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A SURVEY OF THE CURRENT CASE LAW

written by

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26 NOVEMBER 2010

2011 (1) SA 54 (A)

Contract

The time when payment of the purchase price is to be made is a material term of a sale agreement. Omission of any provision for the time of payment therefore means that the sale agreement is void.

THE FACTS

Chretien concluded a written agreement for the sale of her property to Bell. A term headed 'Method of payment of the purchase price' provided that no deposit had to be paid, that no loan had to be obtained by Bell, and that the full price would be paid in cash.

A special condition provided that the parties had agreed that the purchase price payment details would be agreed upon in writing between them by not later than 30 April 2005, and that this would be a cash payment.

Bell paid the purchase price of R1.3m in July 2005.

Chretien took the view that the sale agreement was void because it did not stipulate the method of payment as required by section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE DECISION

The time within which payment of the purchase price must be made is a material term of a sale agreement. The agreement in question did not provide for the time of payment. It therefore omitted a material term of a sale agreement.

As it was an express term of the agreement that the purchase price had to be paid before the obligation to transfer arose, and agreement still had to be reached in respect of the time of payment, there was a failure to comply with section 2(1). The fact that it was to be a cash payment made no difference to this conclusion.

The sale agreement was therefore void.

It was submitted that, because the parties have stipulated that the payment will be a cash payment, in the absence of further agreement between the parties, the sellers could not have expected anything better than cash against transfer of property into the name of the purchaser. Whilst this submission echoes the position in common law, it cannot be I held to apply in the present matter. It was an express term of the agreement that the purchase price was required to be paid before the obligation to transfer arose, and agreement still had to be reached in respect of the time of payment.

SCOIN TRADING (PTY) LTD v BERNSTEIN N.O.

A JUDGMENT BY K PILLAY AJA
(HARMS DP and SNYDERS JA
concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2010

2011 SACLR 42 (A)

Once it is established that payment must be made on a specific date, failure to pay on that date attracts liability to pay mora interest irrespective of fault.

THE FACTS

Mr G.J. Till agreed to buy a ZAR Een Pond Overstamp gold coin from Scoin Trading (Pty) Ltd for R1.95m. The purchase price was to be paid by a deposit of R200 000 and the balance by the end of December 2007, or when the proceeds of the sale of certain properties became available. Till had informed Scoin that he expected R60m from the sale of the properties by the end of December 2007 at which stage the balance would be paid.

Till died in November 2007. The executor in his deceased estate, Bernstein, accepted liability to pay the balance of the purchase price, but denied liability for any interest payable on the balance after December 2007. Bernstein contended that the proper interpretation of the agreement was that Till had agreed to payment upon the sale of the properties and not on or before the end of December 2007. Bernstein also contended that as Till was not at fault in not having paid the balance by the end of December 2007 by reason of his death, mora interest was not payable. He also contended that Till's death rendered performance impossible.

THE DECISION

It was clear from the communications between the parties that Till's promise was to pay the balance by the end of December 2007, not that payment was conditional on the sale of the properties. The proper interpretation of the agreement was therefore that payment would be made on this date.

Since the agreement incorporated a specific date, 31 December 2007, by when performance had to be made default in payment on that date would constitute mora ex re. Damages which follow from such default are mora interest, which begins to run immediately from the date of default. Mora interest is then payable irrespective of any fault on the part of the person obliged to render performance.

As far as the defence of supervening impossibility was concerned, there is no authority that the death of a person renders payment of a debt impossible.

That mora interest is sometimes regarded as a kind of penalty for a failure to pay on due date does not mean that the breach of contract is a delict or that a breach of contract is only established if the debtor acted 'wrongfully' or 'culpably'.
It requires emphasis that unlike damages for delict, in cases of breach of contract, damages are not intended to recompense the innocent party for their loss, but to put them in the position in which they would have been if the contract had been properly performed.

MPANZA v ROAD ACCIDENT FUND

A JUDGMENT BY SWAIN J
KWAZULU-NATAL HIGH COURT
17 NOVEMBER 2010

2011 SACLR 38 (KZN)

In determining whether or not time is of the essence of a contract, it is necessary to examine the nature of the agreement being cancelled and the surrounding circumstances of its creation.

THE FACTS

Mpanza accepted an offer of R55 000.00 made by the Road Accident Fund for compensation for injuries sustained in a motor vehicle accident. This amount was to be paid on or before 28 December 2006.

Mpanza alleged that subsequently, the Fund failed to make payment by the specified date and that in consequence of this repudiation, her attorneys had cancelled the settlement agreement. This took place on 14 June 2007.

Mpanza brought an action against the Fund for payment of damages resulting from the motor vehicle accident. The Fund raised the defence that the claim had been settled and that the cancellation of the settlement agreement was ineffective because it had not been preceded by a letter of demand.

THE DECISION

The cancellation alleged by Mpanza would be effective without a prior letter of demand if time was of the essence in the performance of the settlement agreement. In determining whether or not time was of the essence, it was necessary to look at the nature of the agreement and the surrounding circumstances.

The surrounding circumstances indicated that Mpanza's claim was one for payment of damages, that no provision for the payment of interest had been made, and there was no provision for delayed payment pending the taxation of legal costs. These circumstances indicated that time was of the essence and that there was therefore no need to place the Fund in mora by issuing a letter of demand prior to cancellation.

The defence raised by the Fund was dismissed.

In the present case as pointed out above, the surrounding circumstances to the settlement agreement were that the plaintiff sought compensation for injuries she allegedly sustained some three years before. In addition, no provision was made in the agreement for the payment of interest to the plaintiff in the month before payment was due. Also of significance is that payment to the plaintiff was not to be delayed until the plaintiff's legal costs were finalised, whether by way of taxation, or by way of agreement.
Considering all of the above I am satisfied that time was of the essence in respect of the date for payment by the defendant, and consequently no demand placing the defendant in mora was necessary before the plaintiff cancelled the agreement. It must have been a tacit term of the compromise that its effectiveness was conditional upon it being carried out. It is inconceivable that where, as in the present case, the defendant had failed to make payment some six months after the due date, the plaintiff's remedies could be restricted to enforcing the compromise.

KWIKSPACE MODULAR BUILDINGS LTD v SABODALA MINING CO SARL

Contract

A JUDGMENT BY CLOETE JA
(LEWIS JA, SHONGWE JA,
GRIESEL AJA and THERON AJA
concurring)
SUPREME COURT OF APPEAL
18 MARCH 2010

2010 (6) SA 477 (A)

A tacit term will not be established if it is inconsistent with the purpose of the contract, is not necessary to give business efficacy to the contract, and is not necessary for the performance of the contract.

THE FACTS

In December 2006, Kwikspace Modular Buildings Ltd entered into an agreement as contractor to supply and install an accommodation village for Sabodala Mining Co SARL as principal. Clause 5 of the General Conditions provided that security or retention money was to be provided for ensuring the due and proper performance of the agreement. Recourse to retention money would be possible after a party entitled to exercise a right under the agreement in respect of the retention moneys and/or security had given the other party notice in writing of its intention to have recourse to the retention moneys and/or cash security, and the notice period had elapsed. The agreement provided that the law applicable would be the law of Western Australia.

In terms of clause 5, Nedbank Ltd issued two performance guarantees for the payment of all damages or other amounts including interest due by the contractor to the principal. In terms of the performance guarantees, the bank undertook to effect payment to Sabodala upon receipt of the first written demand that the contractor had committed a breach of the contract and/or had defaulted thereunder and/or had been provisionally or finally sequestrated or liquidated or placed under judicial management.

In October 2008, following various disputes, Sabodala gave notice to Kwikspace of its intention to convert into money the security given by Nedbank.

Kwikspace applied for an interdict preventing the implementation of the performance guarantees. It contended that the terms of the performance guarantees were subject to the terms of the general conditions, and that those terms included a tacit term that the giving of notice in writing of the intention of have recourse to the retention money had to set out the grounds upon which demand for such money would be made.

THE DECISION

Applying the law applicable, the first proposition relied on by Kwikspace was correct: the terms of the general conditions could qualify the right to present the performance guarantees for payment. A court will however, decline to order the issuer of such a guarantee not to pay under it in certain circumstances, one of which is if the issuer acts under an unqualified promise to pay.

The question was whether clause 5 qualified Sabodala's right to present the guarantees for payment. On the facts of the matter, Kwikspace had not shown that any qualification was applicable. The certificates issued for payment required it to pay without qualification and its failure to pay entitled Sabodala to have presented the guarantees for payment. The only reason why it might not have been so entitled was if there was a tacit term as contended for by Kwikspace.

The tacit term contended for would be inconsistent with the purpose for which the performance guarantee was given. It was also not necessary to give business efficacy to the agreement. Neither was it necessary to the performance of the agreement. It was not obvious that the parties would have included the term had they considered the matter at the time of contracting. The tacit term therefore could not be established.

The interdict was refused.

DORMELL PROPERTIES 282 CC v RENASA INSURANCE CO LTD

A JUDGMENT BY BERTELSMANN JA (MHLANTLA JA AND CACHALIA JA concurring, CLOETE JA and MPATI P dissenting)
SUPREME COURT OF APPEAL
13 SEPTEMBER 2010

2011 (1) SA 70 (A)

An agreement which specifies a date of expiry subject to possible earlier dates of expiry, expires on the date so specified and not on a date calculated in accordance with the computation of days.

THE FACTS

Renasa Insurance Co Ltd issued a construction guarantee in favour of the employer Messrs Dormell Properties 282 (Pty) Ltd, its terms being stated in the standard terminology of the JBCC Series 2000 contractor's guarantee. The construction work related to a property development known as the Cobble Walk Retail Development Shopping Centre undertaken by Synthesis Projects (Cape) (Pty) Ltd as contractor. The guarantee's expiry date was 28 February 2008, or up to and including the date of the only practical completion certificate or the last practical completion certificate where there are sections.

Prior to the issue of the construction guarantee, the employer had been converted into a close corporation, Dormell Properties 282 CC.

As a result of considerable delays in the construction work, Synthesis informed Dormell that practical completion of the project would not be earlier than 13 March 2008. Dormell demanded an extension of the guarantee until 15 April 2008. Synthesis refused to comply with this demand. On 28 February 2008, Dormell cancelled the construction contract, and demanded payment from Renasa in terms of the guarantee. Renasa rejected the demand, contending that the guarantee had already expired when demand was made, the expiry having taken place at midnight on 27 February 2008. Renasa disavowed liability to pay in terms of the guarantee on the grounds of its expiry and also on the grounds that the guarantee had been made in favour of Messrs Dormell Properties 282 (Pty) Ltd and not Dormell Properties 282 CC.

Renasa defended a claim for payment in terms of the guarantee on these two grounds. Synthesis and Dormell submitted their dispute to arbitration, the result of which was a determination that Dormell had not been entitled to cancel the construction contract.

THE DECISION

The determination of the expiry date of the guarantee was to be taken from the terms of the guarantee, not from the calculation of a period based on the civil method of computation of days. Those terms indicated that the expiry date was 28 February 2008, or earlier. The final date of expiry was, as stated in the guarantee, 28 February 2008, and accordingly Dormell's cancellation of the contract took place within the period specified in the guarantee.

As far as the second ground of defence was concerned, this should fail if there was sufficient evidence that the guarantee could be rectified to reflect a common intention that it be stated in favour of the close corporation and not the company. It was clear from the evidence that Renasa had been more concerned with its own security than with the identity of the person in whose favour the guarantee was to be stated. The overriding intention of all the parties was to secure the position of the employer. Accordingly, the guarantee could be rectified to reflect this common intention.

In the light of the fact that the arbitration determination was that Dormell had not been entitled to cancel the construction contract, there would be no point in enforcing performance of the guarantee, even though Dormell had succeeded in establishing that it was enforceable. Accordingly, Dormell was only entitled to costs orders until the date on which the arbitration award was made.

SIZABONKE CIVILS CC v ZULULAND MUNICIPALITY

Contract

A JUDGMENT BY GORVEN J
KWAZULU NATAL HIGH COURT
12 MARCH 2010

2010 SACLR 352 (KZN)

Regulation 8 of the regulations promulgated under the Preferential Procurement Policy Framework Act (no 5 of 2000) is inconsistent with the Act and is accordingly invalid.

THE FACTS

Zululand Municipality called for tenders based on regulations promulgated in terms of the Preferential Procurement Policy Framework Act (no 5 of 2000).

Section 2(1)(b)(i) of the Act provides that for contracts with a rand value over the prescribed amount, a maximum of 10 points may be allocated to goals provided for in section 2(1)(d) provided that the lowest acceptable tender scores 90 points for price. Section 2(1)(d) refers to the goals of contracting with historically-disadvantaged persons (HDI) and implementing the programmes of the Reconstruction and Development programme.

Regulation 8(3) provides that for contracts with a rand value over R500 000, the total combined points allowed for functionality and price must not exceed 90.

In the documents issued by the municipality when calling for tenders, 90 points were allocated for price and functionality and 10 points for HDI. Of the 90 points allocated for price, 70 were allocated for price and 20 for functionality. Functionality was defined as targeted experience and years in business.

Sizabonke Civils CC submitted a tender but was unsuccessful. The successful bidder was NRB Construction & Hire CC. Neither Sizabonke nor NRB submitted tenders of the lowest price. Sizabonke then applied for an interdict reviewing and setting aside the award of the tender to NRB, an order declaring that regulation 8 was inconsistent with section 2(1) of the Act and an order that regulation 8 be remitted for reconsideration by the Minister of Finance.

THE DECISION

The references to functionality in the regulations were inconsistent with the Act because the Act provides only for price and makes no allowance for functionality. The introduction of functionality in the regulations therefore had the effect of reducing the point allocation for price as provided for in the Act.

Since the municipality's tender documents allocated only 70 points for price, it was clear that it had not complied with the provisions of the Act, which require the allocation of 90 points. The award of the contract could therefore be reviewed and set aside on the grounds of failure to comply with the provisions of the Act.

NRB contended that since Sizabonke's tender was not the tender reflecting the lowest price, and would therefore not have been awarded the contact, it had no cause for complaint. However, this failed to take into account regulation 9 which entitles an organ of state to award a contract to a tenderer whose price is not the lowest.

As far as the claim that regulation 8 be declared inconsistent with the Act and remitted to the Minister for reconsideration was concerned, it was significant that the Act had made express reference to a 90-point allocation for price. This showed an intention to circumscribe the Minister's power to make regulations. Any deviation from that would be contrary to the principle of legality. It was therefore appropriate that the regulation should be declared invalid.

The award of the tender was set aside and the regulation declared invalid.

FIRSTRAND BANK LTD *v* COLLETT

A JUDGMENT BY EKSTEEN J
EASTERN CAPE HIGH COURT, GRAHAMSTOWN
2 SEPTEMBER 2010

2010 (6) SA 351 (ECG)

Credit Transactions

The referral of a debt review to a magistrates' court does not prevent the credit provider from terminatng the debt review and proceeding to enforce its claim.

THE FACTS

Collett was indebted to Firstrand Bank Ltd in the sum of R677 254,92. She applied for debt review in terms of section 86 of the National Credit Act (no 34 of 2005). Firstrand was provided with a recommendation and this was then referred to the magistrates' court for a hearing in terms of the Act.

Prior to the date of the hearing, Firstrand served a notice terminating the debt review process. It then issued summons against Collett for payment of its claim. In summary judgment proceedings, Collett defended the action on the grounds that the effect of the referral of the debt review to the magistrates' court was to prevent the creditor from proceeding with enforcement of its claim until the magistrates' court had made its determination in terms of section 87 of the Act.

THE DECISION

Section 86(10) of the Act gives a credit provider the right to terminate a debt review process in the circumstances therein provided. Any such termination is however, subject to section 86(11) under which a magistrates court may order that the debt review resume, if a credit provider has proceeded to enforce the credit agreement.

The consumer is therefore not prejudiced by the credit provider's right to terminate the debt review process as this right is subject to the possibility of an order resuming the debt review. The mere fact that a debt review has been referred to a magistrates' court therefore does not prevent a credit provider from terminating the debt review process and proceeding with enforcement of its claim.

The process envisaged in the Act seems to me to be as follows. When an application is received by a debt counsellor in terms of s 86, he is then required to evaluate the consumer's state of indebtedness and the prospects for responsible debt rearrangement (s 86(5) (a) *). Any credit provider referred to by such consumer in his application is required to participate, in good faith, in the debt review process, and in any negotiation designed to result in a responsible debt rearrangement (s 86(5)* (b) *).*
On the completion of this process the debt counsellor is required to reach a conclusion in terms of s 86(7) (a) *or* (b) *or* (c) *. If he concludes, as he did in this case, that the consumer is overindebted, then, in terms of s 86(7)* (c) *, he must formulate a proposal recommending that the magistrates' court make one or both of the orders contemplated in s 86(7)* (c) *(i) and (ii).*
It is only after this process that the matter is referred to the magistrates' court for a hearing. The purpose of the entire process is for the magistrates' court to provide judicial oversight of the debt review process.

FIRSTRAND BANK LTD *v* FILLIS

A JUDGMENT BY EKSTEEN J
EASTERN CAPE HIGH COURT, PORT ELIZABETH
17 AUGUST 2010

2010 (6) SA 565 (ECP)

A credit provider need not apply for rescission of a magistrate's order made in terms of section 86 of the National Credit Act (no 34 of 2005) before proceeding against a consumer in default of such an order.

THE FACTS

Fillis defaulted in repaying a loan made to him by Firstrand Bank Ltd. He applied for debt review in terms of section 86 of the National Credit Act (no 34 of 2005). As a result, a magistrate made an order that he pay R2850.00 per month to the bank.

The bank alleged that Fillis was in default of this order and that in consequence it was entitled to assert its rights against Fillis in terms of section 88(3) of the Act. Fillis contended that until the bank successfully applied for the rescission of the magistrate's order, it could not proceed in terms of section 88(3) against him.

THE DECISION

In terms of section 88(3) a credit provider is prevented from proceeding against a debtor in respect of whom a credit review process has begun until the consumer defaults under the credit agreement and defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit provider, or ordered by a court.

Once the conditions provided for in section 88(3) are met, the credit provider is entitled to proceed against the debtor. No more than the fulfilment of the conditions is required for this. The bank was therefore not obliged to allege any more than that the conditions of the section had been met. Since Fillis had provided no answer to those allegations, he had presented no bona fide defence to the application for summary judgment.

In my view, the restraint placed upon a credit provider, in consequence of a credit review process and a rearrangement order, does, in this instance, fall away on the express authority of s 88(3). This interpretation accords too with the provisions of s 129(2) of the Act.

...

Whatever the obligations of the consumer may have been during the debt review process, and I express no view in that regard, the magistrate hearing the application for a rearrangement order is required to investigate the position of the consumer as it is at that time. The magistrate is then required to make a rearrangement order which finds application from the time the order is made, unless otherwise ordered. In this instance the magistrate ordered that the defendants were to make monthly payments of R2850, 'with effect from 30 November 2009'. This the defendants have failed to do. The defendants are accordingly in default of the rearrangement order.

FIRSTRAND BANK LTD v SEYFFERT

A JUDGMENT BY WILLIS J
SOUTH GAUTENG HIGH COURT
11 OCTOBER 2010

2010 (6) SA 429 (GSJ)

In determining whether a credit provider's notice to terminate debt review processes is sufficient to deny a consumer a bona fide defence in summary judgment proceedings, a court should take into account all factors indicating whether or not the parties have attempted to resolve the default situation which has given rise to the credit provider's legal action against the consmer.

THE FACTS

Firstrand Bank Ltd brought an action against Seyffert for repayment of a loan. Seyffert defended the action on the grounds that he had applied for debt review in terms of the National Credit Act (no 34 of 2005) and that section 130(3) of that Act applied. Seyffert's financial position had been referred to a debt counsellor who had proposed that the monthly repayments on his loan be reduced for the present, and proportionately increased in the future.

