the Coega Industrial Development Zone. The Zone was an area demarcated as part of a government initiative to create an industrial area and new deepwater harbour north of Port Elizabeth. Coega Development Corporation Ltd was established to develop the area, its shareholders being the Eastern Cape Provincial Government and the Department of Trade and Industry. It did so under provisional operator permits which were extended from time to time.

In 2000, the parties began negotiations for the sale of the properties to Coega. After the negotiations had not resulted in any conclusion, Coega indicated that it intended to expropriate the properties.

Offit brought an application for an order declaring that any expropriation would be unlawful. It contended that the permits under which Coega acted were invalid and that any expropriation would not be permissible under the Expropriation Act (no 63 of 1975).

THE DECISION

Section 2(1) of the Expropriation Act empowers the Minister of Public Works to expropriate property under certain conditions, if the property concerned is required for public purposes. In terms of section 3(2)(h) if a juristic person has been charged with the administration of the law and requires property for the attainment of its purposes, and cannot acquire it on reasonable terms, the Minister may expropriate the property on behalf of the juristic person.

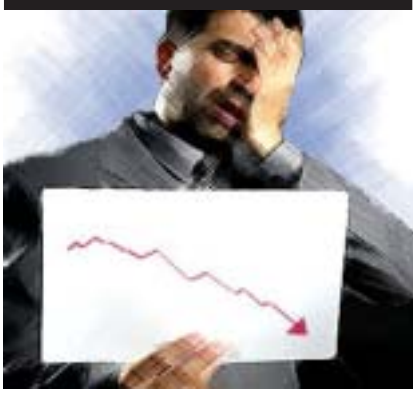
The mere fact that Coega was a private company did not in itself mean that expropriation of property for its purposes could not be for a public purpose. Its shareholders were both squarely in the public sector and their responsibility was to achieve the public purpose of industrial development and employment. Expropriation of Offit's properties would therefore serve a public purpose and the conditions of section 2(1) were therefore satisfied.

STANDARD BANK OF SOUTH AFRICA v MASTER OF THE HIGH COURT

A JUDGMENT BY NAVSA JA (PONNAN JA, MAYA JA and SNYDERS JA concurring, GRIESEL AJA dissenting)
SUPREME COURT OF APPEAL
19 FEBRUARY 2010

2010 SACLR 84 (A)

Insolvency



Liquidators of companies may not place themselves in a position where their personal interests conflict with those of the company they are liquidating, and should not simultaneously act as liquidators of companies with claims

THE FACTS

Mr B.B. Nel and Mr M.L. De Villiers were the liquidators of Intramed (Pty) Ltd. The Standard Bank of South Africa, a creditor, applied for the liquidators to be removed from office.

Before being placed in liquidation, Intramed was a wholly-owned subsidiary of Macmed Healthcare Ltd. Shortly before Intramed's liquidation, Macmed purchased certain businesses for R400m, and transferred one of them to Intramed which managed and conducted the business as a viable proposition. To finance the acquisition of the businesses, Macmed arranged a series of transactions involving the provision of a loan to Intramed by Peregrine Finance (Pty) Ltd entitling Peregrine to subscribe for shares in Intramed at maturity date of the loan. Peregrine ceded its rights to Willridge Investments (Pty) Ltd which offered to Macmed fixed rate redeemable preference shares to be issued by Leoridge Investments (Pty) Ltd, a subsidiary of Peregrine. Macmed would make a security deposit with Willridge entitling it to withdraw funds over the next ten years. Macmed obtained a put option in respect of the preference shares exercisable in the event of default by Leoridge. Macmed also obtained a guarantee in respect of all the Peregrine companies' obligations.

After Intramed was placed in liquidation, Macmed made a claim against it in the sum of R325m. Macmed itself was placed in liquidation, its appointed liquidator being Nel. The liquidators accepted the claim and it was admitted by the Master.

Macmed's claim was based on the implementation of the financing arrangements concluded for the acquisition of the businesses. Standard Bank contended that these arrangements did not give any basis for Macmed's assertion that it had lent the sum of R325m to Intramed, since the loan to Intramed was made by Peregrine and accounting entries showed that this is what in fact took place. The liquidators took the view that Macmed was entitled to base its claim on a loan from itself to Intramed.

The bank claimed that in admitting a claim without proper foundation and supporting documentation showing a loan from Macmed to Intramed, the liquidators showed that they were not fit for office. On the basis of this allegation, and the allegation that the liquidators had misappropriated estate funds in that they had brought expensive proceedings to review and set aside a decision that their fee as liquidators be reduced. The bank brought an application for their removal as liquidators.

THE DECISION

While it was not possible for the financing structure to be fully assessed, the manner in which the Macmed claim was treated by the liquidators gave cause for disquiet. It was their duty as liquidators to act with care and diligence, and examine all available books and documents in connection with it. Yet, certain aspects were not given sufficient attention. This included Intramed's and Macmed's pre-liquidation accounting records, the concerns expressed by interested parties and the implementation of the financial structure by which Intramed had received its financing. It was clear that these issues were not given the attention they deserved, such consideration as was given being perfunctory and dismissive.