In summary judgment proceedings, Seyffert contended that the effect of section 130(3) was to prevent the court from determining the matter and for that reason, judgment against him should be refused. Firstrand contended that as it had given notice to terminate the debt review process in terms of section 86(10), this defence was not available to Seyffert.

THE DECISION

The National Credit Act was designed to protect consumers. However, its intention is not to make the country a debtors' paradise. A plain reading of section 86(10), when read with section 86(11), makes it clear that the giving of notice by a credit provider to a consumer to terminate a process of debt review does not necessarily terminate that process of debt review, although such notice may have this consequence. The determining factor is the extent to which the parties have attempted to deal with the default situation which has arisen.

If a debtor wishes to avoid summary judgment after proper notice has been given in terms of section 86(10), a court will want to see active, serious, sensible and reasonable proposals having been proposed by the consumer, and not an opportunistically supine attitude. It will not want to see a credit provider appearing to adopt a recalcitrant attitude, as such a credit provider may expect to be deprived of the remedy of summary judgment.

In the present case, the evidence suggested that Seyffert was doing no more than clutching at straws to prevent judgment being given against him. There appeared to be no merit in his defence. Summary judgment was granted against him.

It may, furthermore, be salutary to reflect on the fact that money-lenders (credit providers), have, since time immemorial, pursued three objectives in the conduct of their business, namely (i) to recover the money lent (credit provided); (ii) to recover their costs and expenses in operating their business; and (iii) to make a profit. If any one of these objectives is systematically put at risk, the business of providing credit comes to an end. No amount of 'progressive' rhetoric will alter these self-evident truths. From time to time there are those who fulminate against the making of a profit, whether by moneylending or otherwise. Those who do so should take the trouble to read Karl Marx's A Critique of the Gotha Programme *in which he declaims against those who fail to understand the necessity for profit in a viably functioning economy.*

FIRSTRAND BANK LTD *v* GAZU

A JUDGMENT BY LOPES J
KWAZULU-NATAL HIGH COURT
23 SEPTEMBER 2010

2011 (1) SA 45 (KZP)

Service of a summons at a domicilium address may be considered insufficient if the court in its discretion determines that service should be effected so as to notify the party that summons has been served.

THE FACTS

The mortgage bond under which Firstrand Bank Ltd lent money to Gazu provided that Gazu's domicilium address was the property hypothecated. It also provided that a certificate of balance issued by the bank would be prima facie proof of her indebtedness to the bank.

The bank brought an action against Gazu claiming repayment of the money lent and an order that the mortgaged property be declared executable. The summons was served by placing a copy of the summons under a rock on the vacant land which was the mortgaged property.

The Registrar refused default judgment on the grounds that the certificate of balance was not annexed to the summons.

THE DECISION

A certificate of balance is not necessary to complete a creditor's cause of action when the cause of action is set out in detail in the summons. The bank had done this in the present case and was therefore not obliged to have issued a certificate of balance.

Service of the summons was however inadequate. While it may have served the summons on Gazu's chosen domicilium address, there was no evidence that it attempted to notify her of the action it was taking against her. In these circumstances, the court could exercise its discretion and refuse judgment until the bank had attempted to serve summons on some other address where Gazu could be contacted.

This court has a discretion with regard to the provision of service. In this matter it is clear that:

(a) *Miss Gazu was contracting with a banking institution; and*

(b) *the provision of the* domicilium citandi et executandi *is stated in clause 20 of the mortgage bond to be at the hypothecated property; and*

(c) *those words 'THE HYPOTHECATED PROPERTY' have been typed into the mortgage bond which was a document obviously prepared by the bank; and*

(d) *it is notorious that, in dealing with the banks, mortgage bonds and other formal documents are presented to their clients on a 'take it or leave it' basis, and the ability of the other contracting party to balance out the unequal bargaining power in the mortgage bond is extremely limited, if not entirely excluded; and*

(e) *given the requirements with which banks have to comply in order to meet their obligations in terms of the provisions of the Financial Intelligence Centre Act 38 of 2001, it is inevitable that the bank will have a great deal of personal information concerning the applicant. This information will almost certainly include matters such as a residential address, a home and cell telephone numbers and even probably the e-mail address of Miss Gazu.*

FERNDALE CROSSROADS SHARE BLOCK (PTY) LTD v JOHANNESBURG METROPOLITAN MUNICIPALITY

MPATI P (HEHER JA, CACHALIA JA, BERTELSMANN AJA and EBRAHIM AJA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2010

2011 (1) SA 24 (A)

Property

An agreement incorporating all of the essential terms of a lease agreement should be considered a lease, even if the agreement provides for other matters. The purpose of the parties in concluding an agreement does not determine what the agreement is, but their intention as indicated by the terms of the agreement does.

THE FACTS

On 27 March 2002, Ferndale Crossroads Share Block (Pty) Ltd entered into an agreement with Johannesburg Metropolitan Municipality in terms of which the municipality agreed to lease specified land at a rental of R499 per annum. The purpose of the agreement was to enable Ferndale to construct a pedestrian bridge over an arterial road which would channel taxi commuters from a taxi rank to its shopping centre, and would prevent the commuters from crossing the road on foot. It provided for the construction of walls around the taxi rank to prevent commuters from exiting at any other point than the bridge, and for the construction of the bridge itself.

The agreement was put into effect and the bridge was constructed. In 2006, the municipality demolished a section of the wall and erected hawkers' facilities alongside. The effect of this was to allow access to the hawkers' facilities.

Ferndale contended that the municipality's action was contrary to the terms of the lease. The municipality discovered that it had not published a notice of its resolution to lease the land, as required by the provisions of section 79(18) of the Local Government Ordinance. It contended that the result was that no valid lease agreement had been concluded and the agreement entered into was void ab initio.

Ferndale applied for an order that the agreement concluded between the parties was valid and enforceable between the parties.

THE DECISION

Ferndale contended that the agreement was not in essence a lease but an agreement for the construction of the various items required for the channelling of the commuters to its shopping centre. In determining whether or not this contention could be sustained, what the parties' purpose was in concluding the agreement was not the determining factor, but their intention as expressed in the rights and obligations contained in the agreement.

The agreement concluded between the parties contained significant elements of a lease agreement. They were integral to the agreement, and without them, the agreement would have had no purpose. The agreement contained all the essential terms of a lease. The lease element of the agreement therefore meant that the provisions of section 79(18) had to be complied with.

Section 79(18) laid down formalities for the valid conclusion of a lease by the municipality. Without compliance, no valid lease could have been concluded. Since there was no compliance, the municipality could not have exercised the power necessary for the conclusion of a lease. The result of this was that no valid lease was concluded.

Assuming that a court had a discretion to condone this defect, the discretion which was exercised by the court a quo appeared to be the correct one: it held that it would not have ordered specific performance of the agreement, because this would have the effect of frustrating the municipality's redevelopment plans for the central business district, and this would not be in the public interest.

The application was dismissed.

DIRECTOR-GENERAL OF PUBLIC WORKS v KOVACS INVESTMENTS (PTY) LTD

Property

A JUDGMENT BY HASSIM AJ
NORTH GAUTENG HIGH COURT
11 AUGUST 2010

2010 (6) SA 646 (GNP)

A claim against an organ of State need not be preceded by the consent to sue required by the Institution of Legal Proceedings against Certain Organs of State Act (no 40 of 2002) if the claim is not one for which the defendant is liable to pay damages.

THE FACTS

The Director-General of Public Works as tenant concluded a lease with African Alliance (Pty) Ltd/Kovacs Investments 289 (Pty) Ltd as landlord.

Kovacs alleged that R1 112 173,46 was owed to it in terms of the lease and brought an action for payment. This amount was made up of unpaid rental and service charges associated with the leased property.

The Director-General excepted to the claim on the grounds that its consent in terms of section 3(1)(a) of the Institution of Legal Proceedings against Certain Organs of State Act (no 40 of 2002) had not been given to Kovacs Investments to bring the action. It also excepted to the claim on the grounds that Kovacs lacked locus standi to claim as the claim had not been brought in the name of African Alliance (Pty) Ltd with which, together with Kovacs, it had concluded the lease.

THE DECISION

The Act defines a debt in respect of which its provisions apply. A 'debt' is any debt which arises from delictual, contractual or other liability, and for which an organ of State is liable to pay damages.

The additional requirement of liability to pay damages implies that a claim which arises from delictual, contractual or other liability only is not subject to the Act. This would be the case in respect of a claim for specific performance. In the present case, Kovacs claimed payment of money. This is a claim for specific performance. It was therefore not a claim contemplated in section 3(1)(a) of the Act.

As far as the exception based on lack of locus standi was concerned, the lease showed that there were two lessors, Kovacs and African Alliance. As a joint lessor, Kovacs was entitled to claim its pro rata share of the total claim in terms of the lease. It therefore had locus standi to sue.

The exceptions were dismissed.

It is therefore clear that, in the absence of contractual provisions to the contrary, a joint lessor has a claim against the lessee for his pro rata share of the rent received (or due).
I can state it no better than Greenberg J, that there is nothing in the lease agreement in this case to take it out of the general rule laid down by Voet and Pothier . Accordingly, the plaintiff is not precluded from claiming from the defendant rent due by it in terms of the lease (albeit that the claim is limited to its pro rata share).

JANSE VAN RENSBURG *v* KOEKEMOER

A JUDGMENT BY CLAASSEN J
SOUTH GAUTENG HIGH COURT
11 OCTOBER 2010

2011 (1) SA 118 (GSJ)

In order to comply with the Alienation of Land Act (no 68 of 1981), an agreement entitling one of the parties to reside on property which is properly characterised as creating a right of habitatio must be in writing.

THE FACTS

Janse Van Rensburg and his wife agreed to sell their property to Koekemoer subject to their right to live on the property for the rest of their lives. The condition was orally agreed. The property was then transferred into Koekemoer's name. Later, Koekemoer sold the property to the second respondent.

Janse Van Rensburg claimed he and his wife were entitled to registration of their right of habitatio. Koekemoer responded to an action brought to establish the claim by raising an exception. Koekemoer contended that the claimed right constituted an interest in land subject to the Alienation of Land Act (no 68 of 1981) which requires that the agreement on which it stood had to be in writing. Since the claim was based on an oral agreement which failed to comply with the Act, it was of no force or effect.

The exception was upheld. Janse Van Rensburg then amended his particulars of claim so as to base his claim on a breach of contract by Koekemoer. He alleged that by Koekemoer having attempted to evict him and his wife, Koekemoer had repudiated the contract. Janse Van Rensburg refused to accept the repudiation and asserted his and his wife's right to reside on the property for the rest of their lives.

Koekemoer excepted to the amended claim on the grounds that the right asserted by Janse Van Rensburg was also an interest in land and therefore also subject to the Alienation of Land Act.

THE DECISION

The first exception was properly upheld. An oral servitude is unenforceable against the successor in title of the servient tenement, whether or not such successor had notice of the oral agreement. The question then was whether or not the second exception provided an alternative basis for Janse Van Rensburg's claim.

The amended particulars of claim sought to rely on specific performance of an oral agreement, alternatively an interdict preventing Koekemoer from interfering with Janse Van Rensburg's alleged right of residence. That right was the right of habitatio, which is a servitude created by agreement between two parties, and becomes a real right only enforceable against the grantor once it is registered against the immovable property's title deed. Once registered against the title deeds of the property, it becomes a real right against all the world, and as such enforceable.

The servitude in question was therefore properly characterised as 'any interest in land' as referred to in the Alienation of Land Act. It was therefore necessary that it be in writing and signed by the parties as required by that Act. As the amended particulars of claim based the claim asserting an interest in land on an oral agreement, they were in conflict with the Act, and therefore excipiable.

The exception was upheld.

HERALD INVESTMENTS SHARE BLOCK (PTY) LTD *v* MEER

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT, DURBAN
14 SEPTEMBER 2010

2010 (6) SA 599 (KZN)

The owner of a section in a sectional title development derives no advantage from the proviso to section 37(1)(b) of the Sectional Titles Act (no 95 of 1986) when another owner holds the right to exclusive use of part of common property which does not arise from sources contemplated in the Act.

THE FACTS

Herald Investments Share Block (Pty) Ltd owned a section in a sectional title development known as Belmont Arcade. Its section comprised three floors of commercial premises and parking levels. The remaining sections comprised 105 residential flats. Herald's participation quota was 52% of the total participation quotas and the remaining flat owners' participation quota was 48%. As far as voting rights were concerned, Herald held 95 votes, and the owners of the flats, one each.

There were four lifts in the building. Three served the residential flats only. The fourth served all section owners. This was an arrangement which did not arise from any registered right or scheme rules, nor from any agreement between the parties. All of the lifts needed extensive servicing, and in 2005 this was done at a cost in excess of R1m. A special levy was imposed on section owners to cover the costs. Herald objected to the special levy to the extent that it included the cost of servicing the three lifts it could not use.

At a special general meeting of the body corporate, a resolution for the removal of the trustees was put to the vote. The chairman of the meeting ruled that Herald, whose nominees were a majority of the trustees of the body corporate, was disqualified from voting under the rules of the body corporate. The grounds for disqualification were that Herald had not paid all contributions payable by owners in the scheme.The resolution was carried and new trustees were appointed.

Herald brought an application to overturn the resolution. This application, and the question of whether or not Herald was obliged to bear its share of the cost of servicing all of the lifts, was then brought before the court for determination.

THE DECISION

In terms of section 37(1)(b) of the Sectional Titles Act (no 95 of 1986), a body corporate is entitled to create a fund or the purpose of paying the administative expenses and other liabilities of the body corporate. It may require the owners of sections to contribute to such a fund, and it may raise amounts by levying contributions from the owners in proportion to the quotas of their respective sections.

The respondents contended that this section made it clear that Herald was obliged to pay for cost of servicing all of the lifts. Herald contended however, that a proviso to the section applied. This proviso states that the body corporate shall require the owners of sections entitled to the right to the exclusive use of parts of the common property, whether or not such right is registered or conferred by rules made under the Sectional Titles Act (no 66 of 1971), to make such additional contribution to the fund as is estimated necessary to defray the costs of rates and taxes, insurance and maintenance in respect of any such parts, unless in terms of the rules the owners concerned are responsible for such costs.

In the light of the development of the sectional titles legislation, it is possible to conclude that the obligation to pay contributions, in respect of the area of the common property to which a section owner has a right of exclusive use may derive from a registered right under section 27 of the later Act, or from rules made under the earlier Act. No other source of such rights exists. This is clear from the plain

meaning of the proviso as framed in the Afrikaans version of the text, which is also the signed version. Subsequent to the promulgation of the later Act however, a number of amendments were promulgated. Section 60(3) provided for the acquisition of exclusive use rights by agreement, and the continued recognition of such rights when created by agreement when the earlier Act applied. Section 37(1)(b) was however, not amended so as to incorporate this possibility. While this may have been an oversight, it does provide a basis for interpreting the section as referring to an exclusive use area with origins not only in registration or rules made under the earlier Act, but also in some other source.

The intention of section 37(1)(b) is to burden those who enjoyed such rights, with the costs of maintaining the parts of the common property burdened by such rights. This is an equitable arrangement in distributing the cost of maintaining the property among the owners in a development. The alternative would be to expect those who are unable to use part of the common property to pay the costs created by their co-owners' enjoyment of that part.

Given the basis on which the rights to the lifts had been made, it was clear that those rights did not have their source in any of the sources to which the section applied. The section therefore provided no basis upon which the body corporate could recover the costs from any owner enjoying exclusive use. Consquently, the costs were properly to be recovered from all of the section owners and Herald was equally liable therefor.

ETHEKWINI MUNICIPALITY v BROOKS

A JUDGMENT BY GRIESEL AJA (MPATI P, NAVSA JA, VAN HEERDEN JA and MHLANTLA JA concurring)
SUPREME COURT OF APPEAL
27 MAY 2010

2010 SACLR 369 (A)

In order to show that a street has become a public street as contemplated in section 1 of the Local Authorities (Natal) Ordinance (no 25 of 1974) it must be shown that the public has acquired the right to use the street or the street has been taken over by the municipality in terms of any law or that it is reflected as such in a diagramme of the Surveyor-General.

THE FACTS

In 1993, Brooks took transfer of the Remainder of Lot 183, Drummond. When the property was originally created by means of a subdivision of a farm, a servitude of right of way was surveyed over the farm enabling access to it and the other subdivided properties. The title deed of the property recorded the servitude in favour of these properties. The servitude was named Nyala Drive.

Ethekwini Municipality and its predecessor took the view that Nyala Drive was a private road, and it bore no obligation to maintain the road. This view was shared by some owners of the affected properties at the time. A notice at the entrance to the road stated 'Residents' Access Only'. However, in 2005 the municipality changed its position and took the view that Nyala Drive was a public road and it undertook the obligation of maintaining it. This happened after fourteen of the sixteen affected owners petitioned the municipality to consider the road a public street.

Brooks brought an application for an order declaring that Nyala Drive was not a public street as defined in section 1 of the Local Authorities (Natal) Ordinance (no 25 of 1974) and that the servitude did not create a public street.

THE DECISION

The municipality contended that the public had acquired the right to use Nyala Drive. As this was a ground upon which a street would be a public street as provided for in section 1(c) of the Ordinance, it was properly considered a public street.

In order for a servitude to be classified as a public street, those who use a servitude must be members of the public and not just lawful users of the servitude. The municipality's assertions that the public had acquired this right were insufficiently substantiated and were to be put against the substantiated assertions made by Brooks. The evidence therefore did not establish a right on the part of the general public to use the road.

In the alternative, the municipality contended that Nyala Drive had been taken over by it or become vested in it as a public street as provided for in section 1(b) of the Ordinance. It contended that it had done so under section 220 of the Ordinance which entitles the municipality to take over a street as a public street upon application made by affected owners.

The municipality however, could not have acted in terms of section 220 because there was no evidence that the muncipality's council had made any decision to take over the street, and no consequent record of this in the records of the Registrar of Deeds or the Surveyor-General as contemplated in section 221.

The municipality's final contention was that the diagrammes of the Surveyor-General showed that Nyala Drive was a servitude in respect of which the owners had a common right of use, and that this rendered the road a public street under section 1(d) of the Ordinance. However, the mere depiction of the servitude on a diagramme as one in respect of which the owners have a common right of use does not transform the servitude into a public street. Section 1(d) was to be interpreted as excluding a reference to a street in respect of which the owners have a common right of use by servitudinal right.

The application was granted.

PARADYSKLOOF GOLF ESTATE (PTY) LTD v MUNICIPALITY OF STELLENBOSCH

A JUDGMENT BY MPATI P
(MTHIYANE JA, MALAN JA
SHONGWE JA AND GRIESEL AJA
concurring)
SUPREME COURT OF APPEAL
2 JULY 2010

2010 SACLR 337 (A)

A municipality acting in terms of section 14(2) of the Local Government: Municipal Finance Management Act (no 56 of 2003) in the exercise of a contractual right does not act administratively and accordingly, its action cannot be impugned on the grounds of failure to act lawfully as an administrative body.

THE FACTS

The Municipality of Stellenbosch sold to Paradyskloof Golf Estate (Pty) Ltd a piece of land 277 hectares in extent for R16m. As Paradyskloof intended to build 250 dwelling units and a golf course on the property, the agreement provided that the municipality would call for impact studies on the proposed development and institute an application for the rezoning of the property so as to provide for the development.

The agreement was subject to a suspensive condition that the property be rezoned with the development rights required by Paradyskloof. If the suspensive condition was not fulfilled within 18 months of the lodging of the rezoning application, then either party could resile from the agreement.

The rezoning of the property and the development rights were obtained within the 18-month period, but they were later set aside after an application to court by a third party. The parties concluded a second agreement in which the period of fulfilment of the condition was extended to another 18 months from the date of the latter agreement. That period also expired, but the municipality's council resolved not to resile from the agreement but to conclude a settlement agreement designed to reach consensus on outstanding issues.

Consensus could not be reached, and as a result, the municipality decided to resile from the agreement. Paradyskloof contended that this decision was based on an incorrect valuation of the property given by a company appointed by the municipality to reach a valuation. It brought an application for an order declaring unlawful and invalid the decision to resile from the agreement.

THE DECISION

Assuming that the agreement did not lapse after the expiry of the second 18-month period, the question was whether or not the municipality's decision to resile from the agreement was lawful and valid.

Paradyskloof argued that since the valuation obtained by the municipality bore no relationship to the purchase price, and it had relied on that valuation when making its decision in terms of section 14(2) of the Local Government: Municipal Finance Management Act (no 56 of 2003), its decision to resile was unlawful and invalid. Sub-section (b) provides that a municipality may dispose of an asset after it has considered the fair market value of the asset and the economic and community value to be received in exchange for the asset.

This argument could not prevail because, whether or not the section was applicable, the decision to resile was not an administrative act, but the exercise of a contractual right. The parties had agreed that either party could resile from the agreement upon non-fulfilment of the suspensive condition and therefore either party was entitled to asssert its rights as so provided for in the agreement.

Paradyskloof also argued that the municipality's resolution not to resile from the agreement bound the municipality not to do so. However, it was clear that this resolution was dependent on the parties reaching consensus on outstanding issues. This clearly pointed to the decision not to resile being subject to negotiations.

The final argument put by Paradyskloof was that the delay in exercising the right to resile indicated that the municipality had in fact abandoned that right.

However, failure to exercise a right to cancel does not necessarily lead to loss of that right. In any event, the sale agreement provided that no delay or forbearance in the enforcement of any right of either party arising from the agreement would be construed to be an implied consent or election by such party or operate as a waiver.

The appeal failed.

Whatever the reason for the Municipality's decision may have been is really of no consequence. I agree with counsel for the Municipality that in instances such as the present, at worst for the party making the election, its decision to resile may well constitute a breach which would entitle the other contracting party to accept the breach and cancel the agreement, or to reject it and sue for specific performance. Thus, whether or not the provisions of s 14(2) of the MFMA were applicable in this case is, in my view, of no consequence. The decision to resile, whatever the reasons therefor, is not an administrative act which can be reviewed and set aside, but is the exercise of a contractual right. The parties had agreed that upon non-fulfilment of the suspensive condition either party would be entitled to resile from the agreement.

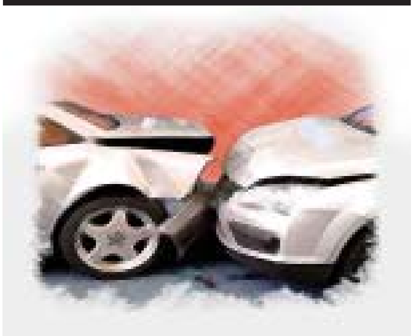
The decision that MAYCO resolved to confirm on 23 February 2006 was the 'in principle' decision taken on 4 October 2005. That 'in principle' decision was clearly subject to the Municipality pursuing 'the option of granting [Paradyskloof] a further extended period of 18 months, to afford them reasonable time to meet the suspensive conditions', and to follow a notice and comment procedure so as to inform the public of its intention to pursue the option just mentioned. Clearly, MAYCO's decision not to resile from the agreement depended on the parties reaching consensus on the issues listed in paragraph (b)(i) and (ii) of MAYCO's resolution of 23 February 2006. If that were not so, it would mean that were the parties unable to reach consensus on those issues, there would be no time limit for the fulfilment of the suspensive condition.

BRUWER *v* NOVA RISK PARTNERS LTD

A JUDGMENT BY CLAASSEN J (MASIPA J and COPPEN J concurring)
SOUTH GAUTENG HIGH COURT
25 OCTOBER 2010

2011 (1) SA 234 (GSJ)

Insurance



An insurer is not entitled to repudiate a claim on the grounds that the insured failed to supply information relating to the event giving rise to the claim if such information is not expressly required by the terms of the insurance policy.

THE FACTS

Nova Risk Partners Ltd insured Bruwer against damage to his motor vehicle.

Clause 3 of the insurance policy provided that if anything happened that could result in a claim, Bruwer was obliged not to make any admission, statement or offer to any other party in connection with any event that may give rise to a claim against him, and was obliged to immediately advise Nova Risk as soon as he became aware of any possible prosecution or inquest.

Clause 6 provided that Bruwer was to inform Nova Risk of all facts material to the acceptance of the insurance or the premium that was charged. If he failed to do this, Nova Risk was entitled to declare the policy void. This also applied during the currency of the policy, so that any changes were to be reported immediately.

During the currency of the policy, Bruwer was involved in an accident while driving his vehicle. As a result of the circumstances of the accident, Bruwer was charged with reckless driving and with driving under the influence of alcohol, as a result of which he was convicted and his licence was endorsed. This accident was followed by a second accident. When notified of the second accident, Nova Risk took the view that the cause was driving under the influence of alcohol, and notified Bruwer that it repudiated his claim arising from the accident. It also stated that it would terminate the policy within 30 days.

Bruwer sued for payment of his claim arising from the accident. Nova Risk defended the action on the grounds that Bruwer had failed to disclose a material fact relating to the risk, namely that his driver's licence had been endorsed as a result of a criminal conviction, that he had been convicted of reckless and negligent driving, that he had failed to advise Nova Risk of any possible prosecution or inquest, had failed to give Nova Risk information which it required to investigate the accident and had failed to inform Nova Risk of all facts that were material to the acceptance of the insurance and the premium charged.

THE DECISION

Nova Risk depended on clause 3 for its right to repudiate. That clause however, made no reference to information regarding any possible prosecution or conviction or suspension or endorsement of a licence. The failure to expressly stipulate that such information was required amounted to a representation that no information beyond any possible prosecution was required. Bruwer was therefore entitled to assume that Nova Risk was not interested in receiving information of actual convictions, sentences and/or endorsements of licences. A reasonable man would not have expected this information to have been disclosed.

It was also clear that the conviction of negligent driving did not in any way affect the insurance risk or calculation of the premium, as the insurance policy expressly indemnified Bruwer against such negligence. In the light of the provisions of section 63(3) of the Insurance Act (no 27 of 1943), the non-disclosure of the conviction and sentence, and endorsement of the licence, would not have been regarded by a reasonable, prudent person as affecting the calculation of the risk or premium. Bruwer's failure to disclose the conviction, sentence and endorsement of his licence was therefore inconsequential.

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

REPRESENTATIVE OF LLOYDS v CLASSIC SAILING ADVENTURES

A JUDGMENT BY LEWIS JA (HARMS JA. CACHALIA JA, MALAN JA and GRIESEL AJA concurring)
SUPREME COURT OF APPEAL
7 JUNE 2010

2010 SACLR 307 (A)

Parties to a contract may choose the law applicable to the contract but the effect thereof may not be to prevent the application of a local statute. 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 insurance policy provided that it was governed by English law but subject to South African jurisdiction.

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 in that it was carried out in contravention of section 73(1) of the Merchant Shipping Act.

THE DECISION

Although parties to a contract are free to choose the law applicable to the contract, if the choice of law has the effect of overriding the peremptory provisions of a statute of the local law (the lex fori) the parties' choice will be disregarded to the extent necessary to ensure compliance with the local statute. In the present case, this meant that the Short Term Insurance Act (no 53 of 1998) applied, and would prevail in the event of any inconsistency with the English Marine Insurance Act, 1906. The position was made clear by section 6(2) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) which provides for the applicability of any law of the Republic.

Section 53 of the Short Term Insurance Act provides that a policy of insurance shall not be invalidated on account of any misrepresentation made to an insurer which is not true unless the representation or non-disclosure is likely to have materially affected the assessment of the risk under the policy. Applying this provision to the question of the stability book, it could not be said that the suggested inaccuracies in it could hardly be said to have been material. Given that the purpose of the book is to guide the master in loading and ballasting the ship,

any inaccuracies could not be said to have materially affected the assessment of the risk.

As far as the qualifications of the skipper was concerned, it was clear that no misrepresentation had been proved on this ground as the evidence showed Lloyds had been satisfied with the skipper's existing qualifications.

As far as the contention that the voyage had been unlawful was concerned, there was no connection between the alleged unlawfulness and the sinking of the ship. Furthermore, even if it was accepted that the voyage was unlawful, section 54(1) of the Short Term Insurance Act applied. This provides that a short-term policy shall not be void merely because a provision of a law has been contravened or not complied with.

There were no grounds upon which Lloyds was entitled to repudiate the claim.

Subsection 5 thus does allow parties to make a choice as to the legal system they wish to govern their contract. But this cannot mean that they can contract out of legislative provisions that amount to ius cogens. One cannot read subsections 2 and 5 in isolation. Subsection 5 must be subject to subsection 2. Read together, as they must be, the subsections mean that while the parties may choose a non-South African system of law to govern their contract, they may not do so where the provisions of the other system are inconsistent with peremptory South African law. The effect of subsection 2 is that ss 53 and 54 of the Short-Term Insurance Act apply to the contract. And to the extent that the English Marine Insurance Act is inconsistent with peremptory statutory provisions it is not applicable

MILLER v NAFCOC INVESTMENT HOLDING CO LTD

A JUDGMENT BY CLOETE JA (MHLANTLA JA, SHONGWE JA, GRIESEL AJA and MAJIEDT AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2010

2010 (6) SA 390 (A)

Insolvency

The Master may authorise the commissioner of an enquiry to determine who may attend the enquiry and have access to the record. Liquidators may delegate their powers provided this does not extend to the delegee exercising powers of discretion.

THE FACTS

Nafcoc Investment Holding Co Ltd brought liquidation proceedings against Serveco (Pty) Ltd resulting in the liquidation of that company. Nafcoc had been Serveco's majority shareholder. Nafcoc and some of its ex-directors brought an application against Miller and the joint liquidators to prevent their examination at an enquiry authorised by the Master in terms of sections 417 and 418 of the Companies Act (no 61 of 1973). The Master's order stated that the contents of this application and the evidence to be taken at the commission was to be kept confidential and private and not be disclosed without the prior leave of the commissioner or the High Court or the Master having first been had and obtained.

Miller was a professional liquidator who acted on behalf of the joint liquidators.

Nafcoc applied for an order setting aside the decision of the Master to convene the enquiry, and interdicting Miller from access to the enquiry, the record thereof and any inspection thereof. It contended that as a person deriving his authority from the appointed liquidators, Miller did not have the permission of the Master to perform any of the acts which only the liquidators could perform. It also contended that the liquidators could not delegate their powers to Miller.

THE DECISION

Section 418(1)(b) of the Companies Act provides that the Master or the court may refer the whole or any part of the examination of any witness or of any enquiry under the Act to a commissioner. In this case, the Master referred the whole enquiry to the commissioner.

The terms of the Master's order indicated that the power conferred was sufficiently wide to authorise the commissioner to allow Miller to attend the enquiry and to have access to the record. The commissioner impliedly exercised the power, well knowing that Miller was not one of the joint liquidators, by permitting him to be present at the enquiry. It was competent for the Master to have done so, and also sensible for the Master, having decided to invoke section 418 and appoint a commissioner, to delegate to the commissioner the power of deciding who might be allowed to attend the hearing and have access to the record.

As far as the argument based on non-delegation was concerned, there was no compelling evidence to show that the liquidators had delegated their powers to the extent of delegating their discretion. They were entitled to delegate their powers but had not done so to the point of delegating the exercise of discretion.

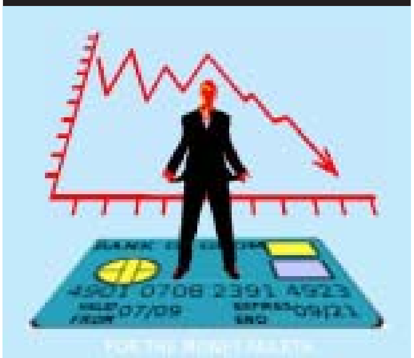
The application was dismissed.

DESERT STAR TRADING 145 (PTY) LTD v No 11 FLAMBOYANT EDLEEN CC

A JUDGMENT BY PONNAN JA (NAVSA JA, CLOETE JA, EBRAHIM AJA and K PILLAY AJA concurring)
29 NOVEMBER 2010

2011 (2) SA 266 (A)

Insolvency



An application for winding up will fail if the respondent shows that it disputes on reasonable and bona fide grounds the debt upon which the applicant relies.

THE FACTS

Desert Star Trading 145 (Pty) Ltd lent Ehlers R859 600. In terms of their agreement, if the loan remained unpaid after 8 June 2008, then interest thereon would be calculated at the compound rate of 1.5% per week. Ehlers did not repay the loan on due date, at which time his indebtedness stood at R1 253 000.

As security for the loan, No 11 Flamboyant Edleen CC agreed to be surety for the due performance of Ehlers' obligations.

Desert Star delivered a notice in terms of section 69 of the Close Corporations Act on Flamboyant demanding payment of the amount then due within 21 days. The notice pointed out that failure to do so would result in an application for the winding up of the close corporation. Desert Star then brought the application for winding up.

Flamboyant opposed the application. It alleged that Desert Star was not a registered credit provider in terms of the National Credit Act (no 34 of 2005) and the loan was therefore void in terms of section 40(4) read with section 89(5) of the Act. It also alleged that the loan was a reckless credit agreement as defined in the Act. Flamboyant contended that in consequence, the suretyship agreement was also void.

THE DECISION

A suretyship agreement which relates to a principal liability arising from a void contract is void. Desert Star's application for liquidation of Flamboyant rested on a suretyship agreement which related to a loan agreement alleged by Flamboyant to be void. The question raised by Flamboyant's defence was whether or not this was so.

In liquidation proceedings, if the respondent disputes on bona fide and reasonable grounds the debt upon which the applicant relies in bringing such proceedings, a court will refuse to give a winding up order. This rule should be applied in the present case. It was not possible to determine whether or not Flamboyant's allegations were sustainable, but they did constitute a bona fide dispute of the debt relied upon by Desert Star. This was therefore not an appropriate case for a liquidation order.

The application was dismissed.

As Corbett JA made plain in Kalil v Decotex (Pty) Ltd *1988 (1) SA 943 (A) 'In regard to* locus standi *as a creditor, it has been held, following certain English authority, that an application for liquidation should not be resorted to in order to enforce a claim which is* bona fide *disputed by the company. Consequently, where the respondent shows on a balance of probability that its indebtedness to the applicant is disputed on* bona fide *and reasonable grounds, the Court will refuse a winding-up order. The* onus *on the respondent is not to show that it is not indebted to the applicant: it is merely to show that the indebtedness is disputed on* bona fide *and reasonable grounds.'*

MOODLIAR N.O. *v* HENDRICKS N.O.

Insolvency

A JUDGMENT BY DAVIS J
WESTERN CAPE HIGH COURT
8 SEPTEMBER 2009

2011 (2) SA 199 (WCC)

A court may confer powers on a provisional liquidator in terms of section 386(5) of the Companies Act (no 61 of 1973) if the circumstances of the company indicate that the provisional liquidators need to consider the implications of the company's situation which would impact upon their ability to perform in the interests of the creditors and affected stakeholders.

THE FACTS

Cape Kingdom (Pty) Ltd was placed in provisional liquidation upon application by the Cape Biotech Trust which alleged it was owed R10m by the company. Moodliar and others were appointed provisional liquidators. They applied for an order in terms of section 386(5) of the Companies Act (no 61 of 1973) for the power to bring or defend any action or other legal proceedings, and to instruct and pay attorneys and counsel, the power to elect or abide by lease agreements. and the power to elect whether or not to continue with certain agreements.

The majority shareholder, the Vetulina Trust, and the chief executive officer of the company, Mr Stander, opposed the application on the grounds that there was inadequate service for provisional liquidation in terms of section 346(4A)(a) of the Act, that Cape Biotech was not a creditor at the time that it applied for the provisional order, and that the final order was unlikely to be granted, because the company was not insolvent.

In support of the first ground, the trust alleged that there had not been service of the application for provisional liquidation on the employees of the company as only three employees had been served with the application and they were no longer employed by the company.

The company's stock and equipment was encumbered in favour of the Standard Bank but the extent of the company's indebtedness to the bank was unclear because Stander challenged the amounts claimed by the bank.

THE DECISION

As far as the first ground of opposition was concerned, there was a dispute between the parties regarding the extent of service on the employees. There may well have been proper service of the application. It was true that a court cannot condone non-compliance with the requirement that a copy of the application must be furnished on the parties, as specified in section 346(4A)(a). However, a court may determine whether the applicant has been in substantial compliance with each of these sections. It is for the court to determine whether the nature of the furnishing of the application, pursuant to the section, has been met. In the present case, the court could determine that the requirements of the section had been met.

As far as the second and third grounds of opposition were concerned, the applicant had to show that the powers sought were necessary for the winding up of the company. From the allegations made in the papers concerning the company's stock and equipment, it was unclear what the legal status of the encumbered assets was. The provisional liquidators would need to take legal advice on this, as well as on the extent of Cape Biotech's claim against the company. Furthermore, given the parlous state of the company, the provisional liquidators needed to consider the implications of leases and other executory contracts, which would impact upon their ability to perform in the interests of the creditors and affected stakeholders.

The circumstances were therefore appropriate for an order in terms of section 386(5).

FIRSTRAND BANK LTD v MVELASE

A JUDGMENT BY D PILLAY J
KWAZULU NATAL HIGH COURT
26 OCTOBER 2010

2011 (1) SA 470 (KZP)

Credit Transactions

Section 86(10) of the National Credit Act (no 34 of 2005) permits termination of a debt review when it is taking place in the magistrates' court.

THE FACTS

Firstrand Bank Ltd lent money to Mvelase. As at 2 June 2010 the arrears in terms of the mortgage bond securing the loan amounted to R209 214,88. On 13 November 2009 a debt counsellor referred the matter to the magistrates' court for debt review in terms of s 86(8)(b) of the National Credit Act (no 34 of 2005), for an order in terms of sections 86 and 87 of the Act. On 30 April 2010 the bank notified Mvelase that his account was in arrears, 60 business days had lapsed since he had applied for debt review and the bank was terminating the review with immediate effect in terms of section 86(10). Mvelase remained in default of the mortgage bond for more than 20 business days after receiving the section 86(10) notice.

After issuing a notice to Mvelase in terms of section 129(1) of the Act, on 8 June 2010 the bank issued summons against Mvelase for payment of all amounts due in terms of the loan.

Mvelase defended the action on the grounds that he was overindebted in terms of section 79 of the Act. As his application for debt review in terms of section 87 preceded the bank's summons, its notice in terms of section 86(10) did not entitle it to issue summons against him. He denied that the bank terminated his debt review lawfully.

The bank applied for summary judgment.

THE DECISION

The overriding purpose of the National Credit Act is to protect consumers against the relatively unbridled freedom to contract and improve their bargaining position. It intends to protect vulnerable consumers in relation to credit providers, and to balance their rights. In analysing the protections put in place in regard to the enforcement of debts by litigation, three models become discernible: model one permits litigation early in the debt recovery process, whilst the debt review is under way before a debt counsellor or magistrates' court; model two permits litigation only after debt review is completed; model three permits litigation to interrupt debt review, but also recognises that the court enforcing the credit agreement can conduct the debt review itself in certain limited circumstances, refer it back to the magistrates' court, or grant an order that also complies with the Act and its purposes.