As liquidator of both Macmed and Intramed, Nel was placed in a conflict situation in regard to Macmed's claim against Intramed. As liquidator of Intramed, he was obliged to assess the competency of the Macmed claim, but as liquidator of Macmed, was obliged to act in its interests in making the claim.

As far as the allegation of misappropriation of estate funds was concerned, this rested on the allegation that the review proceedings were inadvisable and directed at the promotion of the liquidators' interests personally. In the bringing of the review proceedings, the liquidators had acted in their own interests, and had not kept this distinct from their duties as liquidators and had used Intramed's funds in reckless disregard of its interests.

The liquidators had not acted in accordance with the standards to be expected of the liquidators of companies and were to be removed as liquidators.

It is clear that once a claim is proved a liquidator is under an obligation to examine all available books and documents. The mere admission of a claim does not ratify it or make it res judicata. The importance of corroborating documents is clear. The presiding officer is obliged to deliver every document in support of the claim to the trustee. In the scheme of things, liquidators are required to examine all available books and documents for corroboration or comparison. In Estate Friedman v Katzeff *1924 WLD 298 the court, in dealing with a similar section in the previous Insolvency Act 32 of 1916, said the following at 304:*
'In my view there can be no doubt that the word "shall" where used in sec. 43 of the Act is peremptory and not directory, and it is therefore the duty of the Court to see that the provisions of the Statute are complied with.'
The liquidator's duties in this regard are therefore peremptory.

ABSA BANK LTD v BERNERT

A JUDGMENT BY NUGENT JA (CACHALIA JA, MALAN JA, TSHIQI JA and MAJIEDT AJA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2010

2010 SACLR 192 (A)

Banking

A bank is entitled to withdraw a statement recorded in an authorised document of the bank in circumstances where the document is potentially misleading.

THE FACTS

Fawaz Bin Abdullah Al-Khalifa agreed to invest millions of dollars in a plant for the production of vehicles in respect of which Bernert held design rights. As a condition for his investment, the sheikh required Bernert's corporation, Rotrax International CC, to procure a formal undertaking and a guaranteed interest rate for US$6m from an AAA-rated South African banking institution.

Bernert was given to understand that compliance with the condition would entail a written assurance by a South African bank that it would accept US$6m on fixed deposit, and that it would return the money when the deposit matured. In compliance, he obtained from Absa Bank a document addressed to Emirates Bank International in which Absa confirmed that Rotrax's financial adviser, a certain Mr Fanjek, would be guaranteed a fixed deposit of US$6m at Absa. The document, headed 'Verbiage of Guarantee', also contained a number of terms and conditions including references to a guaranteed investment and a loan approved by Emirates Bank. The document was signed by an authorised signatory of Absa.

When it came to Absa's attention that the document had been issued, its attorney addressed a letter to Emirates Bank in which it asserted that the document had been signed without authority to do so, and in irregular circumstances, and should be disregarded. The sheikh was informed of this and as a result, withdrew his interest in investing in the production plant.

Bernert then brought an action against Absa claiming that as a result of it having wrongfully and negligently or intentionally written the letter to Emirates Bank, the investment had been withdrawn and in consequence Bernert had sustained loss of profits in the sum of R187m.

THE DECISION

Liability for negligent misstatement resulting in economic loss depends on proof that the party making the misstatement, made it to the party which relied on the statement. However, in this case, the alleged misstatement was made by Absa to Emirates Bank and not to Bernert.

Apart from this however, the essential question was whether Absa was obliged to allow Emirates Bank, and any other third party, to rely on its authenticity. Because the document itself was vague, to the point that it was meaningless. It did not clearly state the rights and obligations of the interested party, but amounted to a compendium of gibberish. Being recorded on the letterhead of a major bank, it was capable of misleading people, and Absa was entitled to take steps to prevent that from happening. This is what it did when its attorney addressed Emirates Bank.

Whatever the authority the signatory to the document might have had to represent Absa, he did not have the authority to sign the document.

The action failed.

VILVANATHAN v LOUW N.O.

A JUDGMENT BY THRING J
(MOOSA J and BAARTMAN J concurring)
WESTERN CAPE HIGH COURT
19 MARCH 2010

2010 (5) SA 17 (WCC)

Credit Transactions

A judgment of the High Court cannot be rescinded simply because it has been satisfied in full by the judgment debtor, and the judgment creditor consents to its rescission.

THE FACTS

Saambou Bank Ltd sued Vilvanathan for repayment of a loan. Vilvanathan did not defened the action, and in April 2003, judgment by default was granted against him.

Vilvanathan subsequently paid the judgment debt in full, together with interest and costs. On the strength of having done so, he brought an application for rescission of the judgment taken against him. Saambou's successor, Firstrand Ltd, affirmed that it did not oppose the application and that it consented to the rescission of the judgment.

THE DECISION

There are a number of grounds upon which a rescission of judgment may be ordered, one of them being on common law grounds and the others being provided for in the Rules of Court.

Common law grounds require that the applicant for rescission give some reasonably satisfactory explanation why the judgment was allowed to go by default, and show a bona fide defence which, prima facie, carries some prospect of success. This means that an applicant must do more than simply allege that the judgment debt has been paid in full and that the judgment creditor consents to the rescission of the judgment. Were a court to allow rescission of judgment simply on those grounds, this would interfere with the finality of judgments and not be in the public interest. The applicant must show sufficient cause for rescission of the judgment.