The inference to be drawn from the scheme of the Act is that the legislature intended most reviews to be determined by debt counsellors with only a few filtering through to the reviewing magistrates' court, and even fewer proceeding to the enforcement court. The policy consideration underpinning this model is to prevent the magistrates' court from being overburdened with the additional case load emanating from the Act. The question which arises however, is whether or not a credit provider can use a section 86(10) notice to terminate a debt review that is referred to the magistrates' court? This question arises because section 86(10) applies '(i)f a consumer is in default under a credit agreement that is being reviewed in terms of that section '. It is unclear whether the 'section' refers to section 86 only or incorporates section 87. If it includes section 87 then a section 86(10) notice can terminate debt reviews pending in the magistrates' court.

Model one would include section 87 while model two could exclude it. Model three would include it,

but would also accept that the section 130(4) enforcement court may also conduct debt review in limited circumstances prescribed by that section.

Of these three approaches, the third is most consistent with the purpose and intention of the Act. Section 86(10) permits termination of the review when it is in the magistrates' court. This interpretation is the one most capable of balancing the interests of the consumer and credit provider to achieve all the purposes of the Act, especially that of 'promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers'.

Based on this interpretation, and the evidence that the bank had fully complied with all the requirements of the relevant sections, there appeared to be no bona fide defence to the bank's claim. Summary judgment was therefore granted.

At least three models are discernible: model one permits litigation early in the debt recovery process, whilst the debt review is under way before a debt counsellor or magistrates' court. At the other extreme, model two permits litigation only after debt review is completed. Between these extremes model three permits litigation to interrupt debt review, but also recognises that the court enforcing the credit agreement can conduct the debt review itself in certain limited circumstances, refer it back to the magistrates' court, or grant an order that also complies with the NCA and its purposes.

...

The inference to be drawn from the scheme outlined above is that the legislature intended most reviews to be determined by debt counsellors with only a few filtering through to the reviewing magistrates' court, and even fewer proceeding to the enforcement court. The policy consideration underpinning this model is to prevent the magistrates' court from being overburdened with the additional case load emanating from the NCA.

MERCEDES BENZ FINANCIAL SERVICES SOUTH AFRICA (PTY) LTD v DUNGA

A JUDGMENT BY BLIGNAULT J
WESTERN CAPE HIGH COURT
20 SEPTEMBER 2010

2011 (1) SA 374 (WCC)

A credit provider acting in terms of section 86(10) to terminate a debt review must act in good faith.

THE FACTS

Mercedes Benz Financial Services South Africa (Pty) Ltd lent money to Dunga for the purchase of a motor vehicle. Dunga was unable to fully meet his obligations and applied for debt review. On 30 November 2009, Mercedes sent a letter to Dunga in terms of section 86(10) of the National Credit Act (no 34 of 2005) notifying Dunga that as a period of sixty days had elapsed since application for debt review had been made, the debt review process was terminated. It brought an action for delivery of the vehicle and payment of amounts due in terms of the instalment sale agreement.

Dunga defended the action on the grounds that the application for debt review was withdrawn on 25 November 2009, and a new application was made on 14 July 2010. Mercedes applied for summary judgment.

THE DECISION

A credit provider acting in terms of section 86(10) to terminate a debt review must act in good faith. This qualification to the right of the credit provider to terminate a debt review is required because it is upon a proper interpretation of section 86(11) that a court hearing enforcement proceedings would be able to order the resumption of debt review, as provided for in that subsection. The subsection would be unworkable were it possible for a credit provider to terminate a debt review merely on fulfilment of the conditions provided for in section 86(10).

It is not necessary to define the precise ambit of ‘good faith’, but in the absence of special circumstances the termination of a debt review by the credit provider, whilst the consumer is prosecuting it in good faith and in a reasonable manner, would not be regarded as action taken in ‘good faith’.

In the present case, Dunga did not prosecute the debt review in good faith, since he only resumed it on 14 July 2010. However, in terms of section 86(11), Dunga would be able to ask for an order that the debt review be resumed in the present proceedings which were taking place in the High Court. As he might have a defence based on the provisions of section 86(11) which he was unaware of, summary judgment should be refused.

The application for summary judgment was dismissed.

SA TAXI SECURITISATION (PTY) LTD v CHESANE

A JUDGMENT BY
BORUCHOWITZ J
SOUTH GAUTENG HIGH COURT
1 APRIL 2010

2010 (6) SA 557 (GSJ)

The National Credit Act (no 34 of 2005) does not affect an owner's right to interim attachment of its goods pending the outcome of its action against a debtor.

THE FACTS

SA Taxi Securitisation (Pty) Ltd, a registered credit provider under the National Credit Act (no 34 of 2005), leased two motor vehicles to Chesane. It retained ownership of the vehicles. Chesane fell into arrears with the instalment repayments due under the leases. He applied for debt review in terms of section 86 of the Act. More than sixty days later, SA Taxi gave notice of termination of the debt review process. The debt counsellor then issued a debt-review proposal. SA Taxi did not accept the proposal, and then brought an action against him for cancellation of the leases and return of the vehicles.

Pending the finalisation of the action, it sought an order against Chesane for delivery of the vehicles for storage in secure garaged premises in Johannesburg.

THE DECISION

Under common law, an owner of goods may obtain the interim attachment of goods pending the outcome of an action to secure possession thereof. The first question was whether this right was affected by the National Credit Act.

There is no express indication in the Act that an amendment to the common law has been effected. Since the purpose of an attachment order is not to enforce the owner's rights against the debtor, but to preserve the goods against deterioration or damage, it is not a procedure provided for in the debt enforcement provisions of the Act. No provision of the Act therefore, prevented the attachment order sought by SA Taxi. The second question was whether SA Taxi had satisfied the requirements upon which the attachment order could be given.

The termination of the debt review process was lawfully effected in terms of the provisions of section 86(10) of the Act. Following that, no application for resumption or revival of the debt review process had been brought in terms of section 86(11).

Chesane contended that the court should apply section 83 of the Act and suspend what was a reckless credit agreement because there was a reasonable chance of it being found that the credit extended to him was reckless or that it resulted in him being overindebted. However, two factors militated against the court exercising its discretion in favour of Chesane in this respect. Firstly, Chesane initiated the debt review process and then made no attempt to revive it after it was terminated. Secondly, in the event of Chesane being successful in the future trial of the matter, the vehicles can be returned to him.

The attachment order was granted.

SA TAXI SECURITISATION (PTY) LTD *v* MBATHA

A JUDGMENT BY LEVENBERG AJ
SOUTH GAUTENG HIGH COURT
30 MARCH 2010

2011 (1) SA 310 (GSJ)

A lease agreement which provides that the creditor may cancel the agreement upon an event of default allows a creditor to cancel the agreement forthwith upon demand that the default be remedied. A debtor who relies on a defence that credit was extended to him recklessly as contemplated in section 80 of the National Credit Act (no 34 of 2005) must set out sufficient facts to show that credit was extended to him in a reckless manner.

THE FACTS

SA Taxi Securitisation (Pty) Ltd leased motor vehicles to Mbatha and others. The lease agreements were credit transactions as defined in the National Credit Act (no 34 of 2005).

In terms of clause 9 of the leases, an event of default would occur if the debtor failed to make punctual payment of any instalment. Upon an event of default, SA Taxi was entitled, after due demand, to cancel the agreement, obtain possession of the vehicle and recover the total payments not yet paid in terms of the lease.

SA Taxi alleged that Mbatha had failed to pay rentals on due date, as a result of which it had cancelled the lease agreement. It brought an action to repossess the vehicles, and sought summary judgment.

Mbatha denied that he was in default and contended that because SA Taxi had not first demanded payment from him and then given notice of default, it had not been entitled to cancel the agreement. Mbatha also contended that the credit extended under the lease constituted the giving of reckless credit as referred to in section 80 of the National Credit Act and should be set aside. Mbatha had applied under the Act for debt review.

THE DECISION

As far as Mbatha's first contention was concerned, there was nothing in the language of the lease agreement that justified his interpretation. The language of clause 9 made it clear that as soon as demand was made, SA Taxi was entitled to return of the vehicle. SA Taxi made the allegation in its particulars of claim that the agreement had been terminated, alternatively was terminated 'herewith'. As a matter of law, to the extent that demand is required, summons constitutes demand.

As far as the defence based on section 80 of the National Credit Act was concerned, this Act does not permit a debtor to retain the creditor's security while suspending the debtor's own obligations. To show that section 80 applied, Mbatha should have given particulars of the negotiations leading up to the conclusion of the agreement, the parties involved and any credit application he completed at the time. He should also have given details of his level of education and experience, and any previous credit agreements entered into, the extent of his indebtedness at this time and information as to his income and expenditure. Mbatha had given none of this information. There was therefore no indication that section 80 might apply in his case.

Summary judgment was granted.

STRUCTURED MEZZANINE INVESTMENTS (PTY) LTD v DAVIDS

A JUDGMENT BY YEKISO J
WESTERN CAPE HIGH COURT
8 SEPTEMBER 2010

2010 (6) SA 622 (WCC)

A suretyship agreement to a transaction which is not subject to the National Credit Act (no 34 of 2005) will also not be subject to that Act.

THE FACTS

Structured Mezzanine Investments (Pty) Ltd lent R3m to Zapton Investments 786 (Pty) Ltd on 25 April 2008. Davids and the other respondents were sureties for the due repayment of the loan and all other money owing to Structured.

Interest on the loan at the rate of 1.25% per week was payable on the loan from 25 April 2008 until the date on which the loan had to be repaid, 24 October 2008. If the loan was not repaid on that date, interest at the rate of 1.5% per week would be payable.

The loan was given to Zapton to provide interim funding, known as mezzanine funding, for a property development, and was preceded by extensive negotiations in which the interest rate was discussed and decided upon. Those acting for Zapton were shrewd businessmen who were aware of the risks associated with the property development industry. They considered the mezzanine funding to be necessary because commercial banks were not prepared to offer loans for such property developments without initial investment by the property developer itself.

Zapton failed to repay the loan on due date. Structured brought an application for repayment of the loan together with interest thereon.

The court raised the question whether or not the claim was lawful, in the light of the provisions of the National Credit Act (no 34 of 2005) and the Conventional Penalties Act (no 15 of 1962).

THE DECISION

The National Credit Act did not apply to Zapton because it was a juristic person whose asset value exceeded R1m. In terms of section 4(2)(c) of the National Credit Act, the Act applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted. It followed that the Act also did not apply to the sureties for Zapton.

As far as the Conventional Penalties Act was concerned, a penalty provision in a contract is enforceable, unless the results flowing from such enforcement are disproportionate to the loss suffered by the contracting party in whose favour the penalty provision is intended to operate. The agreed alternative rate of 1.5 percent per week was the basis of liability in the event of default or an omission to pay a debt on due date. It would come into operation and become enforceable on breach of the agreement. It was intended to compensate the credit giver in the event of a loss arising from non-performance. Due regard being had to the amount of capital advanced and all the attendant risks involved, it could not be said that either the initial rate of interest, or the alternative rate of interest agreed upon, was disproportionate to the attendant risks involved in advancing or making available the capital required or the loss suffered as a result of non-payment.

It therefore followed that the initial rate of interest, as well as the alternative rate of interest

agreed upon, was not in conflict with the relevant provisions of the Conventional Penalties Act.

As far as public policy was concerned, having regard to the nature of the transaction in the the matter, the niche market which the mezzanine funders serve and the market requirements, the interest rate agreed upon in terms of the loan agreement did not offend good morals, nor was it against public policy.

The application was granted.

Since the provisions of the National Credit Act do not apply to the principal debtor, Zapton, such provisions, equally, do not apply to the respondents. This is so because of the principal debtor, in the instance of this matter, being a juristic person, as contemplated in the definition of the term 'juristic person' in s 1, and the loan agreement in question being a large loan agreement, as contemplated in s 9(4) of the National Credit Act. Clearly, therefore, the provisions relating to the prescribed maximum interest rates, as provided for in the National Credit Act, do not apply to Zapton and the respondents.

...

Having regard to the nature of the transaction in the instance of this matter, the niche market which the mezzanine funders serve and the market requirements (having regard to the general economy), the interest rate agreed upon in terms of the loan agreement, in the circumstances of this matter, does not offend good morals, nor is it against public policy.

RIBEIRO v SLIP KNOT INVESTMENTS (PTY) LTD

A JUDGMENT BY CACHALIA JA (MPATI P, TSHIQI JA, R PILLAY AJA AND K PILLAY AJA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2010

2010 SACLR 521 (A)

An agreement which is not a credit transaction in terms of the National Credit Act (no 34 of 2005) will not become so merely because it is amended by the conclusion of an agreement intended to settle the rights and obligations of the parties to that agreement.

THE FACTS

Slip Knot Investments (Pty) Ltd made two loans to R.B. Merit Investments (Pty) Ltd. Ribeiro and the second appellant were sureties for the repayment of the loans.

Following default in repaying the loans, the parties concluded a settlement agreement. It recorded that loans of R22.5m and R1m had been made, and that the amount outstanding under them was R35 641 117.69. The agreement provided for its repayment at stipulated dates in the future.

Certain amounts were paid in terms of the settlement agreement and R.B. Merit met all of its obligations in terms thereof. The sureties however, did not perform all of their obligations. Slip Knot then brought an action to enforce payment of the outstanding amounts. Ribeiro and the other surety defended the action on the grounds that the agreement was a credit agreement as defined in the National Credit Act. Since Slip Knot was not a registered credit provider, the agreement was void. Slip Knot contended that because the original loans were not subject to the Act, and the settlement agreement was a credit guarantee in respect of them, the settlement agreement was not subject to the Act.

THE DECISION

The initial loan agreements were not irrelevant to the determination of the issue. This was evident in the fact that the settlement agreement specifically referred to the sureties' obligations under the loan agreements and in the fact that at the time the settlement agreement was concluded the sureties still had the obligation to guarantee R.B. Merit's commitments to Slip Knot. It was therefore not a credit transaction.

If the settlement agreement was not a credit transaction at the time it was concluded, it could not have become one subsequently, after R.B. Merit was released from its obligations. If it could have, this would mean that the agreement was not void at the time that it was concluded, but became so once R.B. Merit had discharged its obligations under it. Such a result would be absurd.

The agreement was therefore not void

HARVEY v UMHLATUZE MUNICIPALITY

JUDGMENT BY YN MOODLEY AJ
KWAZULU NATAL HIGH COURT
29 NOVEMBER 2010

2011 (1) SA 601 (KZN)

Property

Expropriation of property for a purpose which is not ultimately realised does not entitle the owner of the expropriated property to reinstatement of his rights of ownership when the expropriation is done in the bona fide execution of a public purpose which cannot be realised due to unforeseen circumstances.

THE FACTS

Harvey owned two properties in Richards Bay. In August 1992, the Umhlatuze Municipality expropriated the properties in terms of section 67 of the Town Planning Ordinance (no 27 of 1949) with the intention that they would be incorporated into a public open space to be used for recreational purposes. Harvey remained in occupation of the properties as tenant.

By 1996, it became clear that the original purpose of the expropriation could not be achieved. Development consultants were engaged and it was recommended that the area in which the properties were situated, known as The Ridge, should become a medium-density residential development, together with associated private parking, garden areas and communal facilities for residents. On 21 August 2001 the council of the first respondent resolved to rezone the properties forming The Ridge, in accordance with the new development plans for the land. On 27 November 2006, the rezoning of the properties was approved by the Provincial Planning and Development Commission.

After taking legal opinion on the matter, on 5 December 2006 the municipality's council resolved to consolidate the properties of The Ridge, and to sell the property by public tender so that it could be developed in accordance with the new zoning. This resolution was confirmed by later resolutions which included qualifications and riders, but the decision to expropriate Harvey's property was not reversed.

Harvey requested the municipality to reverse the expropriation of his properties and reinstate him as owner, and appealed to the municipality's appeal committee in regard to the resolutions taken. The appeal was dismissed and reasons were given. The municipality accepted a tender by the second respondent for the development of the area in accordance with the new development plans. It also resolved to sell the properties which had been owned by Harvey as part of the consolidated property known as The Ridge.

Harvey brought an application to review and set aside the municipality's decisions to award the tender to the second respondent and sell the properties which he had owned.

THE DECISION

The municipality's decision to use the properties for a purpose different from that for which they were originally expropriated, and its decisions to consolidate the properties, and dispose of them en bloc were made in the exercise of its public power, in the ordinary course of administering the properties. This had immediate and direct legal consequences for Harvey. Considered against the backdrop of the manner in which the municipality acquired ownership in the properties, the facts and circumstances which led to the municipality changing the purpose for which the properties were originally intended, its decision to rezone and consolidate the properties en bloc, and to implement those decisions, and the alleged infringements of the rights asserted by Harvey, the municipality's conduct constituted administrative action as contemplated in section 33 of the Constitution and the Promotion of Access to Justice Act (no 3 of 2000).

The thrust of Harvey's case was that, when the municipality

ceased its plan to use the properties for the original purpose for which they had been expropriated, the municipality was duty-bound to permit the applicant to restitution of his properties, against payment by him of their market-related value. In support of this contention Harvey relied heavily on the mandatory stipulation, both in terms of statute law and the Constitution, that property can only be expropriated for a public purpose or in the public interest. He submitted that, conversely, if the public purpose ceased to exist, or were abandoned by the expropriator, the expropriation was no longer legally and constitutionally sustainable in the face of a claim to the property by the original owner.

As a general principle, in South Africa deprivation of property by the State is permissible, provided that it is not arbitrary, and is carried out in terms of a law of general application. A person has no right to compensation, unless a deprivation of property also amounts to an expropriation of that property. Furthermore, expropriation of property is dealt with specifically in section 25 of the Constitution. Harvey sought to bring his case within the purview of section 25(1), not on the basis of any present right of ownership of the properties, but rather on the basis that, once the purpose for which the properties were expropriated changed, he, as the previous owner of the properties, had a right to reobtain them.

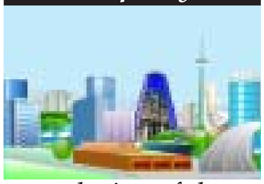
Harvey’s contention rested on the principle that legitimate expropriation must be for a public purpose. While this was a principle applicable in expropriation matters, the fact that the purpose was not in fact realised did not mean that the property had to be returned to its original owner. A distinction has to be made between, on the one hand, cases where an authority expropriates land for a stated purpose, and never even commences to apply it for that purpose, or uses it for a different purpose, or was mala fide from the outset; and cases where, on the other hand, an authority expropriates land for a stated purpose, bona fide intending to use it for that purpose, and endeavouring to bring its contemplated project to fruition, but is thwarted in so doing for some reason, including possibly the fact that circumstances have changed since the time it framed its initial plan. It is in the nature of things that circumstances do change, and authorities cannot foresee their future perfectly.

It was also true that the municipality was duty-bound to consider the interests of the municipality and its residents over the personal interests of Harvey. In terms of section 151(2) of the Constitution, the executive and legislative authority of a municipality is vested in its municipal council, and, in terms of subsection (3), a municipality has the right to govern, on its own initiative, the local-government affairs of its community. One of the objects of local government is to promote social and economic development, as provided for in terms of section 152(1)(c) of the Constitution. It is also responsible for municipal planning, and has administrative responsibilities towards the community which it serves.

Harvey therefore did not acquire any right to reacquire the properties when the municipality changed the purpose for their use. Accordingly, he could not rely on any infringement of the rights contained in section 25 of the Constitution to reacquire the properties.

The application was dismissed.

NATIONAL STADIUM SOUTH AFRICA (PTY) LTD v FIRSTRAND BANK LTD



A JUDGMENT BY HARMS DP (MAYA JA and BERTELSMANN AJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2010

2011 (2) SA 157 (A)

Naming rights in respect of fixed property vest originally in the owner of the property. If the owner confers naming rights on another party whose rights are registered in a personal servitude over the property, those rights are subtracted from the ownership rights and may be asserted by that party as real rights against all persons.

THE FACTS

In terms of an agreement concluded on 20 October 1988, Firstrand Bank Ltd's predecessor obtained the right to the name of the main soccer stadium in Soweto to be the First National Bank Stadium. On 31 January 2007, this agreement was superseded by another agreement, known as the 'servitude agreement', concluded between the same parties as well as the government of South Africa.

In terms of the servitude agreement, the government was to become the owner of the land on which the stadium was situated and the bank's naming rights were re-asserted. The naming rights were to last for ten years as from 7 July 2004, but the bank had a right of renewal for another two years, subject to payment of a fair market value for those rights. If the right of renewal were to be exercised, the naming rights would terminate on 6 July 2016 instead of on 6 July 2014. In implementation of this agreement, the stadium was demolished and a new stadium built in its place.

In 2008, the land was transferred to the government, and the government registered a personal servitude in favour of the bank entitling it to the naming rights provided for in the servitude agreement. The following year, the government concluded a long-term lease with the City of Johannesburg as tenant. The City entered into a stadium management agreement with National Stadium South Africa (Pty) Ltd entitling it to conduct the business of the management of the stadium including the right to name the stadium.

Shortly after conclusion of the World Cup in 2010, National Stadium stated that it had acquired from the City 'all the rights to advertising, sponsorships, naming rights and commercial rights to Soccer City Stadium', and that it had the right to sell the naming rights to the stadium.

The bank applied for an interdict against National Stadium and the City to prevent them from marketing the stadium by any other name than FNB Stadium. National Stadium opposed the application on the grounds that the bank's rights were incapable of being registered as a servitude, alternatively that the bank's rights had terminated when the stadium was demolished in 2007.

THE DECISION

The origin of naming rights is the right of ownership. The government as owner of the land, held these rights until they were alienated to the extent provided for in the servitude agreement and subsequently registered in the servitude. When the servitude was registered, the bank did not obtain personal rights which it could assert only against particular persons - it obtained real rights in the form of the naming rights, entitling it to assert these rights against anyone.

The servitude did not purport to place any duties on the government. However, the government as much as any other person, was no longer entitled to place other naming boards on or around the stadium. The parties could not have intended that conflicting naming boards could be erected at the stadium. This meant that the right to name the stadium, which the government

held as owner, was carved out from its full ownership right, thereby restricting the exercise of that particular right of ownership in respect of the land.

The demolition of the old stadium did not extinguish the servitude. This is because the servitude agreement and the servitude itself covered the new stadium. This is clear when regard is had to the circumstances against which the servitude was granted.

The application was granted.

It is no doubt correct that some naming rights are purely contractual in the sense that they arise as a result of an agreement. This would for instance apply where someone wishes to stage a sporting or cultural event and enters into agreements with others relating to the event. Whether that is necessarily true about a product or a commercial building, such as a shopping centre, office block or sports stadium, is another matter. One would assume that the owner would be the person who could name the building by attaching naming boards to the property or using its name for commercial purposes.

The right to an exclusive name of one's property does not exist unless the name has a commercial or financial significance. Compare Day v Brownrigg *(1878) 10 Ch D 294. As Mr Joseph SC for the City said, it is a common occurrence that the owner of a commercial building would let the building and give the head lessee the right to name the building. Although the grant of the right to name to the lessee is by contract, the owner must have had the right by virtue of its control over the building. This does not mean that others may not refer to the building by some other name, but that use will not have commercial significance.*

That naming rights vest in the owner was impliedly admitted by the managers when they sought to justify their entitlement to those rights. They said that the rights were derived from the City who had obtained them from the owner, albeit by contract. Although Mr Du Plessis *initially submitted that the naming rights of his clients flow from the control Government as owner had over the stadium, he retracted from this position and eventually submitted that the managers' lawyerly evidence was based on a misconception of the legal position. His argument in this regard that naming rights come from nowhere, could (somewhat unkindly) be compared, according to Mr* Louw SC *for the Bank, to the Big Bang theory.*

RGS PROPERTIES (PTY) LTD v ETHEKWINI MUNICIPALITY

Property

A JUDGMENT BY NGWENYA AJ
KWAZULU NATAL HIGH COURT
22 JULY 2010

2010 (6) SA 572 (KZD)

Determination of the value of a property for purposes of imposing rates must be done in accordance with the applicable legislation if the local authority is to succeed in a claim for payment of rates.

THE FACTS

RGS Properties (Pty) Ltd applied for rescission of judgment taken against it by the Ethekwini Municipality. The municipality had taken judgment against it after having brought an action against RGS for payment of rates in the sum of R435 498,29.

RGS's defence to the claim was that the rates alleged to be owing were not owing because of an ongoing dispute between itself and the municipality as to the amount of the rates which were payable. This dispute concerned the proper value to be placed on the property. RGS had objected to the value placed on the property by the municipality but for a number of years thereafter, had received no response from the municipality. In due course, the municipality had agreed to a reduction of the assessed value of the property. This was not arrived at by determination of the Valuations Appeals Board following an appeal procedure, but by way of an offer letter sent to RGS by the municipality.

The municipality contended that because the court had no jurisdiction to determine whether or not the rates were correctly determined, and the obligation to pay rates was not affected by an appeal against a rates valuation, RGS had shown no defence to the claim which had resulted in the judgment taken against it.

THE DECISION

In terms of the applicable ordinance, the municipality was obliged to value the properties within its area of jurisdiction and a ratepayer had the right to file an objection to any valuation. It is not open to the ratepayer or the municipality to act outside the provisions of the legislation, and reach a valuation on their own.

RGS had acted within the provisions of the legislation when it objected to the valuations. The municipality had not acted within its provisions when it made its offer by way of the letter. In the light of this, it was not clear what the basis of the municipality's claim was. It was not clear how it had computed the rates payable by RGS and therefore whether or not what it claimed was owing and payable.

RGS had therefore shown that it had a defence to the municipality's claim. Rescission of judgment was accordingly granted.

EXDEV (PTY) LTD v PEKUDEI INVESTMENTS (PTY) LTD

Property

JUDGMENT BY LEACH JA (HEHER JA, CACHALIA JA, EBRAHIM AJA and PILLAY AJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2010

2011 SACLR 1 (A)

A sale of fixed property which leaves the precise identification of the property sold to the discretion of one of the parties complies with section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE FACTS

On 15 June 2005, Pekudei Investments (Pty) Ltd addressed a letter to Exdev (Pty) Ltd. It recorded that Exdev was purchasing from Pekudei three sections in a development known as Twindale, parking bays and an undivided share in common property for R2 178 000. It also recorded that Exdev intended to replace Twindale with a new building, and that it would provide Pekudei with an office unit and parking bays in the new building at the same price, as well as an option to purchase a further 140 square metres at the prevailing market price.

The sale to Exdev took place. However, Exdev failed to provide Pekudei with the office unit and parking bays referred to in the letter. Pekudei claimed that Exdev had repudiated the agreement, cancelled the agreement and brought an action for damages.

Exdev defended the action on the grounds that the agreement was void for vagueness in that it insufficiently described the property to be sold and failed to specify the option price. Exdev also contended that the agreement was of no force and effect as those deficiencies constituted a failure to comply with section 2(1) of the Alienation of Land Act (no 68 of 1981).

THE DECISION

Because the sale of the property to Pekudei was separate from the option conferred on Pekudei, it was unnecessary to consider whether any invalidity in respect of the option affected the validity of the sale. The sole issue was whether the description of the property sold was so vague as to mean that the sale agreement did not comply with section 2(1) of the Act.

A description of property which complies with the section need not be a faultless description stated in meticulously accurate terms. It is not essential that the property be specified precisely, as it is possible that the parties leave the specification of detail to a later date. In the present case, the size of the property had been determined. It was necessary only for its shape and position to be left to the discretion of Exdev. This was a case where the parties had intended that one of them would choose from a genus or class, the precise identity of the property to be transferred. As such, it constituted sufficient compliance with section 2(1).

McLUCKIE v SULLIVAN

A JUDGMENT BY BLIEDEN J
SOUTH GAUTENG HIGH COURT
7 SEPTEMBER 2010

2011 (1) SA 365 (GSJ)

Corporations

Repudiation, on behalf of a company, of an agreement by the financial contributor and sole shareholder in the company, the effect of which is to render the other contracting party without a claim against the company, knowing that this will be the effect of the repudiation, constitutes reckless trading as defined in section 424 of the Companies Act (no 61 of 1973).

THE FACTS

In June 2004, Dansk Design (Pty) Ltd, represented by Sullivan, agreed to build a house for McLuckie. Sullivan was one of two shareholders in Dansk and a director of the company. He provided the capital required for the running of the company. The other shareholder provided the expertise in building, but in April 2005 he left the company. By that stage, the company's balance sheet reflected an after-tax loss of R1 509 165.

Sullivan had to arrange for sub-contractors to complete the building, with the result that the cost of construction exceeded budget. McLuckie became dissatisfied with the progress of the building work and refused to pay an amount of R900 000 claimed by Dansk for the work.

The parties met on site, and then concluded a settlement agreement. In terms thereof, McLuckie agreed to pay R522 278.12 in full and final settlement of any and all claims by Dansk. McLuckie paid this amount but thereafter, Sullivan informed McLuckie that Dansk would perform no further construction work on the house. Some five months earlier, Sullivan had brought an application to wind up Dansk. Sullivan used the money paid by McLuckie to pay trade creditors of Danks, employees and R300 000 for himself.

In February 2006, Dansk was placed in liquidation. McLuckie brought an action against Sullivan for payment of the R522 278.12 he had paid to Dansk. He based his claim on section 424 of the Companies Act (no 61 of 1973), contending that Sullivan was personally liable for the debts of Dansk as he had carried on the business of the company recklessly or with intent to defraud him.

THE DECISION

The agreement between the parties was that McLuckie would pay the R522 278.12 as the quid pro quo for Dansk providing a written undertaking that it would complete all the outstanding works at the premises. The written record thereof constituted an unequivocal bilateral contract between the plaintiff and Dansk. Dansk could only perform its obligations to McLuckie with the financial support of Sullivan. Sullivan's statement that Dansk would perform no further construction work was a repudiation by Dansk of its agreed obligations to McLuckie. By allowing Dansk to keep the money paid in terms of the agreement, well knowing that there was no possibility that Dansk could pay it back to McLuckie, unless he paid it, Sullivan caused the company to act recklessly, as envisaged in section 424 of the Act. In effect, the situation between the parties was that, at the time he repudiated the contract on behalf of Dansk, Sullivan as its sole director and shareholder, was aware that there was no chance of the company being able to perform its obligations without his financial contribution. Despite this knowledge, he purposely caused Dansk to be wound up, being fully aware that McLuckie could not expect to receive any dividend from the insolvent estate of Dansk. In acting as he did, Sullivan conducted the affairs of Dansk in a manner which fell precisely within the definition of 'reckless conduct', as

defined in the Act. He was therefore liable to recompense McLuckie for the R522 278.12 paid by him in terms of the settlement agreement.

The case was a classic example of a party who owns all the shares and is in control of a company attempting to use its formal identity to avoid it paying a debt due by it to a creditor, in circumstances where, on behalf of that company, he caused it to incur the debt knowing it could not pay it without his financial assistance.

The action succeeded.

The company Dansk could only perform its obligations to the plaintiff with the financial support of the defendant. The defendant's statement that Dansk would not comply with its written undertaking constitutes a repudiation by the company of its agreed obligations to the plaintiff. By allowing Dansk to keep the moneys paid in terms of the agreement, well knowing that there was no possibility that Dansk could pay it back to the plaintiff, unless he paid it, the defendant caused it to act recklessly, as envisaged in s 424 of the Act, and as submitted by counsel for the plaintiff.

Another way of describing the situation between the parties is that, at the time he repudiated the contract on behalf of Dansk, the defendant, as its sole director and shareholder, was aware that there was no chance of the company being able to perform its obligations without his financial input. Despite this knowledge, he purposely caused Dansk to be wound up, being fully aware that the plaintiff could not for one moment expect to receive any dividend from the insolvent estate of Dansk in respect of the moneys paid to it in terms of the repudiated agreement of settlement. The defendant, in acting as he did, conducted the affairs of Dansk in a manner which falls foursquare within the definition of 'reckless conduct', as has been described in the Act. He is therefore liable to recompense the plaintiff for the moneys paid by him in terms of the settlement agreement, in terms of s 424 of the Act.

McMILLAN N.O. v POTT

JUDGMENT BY BINNS-WARD AJ
WESTERN CAPE HIGH COURT
28 JUNE 2009

2011 (1) SA 511 (WCC)

A court will not refrain from applying section 252 of the Companies Act (no 61 of 1973) even if it is accepted that the shareholder claiming relief under the section has been at fault in his conduct as shareholder or director. The section will be applied if the shareholder has not been given the opportunity to withdraw its capital within a reasonable time where the circumstances are such that the shareholder should have been given that opportunity. The fact that the shareholder is the vehicle used by the party against whom the unfairly prejudicial conduct has been committed is no bar to the relief available to a shareholder under this section.

THE FACTS

McMillan, in his capacity as trustee of the McMillan Family Trust held shares in Tygerberg Minolta (Pty) Ltd. Pott and the other respondents were also shareholders in the company, the majority shareholder being Corporate Business Automation (Pty) Ltd.

In terms of an agreement concluded in 2006, before the parties became shareholders in the company, McMillan was to acquire 30% of the shares in the company, and the respondents taking smaller percentages. Although the allotment of shares to the parties did not take place until 2008, McMillan immediately performed the management and running of the company and conducted the business of the company as its managing director.

Towards the end of 2007, the other shareholders became dissatisfied with the way in which McMillan was running the company. The other shareholders requested management accounts from McMillan but he failed to produce these. Disputes between the parties culminated in March 2008 with the passing of a resolution removing McMillan as director and dismissing him and his wife as employees of the company. At that time, McMillan had established another enterprise with the intention of competing with the company.

McMillan applied in his capacity as trustee of the McMillan Family Trust for an order that the trust's shares in Tygerberg Minolta (Pty) Ltd be purchased by the majority shareholder, Corporate Business Automation (Pty) Ltd.

THE DECISION

Section 252(1) of the Companies Act (no 61 of 1973) provides that any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company may make an application to the court for an order under the section.

The fact that the trust was the member of the company, and not McMillan himself, was no bar to the application of the section. It was clear that McMillan had advanced his own capital for the purchase of his initial shareholding in the company, and had done so in order to secure an opportunity for himself. The basis of the trust's investment was indistinguishable from McMillan's interest in the company. If the fact of the trust's formal ownership of the shares were to be a reason not to apply section 252 then this would amount to interpreting the provision so as to limit its application rather than advancing it. The exclusion of McMillan from the business was as relevant and pertinent to the trust's position as member of the company, as it would have been had McMillan himself, in his personal capacity, been the member.

McMillan's action in starting to compete with the company did not detract from his right to claim a remedy in terms of section 252 because he did this only after the other shareholders had become dissatisfied with the way in which he was managing the company. His removal as director may have been properly done in terms of the applicable procedures, but this action remained subject to the provisions of section 252 and could not be done even if it was

done on good cause, without an attendant offer by the majority to allow McMillan to remove his capital on reasonable terms.

Taking into account the fact that the other shareholders had indicated they would buy out the trust's interest in the company, and their later offer to allow the trust the right to appoint a replacement director on the board, it appeared that the circumstances were appropriate for the application of section 252. The failure of the other shareholders within a reasonable time of McMillan's exclusion from the management of the company, to afford the trust the opportunity to remove its capital, was an act or omission by the company that was unfairly prejudicial, unjust or inequitable to the trust within the meaning of the section. There therefore existed a basis to claim relief in terms of the section, even if it was accepted that McMillan had been wholly or in part to blame for his removal from the board and dismissal from employment. The prejudicial unfairness or inequity lay not in his legally justifiable exclusion from the company's management, but in the effect of his exclusion, because a reasonable basis had not been offered in the circumstances for a withdrawal by the member of his or her capital. In this regard, it was significant that McMillan had become a member only on the understanding that he would have an actively participative role in the company.

In these circumstances, the issue of fault would not negate the right of a quasi-partner member to relief in terms of section 252. A party which is itself to blame for the unsatisfactory situation of the company should not readily be allowed to obtain its winding-up in circumstances in which the majority of members wish to continue with it. By contrast however, a member who might have misbehaved in a relevant sense, should not on that account be excluded from the actively participative role that it was initially understood would attach to that member's holding of the shares, without being given an opportunity to withdraw its capital on reasonable terms.

A basis to claim relief in terms of s 252 inured in the circumstances, even if it is accepted that McMillan had been wholly or in part to blame for his removal from the board and dismissal from employment. The prejudicial unfairness or inequity lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on any such member — who had become a member only on the understanding that he or she would have an actively participative role amounting to employment by the company — if a reasonable basis is not offered in the circumstances for a withdrawal by the member of his or her capital.

RAM TRANSPORT (PTY) LTD v REPLICATION TECHNOLOGY GROUP (PTY) LTD

A JUDGMENT BY VAN OOSTEN J
SOUTH GAUTENG HIGH COURT
1 SEPTEMBER 2010

2011 (1) SA 223 (GSJ)

Authorisation for the inspection of the books and records of a company under section 360(1) of the Companies Act (no 61 of 1973) may be allowed in circumstances where the applicant's only purpose is to obtain information to enable him for his exclusive benefit to sue a former director of the company.

THE FACTS

Replication Technology Group (Pty) Ltd was placed in liquidation, its liabilities exceeding its assets by some R50m. Ram Transport (Pty) Ltd proved a claim against the insolvent company. Following a meeting of creditors, it became apparent that there was no hope of Ram being paid its claim. Ram suspected that the affairs of Replication were conducted by its directors and controlling members in a reckless and fraudulent manner. It contemplated an action against them claiming that they were personally liable for the debts of the company, as provided for in section 424 of the Companies Act (no 61 of 1973) and wished to apply to the Master to convene and enquiry.

Ram wished to inspect the books and records of the company. The liquidators indicated their willingness to allow it to do so, subject to Ram obtaining an order of court authorising this. Ram accordingly brought an application for such an order, basing its claim on section 360(1) of the Companies Act. The section provides that any member or creditor of any company unable to pay its debts and being wound-up may apply to the court for an order authorising him to inspect any or all of the books and papers of that company, and the court may impose any condition it thinks fit in granting that authority.

In considering the applicability of this section, the court considered the question whether it should authorise inspection in circumstances where the applicant's only purpose is to obtain information to enable him for his exclusive benefit to sue a former director of the company.

THE DECISION

Authority for the proposition that a court should not authorise inspection in these circumstances is found in In re North Brazilian Sugar Factories (1887) 37 Ch D 83 (CA). However, more recent judgments in foreign jurisdictions have departed from this judgment, and have held that the power conferred under equivalent legislation may be exercised even in circumstances where the principal motive of the applicant creditor is a motive of furthering its own interests rather than the interests of creditors as a whole. This is a desirable trend, and one which South African courts should also adopt.

The wording of section 360(1) is clear and unambiguous. It confers a wide discretion on the court to determine the right to inspect the books and records of the company in question. Given the circumstances of the present case, Ram had established that it was entitled to inspection in order to motivate its application to the Master to convene an enquiry. The application was bona fide and in keeping with the principle of upholding considerations of transparency and accountability in regard to the conduct of directors of companies in their management of the business of companies.

The application was granted.