Rule 31 of the Rules of Court require that rescission of a judgment may be ordered upon good cause being shown. This has been held to mean that the applicant must show that he has a bona fide defence to the claim which had been brought against him. Vilvanathan had not stated he had had any defence to the action which had been brought against him by Saambou. There was therefore no basis in this Rule for rescinding the judgment.

The application was dismissed.

An application for rescission brought under rule 31 is doomed to failure unless the applicant can show 'good cause' or 'sufficient cause', and that means that he must establish, inter alia, that he has a bona fide defence to the plaintiff's claim against him.

AFRICAN BANK LTD v MYAMBO N.O.

A JUDGMENT BY DU PLESSIS J (MAKGOKA J and POSWA J concurring)
NORTH GAUTENG HIGH COURT
10 DECEMBER 2009

2010 (6) SA 298 (GNP)

The procedure of obtaining judgment by consent in terms of section 58 of the Magistrates' Courts Act (no 32 of 1944) is not contrary to the provisions of the National Credit Act (no 34 of 2005).

THE FACTS

African Bank Ltd advanced a loan to the second respondent, at a time when the National Credit Act (no 34 of 2005) had not yet come into operation. The second respondent defaulted in repaying the loan, as a result of which, the bank issued a demand for repayment of the loan. Upon receiving a second demand for payment, the second respondent consented to judgment against him, and agreed to repayment of the loan in monthly instalments. This took place when the National Credit Act had come into operation.

The bank then applied for judgment in terms of section 58 of the Magistrates' Courts Act (no 32 of 1944). The clerk of the court referred the application to the magistrate, who refused to grant judgment on the grounds that judgment by consent is contrary to the purposes of the National Credit Act. The bank applied for an order reviewing the magistrate's decision.

The matter was also referred to the National Credit Regulator. The regulator intervened in the matter by applying for certain declaratory orders relating to the application of the National Credit Act in the context of applications under consents to judgment agreed to by debtors.

THE DECISION

The National Credit Act did not repeal section 58. This is evident from the fact that the Act makes provision for a mechanism to resolve any conflict between section 58 and its own provisions. The effect of section 58 is to allow a cost-effective and speedy means of debt collection. It is in the interests of consumers and credit providers that it be implemented in appropriate circumstances. The magistrate was therefore wrong in holding that it is a provision which is contrary to the purposes of the National Credit Act.

As far as the declaratory orders were concerned, these were to be determined upon the premise that when consent to judgment is given, it is given based on the cause of action set out in the summons. The declaratory orders approved by the court were:

The clerk of the court may refer an application for consent to judgment in terms of section 58 to the court;

A summons upon which an application for consent to judgment is made must comply with the notice requirements of section 130(3) of the National Credit Act, and must attach a copy of the notice sent to the debtor in terms of section 129 of that Act;

If judgment by consent in terms of section 58 is sought, magistrates are entitled to interrogate the applicant, and may require proof by a plaintiff of any fact or document pertaining to the underlying cause of action so as to determine whether a credit agreement under the National Credit Act is at issue;

If clerks of the court have reason to believe that a particular credit agreement may constitute an instance of reckless credit as provided for in section 80 of the National Credit Act, they must refer the request for consent judgment to the court;

If a plaintiff seeks judgment by consent in terms of section 58, based on a cause of action arising from a credit agreement under the National Credit Act, and it is alleged that the defendant is over-indebted, clerks of the court must refer the application to the court. In such cases magistrates are entitled to interrogate the application for judgment, and in so doing they may require proof

by a plaintiff of any fact or document so as to enable the court to determine whether it should act in terms of the section 85 of the National Credit Act;

A credit provider seeking to enforce a credit agreement must allege that it is registered as such or that it is, or was when the agreement was concluded, in terms of the National Credit Act not required to be so registered;

Clerks of court and magistrates may interrogate the application for judgment as to the computation of the admitted debt.

BMW FINANCIAL SERVICES (SA) (PTY) LTD v MUDALY

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT
20 AUGUST 2010

2010 (5) SA 618 (KZD)

Once a credit provider has taken all steps necessary to commence legal proceedings against a consumer for enforcement of a credit agreement, the consumer is debarred from applying for debt review under section 86 of the National Credit Act (no 34 of 2005).

THE FACTS

Mudaly bought a car from BMW Financial Services (SA) (Pty) Ltd but defaulted in paying for it in the five-year period agreed for payment.

On 19 May 2009 BMW sent a notice to Mudaly in terms of section 129(1)(a) of the National Credit Act (no 34 of 2005). On 8 June 2009, Mudaly applied to a firm of debt counsellors for debt review in terms of section 86(1) of the Act. A proposal formulated by the debt counsellor, and circulated to creditors, including BMW, was rejected. On 7 October 2009 attorneys acting on the instructions of the debt counsellor lodged an application for an order for the rearrangement of Mudaly's obligations in terms of section 86(8)(b) of the Act. That application was not served on BMW until 4 December 2009.

On 30 October 2009, prior to service on it of Mudaly's application, BMW gave notice in terms of section 86(10) of the Act to terminate the debt review. On 2 November 2009, it sent a letter cancelling the credit agreement. On 11 December 2009, BMW brought an application for repossession of the car.