ABSA BANK v INTENSIVE AIR (PTY) LTD

A JUDGMENT BY BERTELSMANN AJA (HARMS DP, CACHALIA JA, SNYDERS JA and SHONGWE JA concurring)
Supreme Court of Appeal
1 DECEMBER 2010

2010 SACLR 511 (A)

Banking

A bank may set off funds standing to the credit of its customer when it is clear that the customer holds those funds legitimately and without taint of illegality.

THE FACTS

Louw opened a cheque account in his personal name trading as 'Intensive Air'. This account was known as the 'ticket account' because it was the account into which Intensive Air (Pty) Ltd, a company controlled by Louw, deposited all of its ticket sales relating to flights taken by passengers on the company's aircraft. The funds in the ticket account were used to pay various expenses relating to the company's operations.

The company ran into financial difficulties and was placed in liquidation. As at the date of application for liquidation, the credit balance in the ticket account stood at some R300 000. The bank claimed that it was entitled to set off this amount against amounts then owing by Louw. The liquidators contended that the bank was not entitled to effect set off as this would constitute a disposition without value and subject to section 26 of the Insolvency Act (no 24 of 1936). They also contended that the money in the ticket account was the company's money. They claimed from the bank all amounts paid from the ticket account, as well as the R300 000 then standing to the credit of the account.

The bank denied that any of these amounts constituted dispositions without value as referred to in section 26.

THE DECISION

The amount standing to the credit of the account was money received by Louw as part of the arrangements he had with the company which he controlled. While the bank was aware of Louw's relationship to the company, there was nothing to show that at any time the ticket account was not treated as an account based on an agreement between Louw as client and the bank as banker. There was no suggestion that Louw was not entitled to these funds, nor that the account was conducted as his and in his personal capacity.

Since the onus was on the liquidators to prove that the funds in the ticket account were tainted with illegality, and they had not discharged the onus, the funds could properly be set off against other claims the bank had against Louw.

BENEFELD v WEST

A JUDGMENT BY COPPIN J
SOUTH GAUTENG HIGH COURT
26 APRIL 2010

2011 (2) SA 379 (GSJ)

Contract

A settlement agreement resulting from a dispute which arises from the alleged breach of an illegal agreement is not itself necessarily illegal.

THE FACTS

Benefeld brought an action against West claiming damages for breach of promise. Benefeld alleged that Benefeld had promised to dissolve his marriage to his wife and marry Benefeld and breached his promise to do so. The parties reached a settlement agreement and the action was withdrawn. The terms of the settlement agreement were that West would pay Benefeld the sum of R1.5m.

After West failed to pay the R1.5m, Benefeld brought an action to enforce payment. West raised the defence that the claim for damages was based on an agreement which was invalid and unenforceable as it was contra bonos mores. Benefeld accepted this, but contended that the settlement agreement was unaffected by the illegality of the previous agreement.

The question for decision was whether or not the settlement agreement was contra bonos mores because the previous agreement was.

THE DECISION

The settlement agreement was a self-standing agreement and would not be illegal merely because the previous agreement was illegal. The essential question was whether or not the settlement agreement was, according to its own terms, illegal.

There were obvious differences between the settlement agreement and the previous agreement. The settlement agreement did not provide that the parties would marry each other, or that West would divorce his wife. The previous agreement clearly provided for these things. The settlement agreement was concluded after the break-up of the parties' relationship and appeared to be a compromise in which West made an undertaking to pay an amount of money to Benefeld as a settlement, because West breached his promise to marry Benefeld. The effect of the compromise was indeed that Benefeld would get a payment which she otherwise would not have been able to claim under the previous agreement, but its purpose was to settle the action brought by Benefeld against West. The purpose could not be said to be illegal or void, or contra bonos mores.

The previous agreement would be considered illegal because it was contrary to the institution of marriage. However, the same could not be said of the settlement agreement as it did not encourage the dissolution of West's marriage. Therefore, although West would not have been liable for damages for breach of the previous agreement, he assume liability to pay Benefeld R1.5m under the settlement agreement, and this could not be regarded as contra bonos mores.

GOLDEN MEATS & SEAFOOD SUPPLIES CC v BEST SEAFOOD IMPORT CC

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT, DURBAN
9 DECEMBER 2010

2011 (2) SA 491 (KZD)

In FOB sales, conclusive proof of the transfer of ownership is not given by a bill of lading having been delivered to the consignee. The terms of agreement between transferor and transferee determine the circumstances in which transfer of ownership will take place.

THE FACTS

Mombasa Shipping Agents Ltd sold a consignment of frozen golden deep-sea crabs to Best Seafood Import CC. A dispute arose between the parties. In order to proceed against Mombasa by way of an action in personam against it, Best arrested the cargo of crab in a container already delivered to it in Durban. The arrest was effected in terms of section 3(4)(b) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983) on the grounds that Mombasa was the owner of the cargo at the time of the arrest.

Golden Meats & Seafood Supplies CC brought an application to set aside the arrest on the grounds that it was the owner of the cargo. It alleged that it had bought the crabs from Mombasa prior to the arrest and in terms of the sale agreement, ownership had passed to it. It confirmed that the bill of lading relating to the cargo had been delivered to the shipping line at the port of loading and that Mombasa had issued an instruction that the container was to be released to Golden Meats. These events took place before arrival of the cargo in Durban.

THE DECISION

The onus was on Best to establish that at the time of the arrest, Mombasa was the owner of the cargo.

The fact that the bill of lading had been delivered to the shipping line at the port of loading, and there held by an agent of Golden Meats, was not decisive of the question whether Golden Meats had taken delivery of the cargo. For the determination of this question, the underlying agreement between the parties had to be examined. This agreement clearly showed that Mombasa was selling the cargo of crabs to Golden Meats on credit. In these circumstances, since the sale was an FOB sale, there was no apparent need for the bill of lading as a means of proof of delivery. However, since Best would have held a bill of lading reflecting itself as consignee, the new bill of lading naming Golden Meats as consignee would have enabled Golden Meats to take delivery of the cargo without dispute. This was the reason for the issue of the bill of lading naming Golden Meats as consignee, and there was therefore no indication that parties intended that delivery of the cargo was to be effected symbolically by the delivery of the bill of lading.

There was therefore nothing to indicate that Mombasa had divested itself of ownership of the cargo. Ownership had not passed from Mombasa to Golden Meats and it was not entitled to set aside the arrest.

MSC DEPOTS (PTY) LTD v WK CONSTRUCTION (PTY) LTD

A JUDGMENT BY CHETTY J
EASTERN CAPE HIGH COURT
4 FEBRUARY 2010

2011 (2) SA 417 (ECP)

On a proper interpretation of the standard building contract, a clause should not be read in isolation of others which relate to it.

THE FACTS

MSC Depots (Pty) Ltd concluded an agreement with WK Construction (Pty) Ltd in terms of which WK undertook to build a container depot for the storage of containers. Their agreement incorporated the terms of a standard building contract, the JBCC 2000. Clause 15.3 provided that on being given possession of the site the contractor was to commence works within the period stated in the schedule and proceed with due skill, diligence, regularity and expedition. The sub-clauses of this clause provided for the progress of the construction work at various stages of completion.

WK performed the work in accordance with instructions given by MSC. After completion, certain defects became apparent in the paving work. MSC determined that this had resulted from the use of sand which was more coarse than the standard specified. MSC alleged that this had also resulted from lack of compaction along stake lines, and contended that the presence of a butt joint on the paved surface, showed that WK had failed to construct the pavement in accordance with the design.

After MSC had submitted evidence in support of its claim, WK applied for absolution from the instance.

THE DECISION

MSC had to adduce sufficient evidence of the alleged defects and to establish that the defects constituted a breach of clause 15.3 of JBCC 2000. However, the evidence relied upon, to the effect that the work was not executed properly, was based upon inferences and there was insufficient evidence to show that WK did not perform the work properly.

As far as the interpretation of the contract was concerned, clause 15.3 could not be read in isolation, but had to be read in conjunction with its subclauses and clause 17. This was in effect understood by all the parties. Reading the clause in this way indicated that WK did not breach the terms of the clause.

Absolution from the instance was granted.

GAUTENG MEC FOR HEALTH v 3P CONSULTING (PTY) LTD

Contract

A JUDGMENT BY VAN HEERDEN JA (HEHER JA, MHLANTLA JA, TSHIQI JA AND BERTELSMANN AJA concurring)
SUPREME COURT OF APPEAL

2011 SACLR 15 (A)

An agreement concluded following a request for tenders which contains provisions at variance with the tender conditions is not unlawful if the contracting parties incorporate the variations in full awareness of them.

THE FACTS

In June 2007, the Gauteng Department of Health signed an agreement in terms of which 3P Consulting (Pty) Ltd was to provide services to facilitate the implementation of a turnaround strategy for the Department. The agreement provided that it was to subsist for a period of two years, and would be renewed on substantially the same terms for a further two years, subject to the right of the parties to negotiate any matters relating to the renewal except for the renewal itself.

In December 2008, the parties negotiated the renewal, GP proposing that the contract period extend for a further three years as certain projects required support for the extra year. In March 2009, the Director of Supply Chain Management in the Department confirmed that the proposal for the renewal had been approved for a period of three years ending on 31 May 2012.

In 2009, the Department stated that it would no longer abide by the agreement because the services agreements were void for lack of legality and authority, and the occurrence of irregularities in their conclusion. It contended that it had been concluded contrary to section 217 of the Constitution and to sections 38(1)(a)(iii) and 76(4)(c) of the Public Finance Management Act (no 1 of 1999). It also contended that the renewal of the agreement for a period of three years had been done without following a public bidding process and not in a manner which was fair, equitable and transparent.

THE DECISION

It was understood by the Department's Acquisition Council that the period of the agreement would be four years. Aware that this was the intention, it signed the agreement providing for the two year period with the renewal period of two years. Therefore, whatever any tender invitation might have said, the agreement entered into was lawful and not contrary to any of constitutional and legislative regulations.

As far as the attack on the renewal of the agreement was concerned, the renewal of the agreement did not give rise to a new agreement but to an extended duration of the existing agreement. Since there was no new agreement and no new procurement of goods and services, it was not necessary to follow a competitive public bidding process.

The Department also contended that the provisions relating to renewal were no more than an agreement to negotiate or an option to renew, and therefore unenforceable. However, they were neither. They provided for an extension of the duration of the agreement.

MPANZA *v* ROAD ACCIDENT FUND

Contract

A JUDGMENT BY SWAIN J
KWAZULU-NATAL HIGH COURT
17 NOVEMBER 2010

2011 SACLR 38 (KZP)

In determining whether or not time is of the essence of a contract, it is necessary to examine the nature of the agreement being cancelled and the surrounding circumstances of its creation.

THE FACTS

Mpanza accepted an offer of R55 000.00 made by the Road Accident Fund for compensation for injuries sustained in a motor vehicle accident. This amount was to be paid on or before 28 December 2006.

Mpanza alleged that subsequently, the Fund failed to make payment by the specified date and that in consequence of this repudiation, her attorneys had cancelled the settlement agreement. This took place on 14 June 2007.

Mpanza brought an action against the Fund for payment of damages resulting from the motor vehicle accident. The Fund raised the defence that the claim had been settled and that the cancellation of the settlement agreement was ineffective because it had not been preceded by a letter of demand.

THE DECISION

The cancellation alleged by Mpanza would be effective without a prior letter of demand if time was of the essence in the performance of the settlement agreement. In determining whether or not time was of the essence, it was necessary to look at the nature of the agreement and the surrounding circumstances.

The surrounding circumstances indicated that Mpanza's claim was one for payment of damages, that no provision for the payment of interest had been made, and there was no provision for delayed payment pending the taxation of legal costs. These circumstances indicated that time was of the essence and that there was therefore no need to place the Fund in mora by issuing a letter of demand prior to cancellation.

The defence raised by the Fund was dismissed.

Considering all of the above I am satisfied that time was of the essence in respect of the date for payment by the defendant, and consequently no demand placing the defendant in mora was necessary before the plaintiff cancelled the agreement. It must have been a tacit term of the compromise that its effectiveness was conditional upon it being carried out. It is inconceivable that where, as in the present case, the defendant had failed to make payment some six months after the due date, the plaintiff's remedies could be restricted to enforcing the compromise.

SCOIN TRADING (PTY) LTD *v* BERNSTEIN N.O.

JUDGMENT BY K PILLAY AJA
(HARMS DP AND SNYDERS JA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2010

2011 SACLR 42 (A)

Once it is established that payment must be made on a specific date, failure to pay on that date attracts liability to pay mora interest irrespective of fault.

THE FACTS

Mr G.J. Till agreed to buy a ZAR Een Pond Overstamp gold coin from Scoin Trading (Pty) Ltd for R1.95m. The purchase price was to be paid by a deposit of R200 000 and the balance by the end of December 2007, or when the proceeds of the sale of certain properties became available. Till had informed Scoin that he expected R60m from the sale of the properties by the end of December 2007 at which stage the balance would be paid.

Till died in November 2007. The executor in his deceased estate, Bernstein, accepted liability to pay the balance of the purchase price, but denied liability for any interest payable on the balance after December 2007. Bernstein contended that the proper interpretation of the agreement was that Till had agreed to payment upon the sale of the properties and not on or before the end of December 2007. Bernstein also contended that as Till was not at fault in not having paid the balance by the end of December 2007 by reason of his death, mora interest was not payable. He also contended that Till's death rendered performance impossible.

THE DECISION

It was clear from the communications between the parties that Till's promise was to pay the balance by the end of December 2007, not that payment was conditional on the sale of the properties. The proper interpretation of the agreement was therefore that payment would be made on this date.

Since the agreement incorporated a specific date, 31 December 2007, by when performance had to be made default in payment on that date would constitute mora ex re. Damages which follow from such default are mora interest, which begins to run immediately from the date of default. Mora interest is then payable irrespective of any fault on the part of the person obliged to render performance.

As far as the defence of supervening impossibility was concerned, there is no authority that the death of a person renders payment of a debt impossible.

COETZEE v NEDBANK LTD

A JUDGMENT BY GORVEN J
KWAZULU NATAL HIGH COURT
12 OCTOBER 2010

2011 (2) SA 372 (KZD)

Credit Transactions

A debt review process does not terminate by effluxion of time but by the giving of notice as provided for in section 86(10) of the National Credit Act (no 34 of 2005).

THE FACTS

Coetzee was in default of his obligations under an agreement concluded with Nedbank Ltd. In 2008, he applied for debt review in terms of section 86(1) of the National Credit Act (no 34 of 2005). The debt counsellor sent a notice to Nedbank in terms of that section. Nothing further took place for a year when Nedbank sent Coetzee a notice in terms of section 129(1)(b) of the Act and then brought an action to enforce its rights.

In an application for rescission of the judgment Nedbank obtained against him, Coetzee contended that he had a bona fide defence to Nedbank's claim because Nedbank had not terminated the debt review process by despatching a notice in terms of section 86(10) of the Act.

Nedbank contended that no termination of the debt review process in that manner was necessary because the debt review process not having been proceeded with within a reasonable time, it had terminated by effluxion of time.

THE DECISION

Since it was accepted that Nedbank received the notice of debt review, the only way in which Nedbank could have terminated the review was to give notice of termination thereof in terms of section 86(10) of the Act. This it had not done. If Nedbank's argument that the debt review process had been terminated by effluxion of time were accepted, it would nevertheless be obliged to ensure compliance with the conditions for bringing an action against a debtor as laid down in section 88(3) of the Act. This too, it had not done.

Section 88(3) provides that a credit provider who receives notice in terms of section 86 of the Act may not exercise its rights under that credit agreement until the consumer is in default under the credit agreement, and one of five conditions listed in the section has taken place, or the consumer has defaulted in terms of a re-arrangement agreed between the consumer and credit provider, or ordered by a court or the Tribunal.

Coetzee had raised an issue which, if decided in his favour, would mean that Nedbank was barred, by the provisions of s 88(3) of the Act, from instituting action in the matter to enforce its rights under the agreement. He had therefore set out averments which would, if proved at the trial, constitute a defence to the action. He was therefore entitled to rescission of judgment.

FIRSTRAND BANK LTD v EVANS

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT
18 MARCH 2011

2011 SACLR 53 (KZD)

Notification by a debtor to a creditor that he has applied for debt review amounts to the giving of notice by the debtor that he is unable to pay any of his debts as referred to in section 8(g) of the Insolvency Act (no 24 of 1946) if the notice is reasonably understood to be such a notice by the creditor. Debt review proceedings and any order given under them do not prevent the bringing of sequestration proceedings against the debtor.

THE FACTS

Evans borrowed money from Firstrand Bank Ltd, the extent of his indebtedness eventually rising to R2.8m. On 29 January 2009, he made an application for debt review. On 17 April 2009, Evans wrote a letter to the bank stating that he was under debt review under the National Credit Act (no 34 of 2005). As a result of this, his repayments were being renegotiated and would be made via an attorney's trust account. Evans requested that in view of this, the bank cancel the existing debit order.

In May 2009, the bank gave notice that it was terminating the debt review and in July issued summons for repayment of its loan. In the same month, an order for the rearrangement of Evans' debts was made in the magistrates' court.

Evans did not receive notice of the summons as it was served at the wrong address. Default judgment was taken against him, and in March 2010 his property was attached. Evans brought an application for rescission of the judgment and a stay of the sale in execution.

On 8 April 2010, the bank brought an application for the sequestration of Evans' estate. It relied on the judgment it held against him and his existing indcbtedness. Evans opposed the application on the grounds of the prior proceedings, and that section 88(3) of the National Credit Act precluded an application for sequestration. The bank contended that as it had terminated the debt review, the order made in terms of it was invalid, and was also unsupportable on the grounds that it ordered the monthly payment of debts on an income insufficient to pay them.

After the application for sequestration was brought, Evans sold one of his properties, enabling him to reduce his indebtedness to the bank, and reduce the monthly debt repayments needed to be made to the bank. The judgment against him was rescinded by consent. The bank persisted with its application for sequestration on the grounds that Evans' letter of 17 April 2009 constituted an act of insolvency in terms of section 8(g) of the Insolvency Act (no 24 of 1936).

THE DECISION

The act of insolvency referred to in section 8(g) is the giving of notice by a debtor to a creditor that he is unable to pay any of his debts.

The purpose of any application for debt review is to obtain a declaration that the applicant is over-indebted. It can be inferred from how section 79(1) of the National Credit Act defines over-indebtedness that a debtor who informs his creditor that he has applied for debt review thereby informs the creditor that he is over-indebted and unable to pay his debts. If this is how a reasonable person in the position of the creditor would understand the notice given to it, as at the time the notice is received, then it will be a notice referred to in section 8(g).

Given its knowledge of Evans' financial circumstances, the bank could reasonably have understood Evans' notice to be that he was not able to pay his debts to it. It was therefore an act of insolvency as referred to in section 8(g) of the Insolvency Act.

As far as the contentions based on section 88(3) were concerned, it had to be remembered that sequestration proceedings are not proceedings to enforce payment of debt, even if this is the motive

of the creditor bringing such proceedings. The purpose is to have the debtor declared insolvent. Sequestration proceedings are therefore not precluded by section 88(3).

In exercising its discretion whether or not to grant a sequestration order, a court may take into account the fact that there has been a significant period of time between the notice referred to by section 8(g) and the bringing of the application for sequestration. In the present case, there was an explanation for this lengthy time period in that the bank had been faced with the application for rescission of judgment, and the prospect of protracted proceedings in the High Court and the magistrates' court. In these circumstances, there was no reason for the court to exercise its discretion in favour of the debtor.

The fact that a debt rearrangement order had already been given in the magistrates' court did not affect this. Since sequestration proceedings are not the enforcement of a credit agreement, any such order was no bar to them.