Mudaly opposed the application on the grounds that until determination of his debt review application, BMW was not entitled to an order of repossession, alternatively that until the court made an order to rearrange his obligations, he was entitled to retain possession of the car.

THE DECISION

Section 86(2) of the Act provides that an application for debt review may not be made in respect of, and does not apply to, a particular credit agreement if, at the time of that application, the credit provider under that credit agreement has proceeded to take the steps contemplated in section 129 to enforce that agreement.

The question was whether, as a result of BMW having sent the notice to Mudaly on 19 May 2009, the parties' credit agreement fell outside the process of debt review.

The steps contemplated in section 129 are the steps a credit provider must take in order to entitle it to begin legal proceedings to enforce the credit agreement. Once those steps have been taken, the consumer is debarred by section 86(2) from applying for debt review. There is nothing in the Act which would suggest any other interpretation of this section and it was consistent with the purposes the Act seeks to achieve.

A consumer may apply for debt review in terms of a number of different provisions in the Act, but should the consumer wish to do so under section 86, then the conditions of that provision must apply. These include the condition that the application for debt review take place prior to the occurrence of any need to resort to litigation. Accordingly, the provision cannot be construed so as to create a barrier to legitimate recovery proceedings.

BMW contended that in any event, it had terminated the debt-review process by having given notice of termination on 30 October 2009. Mudaly's response to this was that as he had already lodged an application for an order for the rearrangement of his obligations in terms of section 86(8)(b) of the Act, such a termination was ineffective. However, this application was not made timeously, having only been served on BMW on 4 December 2009, and could therefore not prevent the termination of the debt-review process.

There being no grounds for opposition to BMW's application, an order cancelling the agreement and directing repossession of the car was given.

The correct interpretation of s 86(2) lies somewhere between the views of those who hold that it is triggered by the giving of notice under s 129(1) (a), *and those who contend that it only operates once legal proceedings have commenced. In my view the proper construction is that the bar in s 86(2), to the inclusion of a particular credit agreement in a debt-review process, comes into existence when the credit provider under that agreement has taken all steps necessary to enable it lawfully to commence legal proceedings. If all the requirements laid down in ss 129 and 130 for the commencement of legal proceedings to enforce the agreement have been satisfied a debt-review application under s 86(1) will not extend to that credit agreement.*

ABSA BANK LTD v HAVENGA AND SIMILAR CASES

A JUDGMENT BY HORWITZ AJ
NORTH GAUTENG HIGH COURT
10 AUGUST 2010

2010 (5) SA 533 (GNP)

A creditor bringing an action for enforcement of its rights following cancellation of a credit agreement, must allege the particular terms of the agreement which entitle it to cancel the agreement, alternatively its common law right to cancel in the particular case.

THE FACTS

Absa Bank Ltd brought actions against Havenga and others alleging default under various credit agreements concluded between it and them. None of the defendants defended the actions.

The particulars of claim in each action were similar, each describing the motor vehicle which was the subject of the credit agreement, and each alleging the terms of the agreement, one of which was alleged to entitle Absa to cancel the agreement upon breach by the defendant. The particulars of claim affirmed that in the case of an instalment agreement or lease, the defendant had not surrendered the property to the plaintiff 'as contemplated in section 127 of the National Credit Act (no 34 of 2005) [section 130(1)(c)]'.

In the Havenga matter, the particulars of claim alleged that the agreement in question entitled Absa to cancel the agreement. However, the agreement did not include a cancellation clause. Upon further enquiry by the court, Absa stated that due to limitations of storage space, it kept only electronic copies of its agreements and the agreement in question only became available after the issue of summons. The particulars of claim having followed a pro forma, the inconsistency had arisen.

In the other matters, the particulars of claim contained a similar allegation, and in each case, the agreement in question did not include a cancellation clause.

The bank sought default judgment against the defendants.

THE DECISION

In each case, the bank was obliged to indicate the provision of the agreement which entitled it to cancel. In no case had it attempted to do so, relying only on hypothetical provisions which were not found in the content of the applicable agreement. This procedure had been adopted by employing a computerised template as a precedent for every matter in which a debtor had defaulted, instead of linking the terms of the agreement upon which it sued to the rights it alleged it was entitled to assert against the debtor. In the case of the allegation made concerning the failure to surrender property as contemplated in section 127 of the Act, the bank had not even bothered to state the nature of the particular agreement in issue, but merely contented itself with a hypothetical statement as to what the facts should be, whether the agreement be an instalment agreement or a lease. The juxtaposing of the two sections of the Act in that manner was unacceptable.

A creditor claiming judgment against a debtor must set out its case with reasonable clarity so that the debtor may be informed of the case which it has to meet. Another reason for this is so that the court from which relief is sought can also know what it is that the claimant is claiming and the basis for the claim. It is not for the court to decipher the creditor's claim based on options which the creditor has not taken the time to select in making its claim.

As the bank had not shown that it was entitled to cancel any of the agreements, default judgment was refused.

JMV TEXTILES (PTY) LTD v DE CHALAIN SPAREINVEST 14 CC

A JUDGMENT BY WALLIS J
KWAZULU-NATAL HIGH COURT
20 AUGUST 2010

2010 (6) SA 173 (KZD)

An agreement to supply goods on credit, payment to be made within a stated time period, may be considered to be an incidental credit agreement in terms of the National Credit Act (no 34 of 2005).

THE FACTS

JMV Textiles (Pty) Ltd sold goods to De Chalain Spareinvest 14 CC on credit. It did so in terms of an agreement between them that included a credit limit and provided that payment was to be made within sixty days. If payment was not made within that time period, interest at 2% per month would become payable on overdue amounts.

JMV brought an action for payment of the goods, citing sureties for De Chalain as co-defendants. A defence raised to the action was that JMV Textiles was obliged to be registered as a credit provider in terms of section 40 of the National Credit Act (no 34 of 2005), and because it was not registered, the credit agreement between the parties was unlawful and void, with the result that JMV was precluded from recovering the purchase price of the goods.

In terms of section 40(1) of the Act, a person is obliged to register as a credit provider if that person is the credit provider under at least 100 credit agreements, other than incidental credit agreements, or the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1), an amount of R500 000.

JMV contended that the agreement between it and De Chalain was an incidental credit agreement, so that it was not obliged to register as a credit provider in terms of the Act.

THE DECISION

An incidental agreement is defined as an agreement in terms of which an account was tendered for goods or services and either or both of the following conditions apply:

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined date; or

(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

JMV contended that the first condition applied. The sureties contended that section 8(3)(a)(ii)(bb) of the Act applied in that JMV had agreed to bill De Chalain periodically.

In terms of that section an agreement constitutes a credit facility if, in terms of the agreement:

(a) a credit provider undertakes -

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to -

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of -

(i) any amount deferred as contemplated in paragraph (a) (ii) (aa) ; or

(ii) any amount billed as contemplated in paragraph (a) (ii) (bb) and not paid within the time provided in the agreement.

In order to determine if the sureties' contention was correct, it was necessary to identify the type of transaction contemplated in section 8(3)(a). Analysis of the agreement concluded between JMV and De Chalain indicated that it was not of a type contemplated in this section. The agreement was that JMV Textiles would sell goods on credit to De Chalain, and the expectation was that the price of the goods would be paid each month as it fell due. No fee was to be paid for this and there was no entitlement to pay less than the full amount due each month. The obligation to pay interest would flow from default in making timeous payment, not from a payment short of the full amount due.

The agreement was therefore properly classified as an incidental agreement.

VOLTEX (PTY) LTD v CHENLEZA CC

A JUDGMENT BY MADONDO J
KWAZULU NATAL HIGH COURT
19 MARCH 2010

2010 (5) SA 267 (KZP)

A sale of goods in terms of which the seller agrees to deferred payment of the purchase for a fixed period is not a credit transaction subject to the National Credit Act (no 34 of 2005).

THE FACTS

Voltex (Pty) Ltd sold goods to Chenleza CC following Voltex accepting an application by Chenleza CC for credit facilities. In terms of their agreement, Chenleza was obliged to pay for the goods within 30 days of delivery.

The goods were sold to Chenleza over a period of six months, the total purchase price under the sale agreements amounting to R239 457.57.

Voltex alleged that Chenleza had defaulted in making payment for the goods within 30 days of delivery, and brought an action for payment. Chenleza defended the action on the grounds that the sale agreements were credit agreements and therefore subject to the National Credit Act (no 34 of 2005). Since Voltex was not registered as a credit provider, the sale agreements were void in terms of section 40(4) read with section 89 of the Act.

Voltex excepted to Chenleza's defence on the grounds that the sale agreements were not credit agreements as defined in the Act, and that accordingly it was not a credit provider and did not need to be registered as such.

THE DECISION

The relevant provisions of the Act defining a credit transaction are found in section 8(1), (3) (4) and (5). That most directly relevant to the present case was section 8(3) which provides that an agreement constitutes a credit facility if, in terms of that agreement a credit provider undertakes to supply goods or services or to pay amounts, as determined by the consumer from time to time, to the consumer, and either to defer the consumer's obligation to pay any part of the costs of goods or services, or to repay to the credit

provider any part of the payable amount or bill the consumer periodically for any part of the cost of goods or services, or any part of the payable amount, and a charge, interest or fee is payable in respect of the deferred obligation or amount payable.

This section does not only apply to a credit card transaction or bank overdraft and can apply to other transactions. In the present case, Voltex deferred the Chenleza's obligation to pay the whole purchase price for 30 days. However, in terms of the credit facility agreement, Chenleza's obligation was to pay the amount owed in full. Since the whole amount owed was payable on or before the specified date or period, this could not be construed as deferring Chenleza's obligation to pay the purchase price, in the manner contemplated in section 8(3). The sale agreements were therefore not credit transactions as defined in this section.

The sale agreements clearly did not fall within any of the other subsections of section 8. Accordingly, they were not subject to the Act and the defence raised by Chenleza was without substance. The action succeeded.

Since the agreements of sale in question do not satisfy all the criteria set out in ss 8(1), (3), (4) and (5) of the Act, they cannot be said to be credit agreements as defined in the Act. In the premises, there was no obligation at all on the plaintiff to register as a credit provider. Accordingly, it follows that all the defences raised by the defendants in their plea fall away.