The application was granted.

It follows from this statement of what constitutes over-indebtedness for the purposes of the NCA that a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts.

...

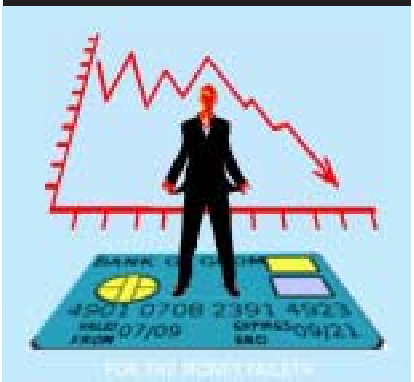
However valid these points may be they do not alter the fact that when Mr Evans wrote this letter he was unequivocally conveying to FNB that he was at that time unable to pay his debts. It is true that he was hoping by way of the mechanisms of the NCA, to make arrangements for the payment of those debts on a basis different from his existing contractual obligations. I assume in his favour that he genuinely believed that if his debts were rearranged they would ultimately be discharged. Nonetheless what he was conveying to FNB was that he was not in a position at that time to pay his debts on the terms on which they had been incurred.

LAMONICA v BALTIC REEFERS MANAGEMENT LTD

A JUDGMENT BY BLIGNAULT J
WESTERN CAPE HIGH COURT
5 NOVEMBER 2009

2011 (3) SA 164 (WCC)

Insolvency



A trustee in insolvency of a foreign company may be recognised as the party entitled to make claims on behalf of that company if the foreign court granting a bankruptcy order in respect of that company had jurisdiction over that company.

THE FACTS

Lamonica was appointed by the United States Bankruptcy Court of the Southern District of New York as bankruptcy trustee of Eastwind Development SA, a company incorporated in accordance with the company laws of Panama. Eastwind was the registered owner of the EW Cook, a ship registered in Panama. The ship was arrested in Cape Town and an order was given for its sale. From the proceeds, a fund was created.

Lamonica alleged that Eastwind had a claim against the fund which arose by virtue of the assignment of certain mortgages. He alleged that this included a claim for damages in the sum of USD$8 397 664 held by the mortgagees against Baltic Reefers Management Ltd in respect of the purchase price of bunkers supplied by Baltic to the ship.

Lamonica applied for an order recognising him as the duly appointed bankruptcy trustee of Eastwind for the purpose of exercising the rights and fulfilling the obligations contained in the order for the sale of the ship and the establishment of the fund, in particular the order relating to the filing of claims and any objections to the claims asserted by other claimants.

Baltic opposed the application on the ground that Lamonica was not entitled to a recognition order, since he was appointed by a court which was not the court of the country of Eastwind's domicile, ie Panama, and on the ground that Lamonica had failed to establish on a balance of probabilities, that Eastwind had a claim against the fund.

THE DECISION

For the purposes of decision, the rule could be accepted that a foreign trustee of an insolvent estate is only entitled to recognition in South Africa when the insolvent was domiciled in that foreign State. The essential question however, was whether or not it was correct that a company is domiciled in the country where it is registered. Baltic's contention was that a company is so domiciled and that in the present case, this was the country of Panama. The consequence of this would be that in accordance with the accepted rule, the foreign trustee would not be entitled to recognition in South Africa.

The domicile of a company is not as helpful in dealing with this question as the jurisdiction of the court relevant to the company. In the present case the New York Bankruptcy Court had jurisdiction to grant the bankruptcy order, and it did so by reason of the fact that Eastwind's principal place of business was situated in its area of jurisdiction. In South Africa a court would have had jurisdiction to liquidate a company on similar grounds. There were therefore sufficient grounds to order recognition of Lamonica as the duly appointed bankruptcy trustee of Eastwind.

As far as the merits of Eastwind's claim against the fund was concerned, this was not a matter to be decided at this stage. There was nothing to indicate that its claim was not bona fide or was vexatious. Accordingly, there was no reason not to grant the order sought.

The application was granted.

STRYDOM N.O. *v* THE MASTER

A JUDGMENT BY TUCHTEN J
NORTH GAUTENG HIGH COURT
12 OCTOBER 2010

2010 (6) SA 630 (GNP)

A liquidator cannot claim his remuneration until the account in the estate showing the amount thereof has been confirmed.

THE FACTS

Strydom was a joint liquidator in the liquidation of Coal Experts (Pty) Ltd. After the other joint liquidator had been removed from office following allegations of fraud, he drew up a provisional liquidator's account up to the first meeting of creditors. In it, he made provision for liquidators' fees, excluding VAT, of R1 134 869,91.

Under cover of a letter submitted with the account, Strydom stated that the provisional liquidators had done a substantial amount of work and had recovered assets of value in and associated with the estate, and that the work still to be done by the liquidators in winding up the estate was of limited extent. He stated that in view of this, a provisional payment of the liquidator's fee should be allowed by the Master.

An official in the Master's office refused to approve the provisional account and refused to tax the provisional liquidator's fees. She stated as her reason that there would be no benefit to creditors from an early payment, that there was no reason why a first liquidation and distribution account could not be lodged, and that the application for payment of the provisional liquidator's fees was a repeat of another application which had been rejected at an earlier date.

Strydom applied for a review and setting-aside of the Master's decision not to accept the provisional account and to tax the fee of the provisional liquidators in accordance with section 384 of the Companies Act (no 61 of 1973) and regulation 24.

THE DECISION

The decision made not to allow the taxation of the provisional fee was made in the exercise of the discretion of the official in the Master's office. The decision was that the fee should not be allowed in the circumstances of the case.

The purpose of the submission of the account, under cover of Strydom's letter was to obtain payment of the provisional liquidator's fees before confirmation of any liquidation and distribution account. The Master's office official understood this, and concluded that there would be no benefit to creditors if the provisional liquidators received an early payment of their fees. In doing so, she acted correctly, and there were no grounds for overturning her decision.

There is, in any event, no express provision in either the Insolvency Act (no 24 of 1936), or the Companies Act, providing for the time when a trustee or liquidator may pay himself his fees. However, under the common law, a trustee cannot claim or draw his remuneration until the account in the estate showing the amount thereof has been confirmed.

The application was dismissed.

TONGAAT PAPER CO (PTY) LTD v THE MASTER

Insolvency

A JUDGMENT BY SISHI J
KWAZULU NATAL HIGH COURT
15 SEPTEMBER 2010

2011 (2) SA 17 (KZP)

An owner of assets which it contends have been unlawfully sold by liquidators of an insolvent estate is entitled to object to a decision of the Master which fails to uphold the owner's objection to an account reflecting the sale.

THE FACTS

Spiral Paper (Pty) Ltd objected to the liquidation and distribution account in the insolvent company Auspaper Mills (Pty) Ltd on the grounds that it incorrectly reflected a deposit arising from the sale of certain assets to the fifth defendant. The Master of the High Court rejected the objection on the grounds that it involved a dispute of fact which he was not empowered to resolve.

Tongaat Paper Co (Pty) Ltd alleged that it was the owner of the assets and was a person aggrieved by the Master's decision as provided for in sections 111(2)(a) and 151 of the Insolvency Act (no 24 of 1936). It brought an action to review and set aside the Master's decision.

The liquidators excepted to the action on the grounds that Tongaat did not have locus standi to sue and its appropriate remedy was to vindicate the assets against the possessor of them.

THE DECISION

A person aggrieved is, as said in *Ex parte Sidebotham; In re Sidebotham* (1880) 14 Ch D 458 (CA) ([1874 - 80] '(not) a person who is disappointed or disgruntled because of a benefit which he might have received. A person aggrieved must surely be a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.'

In accordance with this judgment, Tongaat's position was that it was the owner of the assets sold by the liquidators to the fifth defendant. It therefore clearly had a legal grievance. Tongaat fell within the concept of a person aggrieved and accordingly had the locus standi to institute the action. It did not have to be a proved creditor or to have lodged an objection to the estate account.

The exception was dismissed.

NETSTAR (PTY) LTD *v* COMPETITION COMMISSION OF SOUTH AFRICA

A JUDGMENT BY WALLIS AJA (DAVIS DP and DAMBUZA JA concurring)
COMPETITION APPEAL COURT
15 FEBRUARY 2011

2011 (3) SA 171 (CAC)

Competition

The Competition Commission's decisions following complaints brought to it must be based on evidence of a contravention of the Competition Act (no 99 of 1998) and should not be based on a determination that specific conduct is anti-competitive.

THE FACTS

The Vehicle Security Association of South Africa (VESA) established a system of accreditation for firms engaged in the business of stolen vehicle recovery. Accreditation was given to firms which adhered to certain minimum standards. These were that the vehicle recovery system fitted by the firm had to have been fitted in 3000 vehicles, that the operator had been in operation for over a year, that the supplier had effected over 100 recoveries with that system, and that the recovery rate fell within a defined industry average.

The insurance industry's representative body, the South African Insurance Assocation (SAIA), required that the Association set the system of accreditation as a minimum standard. SAIA determined that any person insuring their vehicle and installing a stolen vehicle recovery system in it by a firm accredited by VESA would be entitled to a discount on insurance premiums paid in respect of the motor vehicle.

Following a complaint brought to it by a firm which could not achieve accreditation, the Competition Commission of South Africa decided that the requirement of accreditation was in contravention of the provisions of section 4(1)(a) of the Competition Act (no 99 of 1998) in that by collectively agreeing on accreditation criteria for VESA membership this had the effect of obstructing new entrants from entering into and/or effectively participating in the market for the tracking and recovery of motor vehicles to the detriment of consumers.

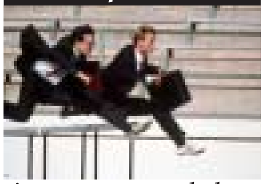
Netstar (Pty) Ltd, one of the accredited firms, and other accredited firms appealed the decision.

THE DECISION

A contravention of section 4(1)(a) arises when (i) there is an agreement, as defined in section 1(1)(ii), that has the effect of substantially preventing or lessening competition in a market, (ii) there is a concerted practice, as defined in section 1(1)(vi) having the same effect, and (iii) a decision by an association of firms has that effect. The Commission's position was that there was a contravention of s 4(1)(a) either because of an agreement between or because of a concerted practice by Netstar and the other appellants.

It is important to distinguish between an agreement and a concerted practice. In determining whether there was an agreement between Netstar and the other appellants, it was clear that there were no facts to support the allegation that there was an agreement between them that membership of and accreditation by VESA should only be granted to new entrants who could satisfy the criteria set by VESA. The evidence went no further than to show that Netstar and the other appellants, together with other participants in the vehicle-tracking industry, and with the approval of VESA and SAIA, agreed to the adoption of the standards for membership and accreditation by VESA.

Neither VESA nor SAIA was in a horizontal relationship with Netstar and the other appellants and the other approved companies. This raised the issue of whether such an agreement could fall within section 4(1)(a) merely because some of the parties were in a horizontal relationship. As this was not an issue which could be determined at this stage, it was assumed that such an agreement could fall within section 4(1)(a).



As far as the alleged concerted practice was concerned, there was no evidence to show that other parties had attempted to gain entry to the market of vehicle tracking and had been unable to do so because of the accreditation requirements set by VESA. There was also no evidence to show that there had been a reduction in competition in the supply of vehicle tracking systems. No causal link between the accreditation system and the reduction of competition had been demonstrated. Whereas the effect of the requirements of SAIA might have been to reduce competition, it was not a party to the proceedings brought before the Competition Commission. A complaint which might have been directed at SAIA could not be directed at Netstar and the other appellants.

The appeal succeeded.

In my view it is clear that the conduct that had the closest connection with any prevention or lessening of competition was that of SAIA and its members. While the preparation of the standards was a necessary element, that flowed from SAIA's needs, not those of the appellants. SAIA participated in the preparation of the standards, assisted in their launch, and its members, or the bulk of them, decided to use VESA accreditation in giving reduced or discounted premiums. The moment SAIA changed that stance, the standards could no longer play a role in determining competitive conditions in the market, as occurred when it agreed to continue to endorse the appellants' systems after they withdrew from VESA. As counsel put it, without SAIA there was no effect in the market. It follows that any prevention or lessening of competition in the market as a result of these standards being implemented was brought about by SAIA and its members, and was not an effect of any agreement among the appellants.

ORIENTAL PRODUCTS (PTY) LTD v PEGMA 178 INVESTMENTS TRADING CC

A JUDGMENT BY SHONGWE JA (HARMS DP, LEWIS JA, MAYA JA and R PILLAY AJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2010

2011 (2) SA 508 (A)

Property

An owner of fixed property may lose ownership of the property to one who has taken transfer thereof based on a void transaction if the transferee is able to raise the defence of estoppel against the owner.

THE FACTS

Oriental Products (Pty) Ltd owned certain fixed property situated in Clansthal, Kwazulu-Natal. Mr Qu, the manager of this company and associated companies, sold the property without proper authority to do so. The property was transferred to the second respondent in December 2005.

In 2006, the directors of Oriental, a Mr Kuk and his daughter, Ms Cook, made inquiries regarding the registered ownership property with a conveyancer, and by the end of the year had ascertained that it was no longer registered in the name of the company. In February 2007, the property was transferred to Pegma 178 Investments Trading CC.

In May 2008, Oriental brought an application to vindicate the property.

THE DECISION

(per Shongwe JA)

It was accepted by all parties that because of the lack of proper authority, the transfer of the property to both the second respondent and Pegma was void. The question which then arose was whether or not Pegma could raise an estoppel against Oriental's claim of ownership.

Estoppel requires proof that there was a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner or was entitled to dispose of it; the representation must have been made negligently in the circumstances; the representation must have been relied upon by the person raising the estoppel; and such person's reliance upon the representation must be the cause of his detriment.

In the present case, all of these elements had been proved. Oriental's negligent representation consisted in the fact that when it learnt of the transfer of the property to the second respondent, it did nothing about this in the period up until the transfer to Pegma, and took no further action until it brought the present application in May 2008. (per Harms DP)

The representation itself consisted in Oriental having knowingly left the deeds register to reflect the incorrect position as to ownership. This omission represented to the world in general, and to the Pegma in particular, that the second respondent was the true owner of the property. It could not be said with any measure of confidence that the first respondent did not take transfer in the light of this representation.

The application was dismissed.

PREFIX PROPERTIES (PTY) LTD v GOLDEN EMPIRE TRADING 49 CC

Property

A JUDGMENT BY GORVEN J
KWAZULU NATAL HIGH COURT
6 DECEMBER 2010

2011 (2) SA 334 (KZP)

To establish an improvement lien, it is necessary to show that expenses incurred in the alleged improvement are necessary or useful. It is permissible to refrain from tendering return of what has been paid under an agreement when bringing an action for restitution, if it appears that restitution might not be practically achieved following the successful outcome of such an action.

THE FACTS

Prefix Properties (Pty) Ltd sold a portion of certain fixed property to Golden Empire Trading 49 CC. At the same time, under an agreement known as 'the CC agreement', the second and third applicants sold their interest and loan accounts in the second respondent to the third respondent. In April 2007, the third respondent took possession of the property and the hotel business conducted at it.

The third respondent made payments to Prefix and the other applicants totalling R1.5m, R550 000 of this being in respect of the CC agreement. Prefix alleged that it was entitled to be placed back in possession of the property and the second and third applicants alleged they were entitled to restoration of the shareholding and loan account in the second respondent. They alleged that the property agreement was null and void ab initio, that the CC agreement has been cancelled, and that ownership in both was reserved.

Prefix and the other applicants brought an application to enforce their rights as alleged by attaching the business assets pending the determination of their rights in an action for damages. They contended that in view of the fact that the business was under financial pressure and apparently failing to meet various committments, it was entitled to retain payments already made to it by the third respondent.

Two of the defences raised by Golden were firstly that in relation to the property agreement, Golden had made improvements and accordingly had a lien entitling it to resist the application for eviction from the property, and secondly that in relation to the claim to be restored to possession of the subject-matter of both agreements, Prefix and the other applicants were obliged to tender repayment to the respondents of the amounts paid pursuant to the agreements and, not having done so, they were not entitled to the relief they sought.

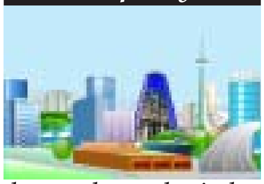
THE DECISION

As far as the first defence was concerned, Golden had made insufficient averments necessary to establish an improvement lien. It had made no averment that the expenses it had incurred were necessary or useful. Furthermore, there were sufficient averments or evidence as to the amount for which the lien was to serve as security. The report it had put up in support of the value of a conference centre established at the hotel did not deal with the correct basis for valuation as it dealt only with replacement cost.

As far as the second defence was concerned, Golden's argument was that in relation to the CC agreement, it was impermissible for the second and third applicants to set off the part payment of the purchase price against its unliquidated claim for damages.

The object of the rule upon which Golden depended was that the parties ought to be restored to the respective positions they were in at the time they contracted. This rule should be viewed in the light of the fact that the business asset which the applicants intended to claim was apparently failing, and might not be available to the applicants following the outcome of the action it intended to bring. There was sufficient evidence to show that it would be just and equitable, pending the outcome of an action, that the second and third applicants were excused from tendering restitution of the third respondent's performance under the CC agreement prior to the return to them of the shareholding and loan account in the second respondent.

The application succeeded.



MSC GINA MEDITERRANEAN SHIPPING CO SA v CAPE TOWN IRON AND STEEL WORKS

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT, DURBAN
22 FEBRUARY 2011

2011 (2) SA 547 (KZD)

A party opposing an application for attachment of property as security for a plaintiff's claim must rebut allegations made by the plaintiff indicating that the defendant will not be able to satisfy any judgment given against it. The application for attachment of such property must sufficiently identify the property to be attached to indicate that it is the defendant's property.

THE FACTS

MSC Gina Mediterranean Shipping Co SA brought an action against Cape Town Iron and Steel Works (the 'defendant') for the recovery of freight charges. Prior to trial, information suggesting that the defendant might cease its business operations and go into liquidation came to MSC's attention. It requested the defendant's attorneys to indicate whether or not the defendant would be able to satisfy any judgment and any adverse costs order given against it. The defendant declined to do so.

MSC brought an application for a security arrest in terms of section 5(3) of the Admiralty Jurisdiction Regulation Act (no 105 of 1983). It sought an order that the sheriff be authorised and directed to arrest the property of the defendant for the purpose of providing such security. The defendant opposed the application on the grounds that MSC had not shown that it had a genuine and reasonable need for security, that the court lacked jurisdiction in the matter, and that the property sought to be arrested was insufficiently identified.

THE DECISION

The fact that the defendant declined to rebut the allegations made by MSC regarding its doubts as to whether or not it could satisfy any judgment and any adverse costs order given against it was a factor which reinforced the prima facie case which MSC had made against it. Since it would have been simple for the defendant to have denied the allegations, and put up contrary evidence indicating that it was a continuing business operation, its response could be considered evasive similarly to that of the respondent in the matter of the *Orient Stride* 2009 (1) SA 246 (A). MSC had discharged the onus of showing that it had a genuine and reasonable need for security.

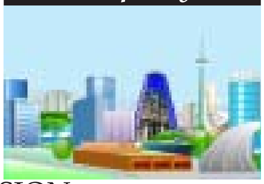
As far as the jurisdiction point was concerned, it was doubtful whether the court could be said to lack jurisdiction insofar as the arrest was concerned when it was accepted that the court had jurisdiction insofar as the action against the defendant was concerned. However, for the purposes of the present matter, it could be assumed that the court did have jurisdiction in respect of both matters.