SWINBURNE v NEWBEE INVESTMENTS (PTY) LTD

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH
COURT, DURBAN
22 APRIL 2010

2010 (5) SA 296 (KZD)

Contract

An indemnity clause must be construed in the context of the contract in which it exists. If the context indicates a limitation on the scope of the clause, then the indemnity must be understood to have the limited scope so indicated.

THE FACTS

Swinburne was a tenant in a property owned by Newbee Investments (Pty) Ltd.

Clause 17 of the lease provided that Newbee was responsible for the maintenance and repair of the property but would not be responsible for any loss or damage which the Swinburne might sustain by reason of any act whatsoever or neglect on the part of Newbee, or by reason of the premises at any time falling into a defective state of repair. Clause 26 provided that Newbee would not be responsible for loss sustained as a result of any theft, burglary or fire on the premises or for any damage suffered as a result of any negligent act or omission on the part of Newbee.

Swinburne was injured at the premises, when he was climbing a flight of stairs. He slipped on a stair on which sand had accumulated following heavy rains, and fell. There was no handrail at the flight of stairs, and if there had been, Swinburne could have used this to prevent his fall.

Swinburne claimed ensuing damages from Newbee. Newbee contended that it was protected by the provisions of clause 17 and clause 26.

THE DECISION

Clause 17 provided for Newbee's obligations in regard to the maintenance and repair of the building, and had to be construed as referring to acts or neglect relating to obligations of repair and maintenance. They did not extend to the provision of a basic safety feature such as a handrail for the stairs on which Mr Swinburne fell, and therefore did not assist Newbee in its defence of the action.

As far as clause 26 was concerned, this provision was to be construed against the background of the general context of the lease. The lease was generally concerned with regulating the ordinary and natural consequences of the relationship between landlord and tenant and there was no indication that it was directed at accidents causing personal injuries. It also did not deal expressly with questions of possible negligence, except for clause 17.

Clause 26 was to be taken as referring to loss arising from damage to property and not to person. A reasonable person reading the clause would not understand the reference to 'any damage' as extending to a claim for damages arising from personal injury. It appeared in a clause that in other respects was clearly dealing only with loss or damage to physical property. There was no word that referred in clear terms to harm to the person, as would have been the case had the word 'injury' or 'personal injury' been used. While a negligent act or omission may cause both damage to property and physical injury to the person, the true question in construing this clause was whether the reference to 'any damage' extended to the latter. The clause was capable of a construction that confined its scope to damage to property.

Newbee was therefore not able to rely on either of these clauses in defending the action for damages.

CALIBRE CLINICAL CONSULTANTS (PTY) LTD v NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

Contract

A JUDGMENT BY NUGENT JA (LEWIS JA, PONNAN JA, CACHALIA JA and LEACH JA concurring)
SUPREME COURT OF APPEAL
19 JULY 2010

2010 (5) SA 457 (A)

A body does not undertake administrative action susceptible to judicial review when the actions it undertakes cannot be categorised as the exercise of a public power or the performance of a public function.

THE FACTS

The National Bargaining Council for the Road Freight Industry was a bargaining council established under the Labour Relations Act (no 66 of 1995). It decided to extend an existing anti-AIDS programme by the establishment of a 'Wellness Programme' which was intended to provide anti-retroviral treatment to its member. It called for tenders for the submission of proposals for the implementation of the programme.

Calibre Clinical Consultants (Pty) Ltd and Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd in partnership, and others acting as a joint venture consortium submitted a tender. In June 2008, the Council notified Calibre and other tenderers that no appointment was to be made as it had decided not to appoint a service provider for the programme. Two of the reasons for the Council's decision were that it had been determined Thebe was factually insolvent and its primary service provider, a certain Dr Grietjie Strydom, was subject to a restraint of trade agreement which prevented her from performing the required services. The Council had appointed a firm of auditors to conduct a due diligence report in respect of all of the tenderers. The firm had determined that the consortium was heavily dependent on Strydom and that both its tenure at its premises and its income source were tenuous. The Council had considered that the consortium's reply to this, as well as a report by a second firm of auditors, had been unsatisfactory.

Following the rejection of Calibre's tender, by a process of restricted invitation, and excluding Calibre, the Council appointed HIV Managed Care Solutions (Pty) Ltd to implement the Wellness Programme. Cailbre brought an application to review and set aside the Council's decision in June 2008 not to appoint a service provider, its decision to exclude it from the later determination of a service provider, and its decision to appoint HIV Managed Care Solutions as its service provider.

THE DECISION

The decisions of the Council would be susceptible to review only if they constitute 'administrative action' as referred to in the Promotion of Administrative Justice Act (no 3 of 2000) and as appears from the nature of the decision concerned. In essence, this meant that the enquiry in the present case was whether the council, in making the decisions attacked by Cailbre, was 'exercising a public power or performing a public function', or in other words, its conduct exhibited features which were governmental in nature.

An important indication in such an enquiry is whether the exercise of the power or the performance of the function entails public accountability, of the kind applicable to a functionary or body which has no special relationship with the parties affected by it, other than that they are adversely affected by its conduct. The question was whether the body can properly be said to be accountable, notwithstanding the absence of any such special relationship.

A bargaining council, like a trade union and an employers' association, is a voluntary association that is created by agreement to perform functions in the interests and for the benefit of its members. It cannot be said to be publicly accountable for the procurement of services for a

project that is implemented for the benefit of its members. The wellness programme was such a project. In introducing and implementing it, the council was not performing a function that was woven into a system of governmental control or integrated into a system of statutory regulation. Government did not regulate, supervise and inspect the performance of the function.

It followed that the council's decision was not susceptible to review. The application was dismissed.

NKENGANA v SCHNETLER

A JUDGMENT BY BY GRIESEL AJA (MPATI P, MHLANTLA JA, SHONGWE JA AND TSHIQI JA concurring)
SUPREME COURT OF APPEAL
7 MAY 2010

2010 SACLR 278 (A)

A tender of performance of the full amount due entitles the tenderer to counter-performance by the other party, even if the tender was preceded by an insufficient tender.

THE FACTS

Nkengana and Schnetler concluded an agreement for the sale of Schnetler's fixed property. The agreement provided that the purchase price of R260 000 was payable in five instalments.

Shortly after conclusion, the parties orally agreed to a variation of the payment terms. Nkengana was obliged to pay the purchase price by paying amounts due to the bondholder over the property, the Standard Bank. Nkengana did so, and then claimed he was entitled to transfer of the property against payment of a balance of R21 945.17.

Schnetler alleged that further amounts were due arising from various causes. In response, in his replying affidavit, Nkengana increased his tender of payment to cover all amounts due to Schnetler.

Schnetler refused to give transfer of the property, contending that the tender originally made by Nkengana was insufficient to entitle him to transfer.

THE DECISION

A valid tender entitling the tenderer to counter-performance must be a tender in the full amount due. The tender originally made by Nkengana was insufficient. Accordingly, Schnetler was entitled to reject it.

However, by the time the final tender was made in the replying affidavit, Nkengana had made sufficient tender to entitle him to specific performance because the total amount tendered then exceeded the purchase price. Notwithstanding the fact that there were past disputes regarding the amount due, this entitled Nkengana to transfer of the property.

Schnetler was obliged to give transfer of the property to Nkengana.

DELPHISURE GROUP INSURANCE BROKERS CAPE (PTY) LTD v DIPPENAAR

A JUDGMENT BY LEACH JA (MPATI P, NUGENT JA, MALAN JA and SERITI AJA concurring) SUPREME COURT OF APPEAL 31 MAY 2010

2010 (5) SA 499 (A)

Insurance

An insurance broker marketing an insurance product as superior to other insurance products knowing that the product has not been underwritten by any insurer makes a misstatement which may result in damages for economic loss.

THE FACTS

Delphisure Group Insurance Brokers Cape (Pty) Ltd was an insurance brokerage and an accredited agent of the international insurer, Lloyd's of London on whose behalf it was mandated to market a range of short-term insurance policies.

Delphisure devised a new insurance product known as 'Farmsure' which was intended to provide cover for farmers in the event of crop failure. It began marketing this product with farmers. At this time, Lloyds had not approved the product nor undertaken to insure in the event of any proposal being made under it. This fact was not made known to Bexsure, the company with which Delphisure had arranged to undertake the marketing of the product.

Dippenaar and the second respondent applied to Bexsure for insurance cover under the Farmsure terms for the 2004 season. At the same time, they cancelled the crop insurance cover they had with Mutual and Federal.

Lloyd's decided not to underwrite the Farmsure product. Delphisure attempted to secure an alternative underwriter but was unsuccessful.
Dippenaar's crops failed. When he discovered that he was without cover, he brought an action against Delphisure and Bexsure, claiming that he had suffered damage as a result of their misstatement that the Farmsure insurance cover was available to him when in fact it was not.

THE DECISION

Delphisure contended that a reasonable person would not have foreseen that farmers who applied for the Farmsure insurance cover would cancel their applications in respect of that cover with other insurers or, at the very least, would only have foreseen that those who had already applied for insurance would only cancel such applications once they had applied for and been granted Farmsure insurance. However, the selling point for the Farmsure cover was that it was superior to other insurance cover. This being the case, a reasonable person would have foreseen that farmers would cancel their existing insurance cover in favour of the superior product being offered by Delphisure.

The misstatement made by Delphisure could be classified as wrongful considering the following aspects:

- whether Dippenaar was vulnerable to the risk or had accepted it under a contractual disclaimer;
- whether the extension of liability would impose an unwarranted burden on an insurance broker such as Delphisure or whether it would not unreasonably interfere with its commercial activities;
- the nature of the relationship between the parties, contractual or otherwise;
- whether the relationship between the parties was one of 'proximity' or closeness;
- whether the statement was made in the course of a business context or in providing a professional service;
- the professional standing of the maker of the statement;
- the extent to which Dippenaar was dependent upon Delphisure for information and advice; and
- the reasonableness of Dippenaar relying on the accuracy of the statement.

Taking into account the factors causing the loss, Delphisure was liable in delict for the loss suffered by Dippenaar. Bexsure however, was not liable, since it had not known that Lloyds had refused to underwrite the Farmsure product.

JOHANNESBURG METROPOLITAN MUNICIPALITY v GAUTENG DEVELOPMENT TRIBUNAL

A JUDGMENT BY JAFTA J (NGCOBO CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, KHAMPEPE J, MOGOENG J, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J and YACOOB J concurring)
CONSTITUTIONAL COURT
18 JUNE 2010

2010 (6) SA 182 (CC)

Property

A development tribunal acting under the powers given to it by the Development Facilitation Act (no 67 of 1995) may not approve applications for the grant or alteration of land-use rights which fall under the heading of 'municipal planning', and may not exclude any bylaw or Act of Parliament from applying to land forming the subject-matter of an application submitted to it. Development tribunals must consider the applicable integrated-development plans, including spatial-development frameworks and urban-development boundaries of municipalities when determining applications for the grant or alteration of land-use rights which are legitimately made to it.

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

The Development Facilitation Act has a very wide reach. It applies to all land-development applications, irrespective of where the land is located and regardless of whether some other law governs development on it. The question which arose was whether, by conferring the powers it did on development tribunals, the provisions of this Act were consistent with the provisions of the Constitution regulating the allocation of powers and functions to municipalities.

Section 156(1) of the Constitution confers powers on municipalities including powers relating to municipal planning. If 'municipal planning' was understood to include the power to authorise land-rezoning and establish townships, then the powers alleged to be within the comptence of the Tribunal in fact fell within the executive authority of municipalities.

The term 'municipal planning' was not defined in the Constitution. But 'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning. This includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. Nothing in the Constitution indicated that the word carried a meaning other than this commonly understood meaning.

In consequence, the powers sought to be exercised by the Tribunal fell under the heading of 'municipal planning' and therefore fell outside of the powers conferred on it under the Constitution. This included the power of urban and rural development which was conferred on the Tribunal by the Constitution, but which was not broad enough to include powers forming part of 'municipal planning'. It followed that the expansive interpretation contended for by the Tribunal was to be rejected.

Those provisions of the Development Facilitation Act under which the Tribunal purported to act were constitutionally invalid. Development tribunals were ordered to consider the applicable integrated-development plans, including spatial-development frameworks and urban-development boundaries of municipalities when determining applications for the grant or alteration of land-use rights. It was also ordered that no development tribunal established under the Act was entitled to exclude any bylaw or Act of Parliament from applying to land forming the subject-matter of an application submitted to it.

The term 'municipal planning' is not defined in the Constitution. But 'planning' in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use 'planning' in the municipal context, they were aware of its common meaning. Therefore, I agree with the Supreme Court of Appeal that in relation to municipal matters the Constitution employs 'planning' in its commonly understood sense. As a result I find that the contested powers form part of 'municipal planning'.

Does the Constitution allocate the same powers to the provincial sphere ?

The question that arises is whether the same powers are also part of 'urban and rural development' under Part A of Schedule 4, as contended for by the respondents. To construe any of the functional areas allocated to provinces as encompassing the contested powers will not only be inconsistent with the constitutional Scheme as revealed in the schedules, but also with ss 41.

SWARTLAND MUNICIPALITY v LOUW NO

A JUDGMENT BY LE GRANGE J
WESTERN CAPE HIGH COURT
21 DECEMBER 2009

2010 (5) SA 314 (WCC)

There is no conflict between the land use provisions of the Land Use Planning Ordinance 15 of 1985 (Cape) and the Mineral and Petroleum Resources Development Act (no 28 of 2002). A municipality is entitled to regulate land usage by restricting the performance of mining activity.

THE FACTS

The Hugo Louw Trust owned property situated within the area of jurisdiction of the Swartland Municipality. The property was zoned as agricultural land.

Elsana Quarry (Pty) Ltd held mining rights over the land, obtained under the Mineral and Petroleum Resources Development Act (no 28 of 2002). It began mining granite on the farm. A neighbouring owner objected to the mining activity, alleging that it had a detrimental effect on production of agricultural goods.

Elsana applied to the Swartland Municipality for the rezoning of its property under the Land Use Planning Ordinance 15 of 1985 (Cape) but later withdrew the application, following advice that it was unnecessary for it to have done so. Elsana contended that it was entitled by virtue of the mining right which had been issued to it to continue its mining activities on the property. The municipality contended that, until the property was zoned Industrial III, Elsana was not permitted to conduct mining activities on the property.

THE DECISION

Section 23(6) of the Act provides that a mining right is subject to any relevant law. This would include the Land Use Planning Ordinance whose existence must have been known to the legislature at the time the Act was enacted. Under the ordinance, municipalities assume the power to act in relation to property falling within their jurisdiction, and it would be incorrect to interpret the Act so as to prevent the proper functioning of a municipality in the exercise of that power.

The question arose whether there was any conflict between the provisions of the Act and the provisions of the ordinance, in which case section 146 of the Constitution would apply. The ordinance regulated land use. It did not regulate mining activity or the exercise of mining rights. The competency of the municipality was therefore not affected by the provisions of the Act. Rezoning cannot be regarded as a matter connected to the issuing of mineral rights to such an extent that it is also regulated thereby, and in fact renders provincial and municipal planning legislation, as provided for constitutionally, superfluous. The Act is silent on the issue of rezoning and can therefore not be read as impliedly having repealed legislation with LUPO's character and aim.

The trust was therefore not entitled to permit mining activity on its property.