As far as the identification of the property to be attached was concerned, the onus was on MSC to show on a balance of probabilities that this belonged to the defendant. However, the property sought to be attached was not identified. Any order given for the attachment of unidentified property would therefore amount to authorising the sheriff to seek out and find property of the defendant. Such an order would not be authorised by section 5(3) of the Act, and could not be given as the court giving the order needs to be satisfied that the property to be arrested is owned by the defendant or is vulnerable to an action in rem.

The application was dismissed.

KUZWAYO v REPRESENTATIVE OF THE EXECUTOR IN THE ESTATE OF MASILELA

Property



A JUDGMENT BY LEWIS JA (VAN HEERDEN JA, MAYA JA, SHONGWE JA AND PILLAY AJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2010

2011 SACLR 28 (A)

A court has the power in terms of section 6 of the Deeds Registries Act (no 47 of 1937) to order cancellation of rights registered in the deeds register.

THE FACTS

On 4 January 1985, Kuzwayo obtained a site permit in respect of erf 2000 Vosloorus, Gauteng. Two years later, she notified the Vosloorus Town Council that she was unable to pay rent due for the property and that she handed back the property to the council. The council then allocated the site to Masilela who paid the arrear rental, as well as other amounts due in respect of the site.

Masilela built a house on the property and resided there until he died thirteen years later. Thereafter, his family continued to live at the house.

On 3 March 2004, an official acting in terms of the Conversion of Certain Rights into Leasehold or Ownership (no 81 of 1988) issued a declaration that Kuzwayo had bought the site. The following month, the property was transferred to her. The issue of the declaration was a clerical error and had not been preceded by an inquiry into the site and the identity of the occupier, as required by the Act.

When Masilela's family began to receive municipal accounts addressed to Kuzwayo, they referred them to the representative of the executor of Masilela's estate. The representative discovered that the error had been made. It applied for an order that the error as recorded in the deeds registry be rectified. Kuzwayo opposed the application.

THE DECISION

Section 6 of the Deeds Registries Act (no 47 of 1937) provides that the Registrar of Deeds may not cancel any deed of transfer except upon an order of court. Implicit in this section is the court's inherent power to order cancellation of rights registered in the deeds register. In the light of sections 2, 4 and 5 of the Conversion Act, as holder of the site permit, the estate of the late Masilela was entitled to ask for such an order in respect of the record of the transfer to Kuzwayo as it was clear she neither a permit holder nor an occupier of the site.

The appropriate order was therefore that the Registrar of Deeds cancel the deed of transfer in favour of Kuzwayo and that the procedures of the Conversion Act be applied by way of an inquiry into the site and a declaration of ownership of the holder of the site permit.

GOLD REEF CITY THEME PARK (PTY) LTD v ELECTRONIC MEDIA NETWORK LTD

A JUDGMENT BY NICHOLLS J
SOUTH GAUTENG HIGH COURT
29 SEPTEMBER 2010

2011 (3) SA 208 (GSJ)

Corporations

A trading corporation may sue for defamation since such an entity may have developed a reputation entitled to protection.

THE FACTS

Electronic Media Network Ltd (EMN) broadcast a television report on its 'Carte Blanche' programme concerning the safety of rides offered to visitors to Gold Reef City Theme Park (Pty) Ltd's amusement park and entertainment complex. The broadcast suggested that the rides offered by Gold Reef City were potentially unsafe as a result of weaknesses and defects in the structures used for the rides.

Gold Reef City and the owner of the complex, Akani Egoli (Pty) Ltd, brought an action against EMN claiming general and special damages arising from the broadcast. They alleged that the content of the broadcast was wrongful, untruthful and defamatory of them. Gold Reef City claimed R200 000 in general damages and R43 105 092 in special damages, while Akani claimed R200 000 in respect of general damages, and an amount of R3 661 347 in respect of special damages.

EMN defended the action on a number of grounds, one of which was that the plaintiffs, being trading corporations, ought not to be entitled to sue for defamation. EMN contended that, if the plaintiffs could sue, their claim should be limited to general damages. It also contended that if the facts allowed an action in delict, this should be limited so as to allow a claim in damages only to non-trading plaintiffs.

THE DECISION

It is incorrect to say that a trading corporation has no reputation to be protected under the law of delict. It has long been recognised that trading corporations have a personality right which is worthy of protection, and can sue for defamation. While it may not be identical to that of a human plaintiff, a trading corporation does have a reputation which may be disparaged. The plaintiff in a defamation action, including a trading corporation, seeks not only to recover economic loss, but also reparation for a wrong inflicted.

Atrading corporation's right to sue for defamation under the law of delict is not inconsistent with the Constitution, and in this respect, the common law requires no development to bring it into harmony with the spirit, purport and objects of the Bill of Rights.

As far as the contention that a claim for special damages should not be allowed was concerned, it did appear that the enormity of the potential awards would have a chilling effect on freedom of expression. This could not serve the interests of democracy, and the disproportionality may well constitute an unjustifiable limitation to the right of freedom of speech. By limiting such claims to the law of delict, the plaintiff is not non-suited, but the onus is shifted so as not to burden the defendant with the presumptions of unlawfulness and intention. This issue however, did not require decision at this stage as this related to the question of quantum of damages.

MUTUAL & FEDERAL INSURANCE CO LTD v SMD TELECOMMUNICATIONS CC

A JUDGMENT BY TSHIQI JA (NAVSA JA, CLOETE JA, MHLANTLA JA and SHONGWE JA concurring)
SUPREME COURT OF APPEAL
1 OCTOBER 2010

2011 (1) SA 94 (A)

Insurance

An occurrence clause in an insurance policy which specifies the cause of the event insured against should be interpreted as referring to the effective cause of the event, whether or not the event is preceded by a succession of causes intervening prior to the insured event.

THE FACTS

Mutual & Federal Insurance Co Ltd insured SMD Telecommunications CC in the event of disability or death of one of its managerial staff, occurring as a result of 'bodily injury caused solely by violent, accidental, external and visible means which injury shall independently of any other cause be the sole cause of any of the results' . An exception clause excluded cover for 'any occurrence consequent upon any pre-existing physical defect or infirmity'.

During the currency of the insurance policy, one of the managerial staff, a certain Mr Compton-James, was involved in a motor accident and sustained orthopaedic injuries. His recovery was attended by complications and seven months after the accident, he died.

Compton-James had a history of coronary problems. Expert evidence indicated that while this may have been a contributing factor to the death of Mr Compton-James, the ultimate cause was the motor accident. When SMD claimed against Mutual and Federal under the insurance policy, Mutual and Federal repudiated the claim on the grounds that his death did not fall within the terms of the policy as it was caused by the coronary problems and not by the accident.

SMD claimed payment in terms of the policy.

THE DECISION

The words 'bodily injury' include bodily injury arising from a succession of causes beginning with the cause referred to in the policy.

To succeed in its claim, SMD would have to prove on a balance of probabilities that the injury sustained in the accident was the proximate cause of Compton-James' death and that his pre-existing condition was not a contributory 'cause' within the intended meaning of this word. SMD was greatly assisted in this task by the principle established in Concord Insurance Co Ltd v Oelofsen NO 1992 (4) SA 669 (A), which construed a policy practically identical to that between Mutual and Federal and SMD. The 'cause' was considered not to include a pre-existing condition. The effect of this is that once the causal nexus between the accident and the death has been established, the onus would then shift to Mutual and Federal to show on a balance of probabilities that the proximate cause of the accident was excluded by the exception clause.

Since the expert evidence led by SMD indicated that the ultimate cause of death was the motor accident, and the expert evidence led by Mutual and Federal did not directly contradict this, it could be accepted that this was the cause of death, and therefore fell within the terms of the policy. As Mutual and Federal had not relied on the exception clause, there was no reason why it was not liable to make payment under the policy.

COMPANY UNIQUE FINANCE (PTY) LTD v JOHANNESBURG NORTHERN METROPOLITAN LOCAL COUNCIL

A JUDGMENT BY BLIEDEN J
GAUTENG SOUTH HIGH COURT
13 AUGUST 2010

2011 (1) SA 440 (GSJ)

Agency

A principal may be estopped from the denying the authority of a person purporting to act on its behalf in circumstances where it has made a representation indicating that that person has such authority and another party has relied on that representation to its detriment.

THE FACTS

Mr J J Du Plessis signed three agreements on behalf of the Johannesburg Northern Metropolitan Local Council. One was for the lease of a copier for a total rental of R971 703,96, and the other two were for the lease of radiophones for a total rental of R6 272 032,80 each. Du Plessis was an acting senior superintendent: support services, within the council's security subcluster, and was described in the agreements as 'executive officer (acting) security'. He signed each under that title. The lessor under the agreements was Company Unique Finance (Pty) Ltd.

All three contracts were preceded by a resolution on a council letterhead and signed by an individual who described himself as head of security. Representatives of Company Unique attended the offices of the council to obtain assurances that the council confirmed the agreements.

Within a few months of signature, the council notified Company Unique that Du Plessis did not have the authority to sign the agreements on its behalf, as a result of which the agreements were null and void.

Company Unique treated the notification as a repudiation of the agreements and brought an action for damages.

THE DECISION

Because of it representation, both in words and conduct made by the council, that Du Plessis had the authority to sign the agreements, and that Van Wyk had the authority to record that an authorising resolution had been passed, the council should reasonably have expected that outsiders such as Company Unique would act on the strength of it. A reasonable man, in the face of visits to the council's business premises by officials, to speak to high-ranking officials in the council, and after receipt of the resolution on an original letterhead bearing an original stamp with original handwriting, completed in the typed form, would not necessarily have made enquiries with any other officials.

The council was therefore to be seen as having made a representation upon which Company Unique relied.

Company Unique was misled by the council into believing that Du Plessis, who purportedly acted on its behalf, had authority to conclude the agreements. This was a belief which was reasonable, and Company Unique had acted on that belief to its prejudice. The council was therefore to be estopped in denying Du Plessis' authority to contract on its behalf.

The action succeeded.

AFRICAN DAWN PROPERTY FINANCE 2 (PTY) LTD v DREAMS TRAVEL AND TOURS CC

A JUDGMENT BY PONNAN JA (TSHIQI JA and MAJIEDT JA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2011

2011 (3) SA 511 (A)

Credit Transactions

A court should not declare an agreed interest rate to be usurious without evidence that it is tainted with oppression, or extortion, or something akin to fraud.

THE FACTS

Dreams Travel and Tours CC required short-term finance of R5m to fund the import of branded jeans into South Africa. It was unable to raise the money with registered banks, and so turned to a private financier, African Dawn Property Finance 2 (Pty) Ltd, which carried on business as a short-term financier and was a registered credit provider in terms of section 40 of the National Credit Act (no 34 of 2005). African Dawn agreed to lend Dreams the money required, subject to Dreams providing security in the form of certain suretyships and mortgage bonds.

The agreement provided that Dreams was to pay interest on the loan in the amount of 5% per month. In the event of default, this rate would be 6.5% per month.

Dreams defaulted in repaying the loan. It took the view that the agreement was unlawful and contrary to public policy because the interest rate provided for was excessive, unconscionable and against the public interest. It brought an application for an order declaring the agreement to be unlawful. African Dawn counterclaimed for payment in terms of the agreement.

THE DECISION

As the National Credit Act did not apply to the agreement, the question was whether or not the agreement could be considered unenforceable under the common law. Under the common law, agreements which are unconscionable and against the public interest are not enforceable. However, as established in the common law, in order for an agreement on interest to be considered usurious, it must be shown that it is tainted with oppression, or extortion, or something akin to fraud. This principle of the common law is not inconsistent with constitutional principles.

Considerations of commercial and social certainty render the common law principle as sound today as it was when first articulated over a century ago. Constitutional considerations should not be seen as detracting from it; in fact, they appear to enhance it. They do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notions of good faith. The fact that a term is unfair, or that it may operate harshly, is insufficient in itself to lead to the conclusion that it offends against constitutional principles.

Applying the common law principle to the facts of the case, it appeared that no facts were disclosed which ought to have induced a court to afford Dreams the relief that it sought. A court could not interfere with the agreement deliberately entered into by the two parties dealing at arm's length with each other merely because it subjectively believes that the rate of interest stipulated was unfair. Dreams was represented by a man conversant with business. The rate of interest was undoubtedly high, but it might not have been incommensurate with the risk that African Dawn ran in advancing its money to Dreams. There were no circumstances that showed either extortion or oppression, or anything akin to fraud, and, therefore no court was entitled to say that the transaction was a usurious one.

The application was dismissed and the counterclaim allowed.

FIRSTRAND BANK LTD v FOLSCHER

A JUDGMENT BY
BERTELSMANN J, MAKGOBA J
and TUCHTEN J
NORTH GAUTENG HIGH COURT
24 MAY 2011

2011 (4) SA 314 (GNP)

In the absence of extraordinary circumstances, a bond creditor is entitled to execute against the property taken as security under its bond. A court enforcing the bond creditor's right may take into account any such circumstances in determining whether or not to order execution against the bonded property.

THE FACTS

On 11 April 2011, in *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC), the Constitutional Court decided that 'it is unconstitutional for a registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules of Court, to the extent that this permits the sale in execution of the home of a person', as this is incompatible with section 26 of the Constitution.

The Full Court of the North Gauteng High Court was then convened to determine the manner in which the court should approach an application for authorisation of a writ of execution against a person's home. In particular, the court considered the question of how Rule 46(1)(a)(ii) of the Rules of Court should be implemented in such circumstances. The Rule requires a court to consider all the relevant circumstances before authorising the issuing of a warrant of execution.

THE DECISION

In the absence of extraordinary circumstances, a bond creditor will be entitled to execute against the property taken as security under its bond. The possible extraordinary circumstances which might arise cannot be listed in their entirety, but would usually consist of factors that would render enforcement of the judgment debt an abuse of the process of the court.

The following factors to be taken into consideration by the court, when deciding whether a writ should issue or not, are:

- Whether the mortgaged property is the debtor's primary residence;
- the circumstances under which the debt was incurred;
- the arrears outstanding under the bond when the latter was called up;
- the arrears on the date default judgment is sought;
- the total amount owing in respect of which execution is sought;
- the debtor's payment history;
- the relative financial strengths of the creditor and the debtor;
- whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
- the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer J if execution went ahead and he lost his home;
- whether any notice in terms of section 129 of the National Credit Act (no 34 of 2005) was sent to the debtor prior to the institution of action;
- the debtor's reaction to such notice, if any;
- the period of time that elapsed between delivery of such notice and the institution of action;
- whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
- whether the property is occupied or not;
- whether the property is in fact occupied by the debtor;
- whether the immovable property was acquired with moneys advanced by the creditor or not;
- whether the debtor will lose access to housing as a result of execution being levied against his home;
- whether there is any indication that the creditor has instituted action with an ulterior motive or not;

- the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

Not each and every one of these considerations will have to be taken into account in every matter. The enquiry must always be fact-bound to identify the criteria that are relevant for the particular case.

Absent any extraordinary circumstances, the judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. Bond finance is an important socioeconomic tool, enabling individuals to acquire their own home, to make the most important investment of their lives, to build up a nest egg, and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital. The special hypothec registered in favour of the creditor, as security for the moneys advanced for the purchase of the home and capital loans, is entered into between borrower and lender consciously, deliberately and for mutual benefit. If the lender were no longer to enjoy the assurance of bond security, access to housing for persons not qualifying for a State subsidy would become expensive and beyond the reach of the man in the street, with grave negative consequences for society and its social and commercial stability. The trust in bond finance, based upon the assurance that its repayment will be upheld by our courts, should therefore not be undermined. As Froneman J put it in Gundwana *(supra) at para 53:*

'Some further cautionary remarks are called for. It is rather ironic that the effect of this judgment is to restore to the courts a function that they exercised for close on a century before the introduction of rule 31(5) in 1994. The change to the original position has been necessitated by constitutional considerations not in existence earlier, but these considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. What it does is to caution courts that, in allowing execution against immovable property, due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders.'

GUNDWANA v STEKO DEVELOPMENT CC

A JUDGMENT BY FRONEMAN J (MOSENEKE DCJ, CAMERON J, JAFTA J, KHAMPEPE J, MOGOENG J, NKABINDE J, VAN DER WESTHUIZEN J, YACOOB J and MTHIYANE AJ concurring)
CONSTITUTIONAL COURT
11 APRIL 2011

2011 (3) SA 608 (CC)

When a creditor seeks default judgment against a debtor and an order that the debtor's property be declared executable, the application may not be granted by the registrar of the court but must be granted by the court itself. The court must be placed in a position where it can determine whether or not granting the orders will violate the defendant's constitutional right to property.

THE FACTS

Gundwana borrowed R25 000 from Nedbank Ltd for the purpose of buying a house. She mortgaged the property to the bank as security for repayment of the loan. She fell into arrears with her repayments, as a result of which the bank obtained a default judgment against her and an order that her property be declared executable.

Gundwana made arrangements with the bank to repay the debt, and thereafter paid some of the amounts due to the bank in varying amounts. Some four years later, she remained in arrears to the extent of R5268,66. The bank brought about the sale of the property in execution of the judgment it held against her. At the sale in execution, the property was sold to Steko Development CC.

Steko Development obtained an order evicting Gundwana from the property. After unsuccessfully appealing against this order, she brought an application in the Constitutional Court appealing against the eviction order and rescinding the default judgment taken against her by the bank. She contended that the High Court Rules relating to the grant of default judgment in circumstances where the defendant would lose its property were unconstitutional as they were contrary to the right to housing.

THE DECISION

In *Jaftha v Schoeman* 2005 (2) SA 140 (CC) it was determined that section 66(1)(a) of the Magistrates' Courts Act violated section 26(1) of the Constitution, to the extent that it allowed execution against the homes of indigent debtors, where they lost their security of tenure. The judgment requires that when default judgment is sought, it must be determined whether the facts of the matter are of the kind which arose in the Jaftha case. This involves an evaluation that goes beyond merely checking the summons to determine whether it discloses a proper cause of action since what has to be determined is whether the defendant is indigent and whether the mortgaged property is the defendant's home. In the present case, none of these facts were investigated when default judgment was given.

This evaluation must be done by a court of law, not the registrar. To the extent that the High Court Rules and practice allow the registrar to do so, they are unconstitutional.

The eviction order was set aside and the rescission application referred back to the High Court for reconsideration.

AVENG (AFRICA) LTD v MIDROS INVESTMENTS (PTY) LTD

A JUDGMENT BY WALLIS J
KWAZULU-NATAL HIGH COURT
8 MARCH 2011

2011 (3) SA 631 (KZD)

Contract

A party may proceed against another by litigation rather than by arbitration despite an agreement that disputes are to be determined by arbitration, but may not do so if it is in breach of the agreement to arbitrate.

THE FACTS

Aveng (Africa) Ltd agreed to construct a shopping centre for Midros Investments (Pty) Ltd. In terms of the agreement, the parties were entitled to submit disputes which might arise between them to arbitration.

After completion of the construction work, Aveng submitted a claim of some R1.5m to Midros, this amount being the balance payable to it and recorded in payment certificates issued in terms of the contract. Midros failed to pay this sum, and Aveng brought an action for payment.

While the action was still pending, the parties entered into settlement negotiations. This ended in an agreement that Aveng would remedy certain defects in the construction work and Midros would pay the balance outstanding.

Certain differences continued between the parties. As a result, and in view of the fact that the action it had brought would not reach finality for years to come, Aveng wished to submit them to arbitration. It applied for an order staying the action in order to pursue its claim by arbitration. Midros opposed the application on the grounds that the dispute had been settled in the settlement agreement which did not provide for arbitration.

THE DECISION

By proceeding by way of legal action against Midros, Aveng did not abandon its right to arbitration as provided for in the agreement. It was therefore not debarred from proceeding by way of arbitration and to have the dispute determined in that manner.

However, by proceeding by way of legal action, Aveng was in breach of the agreement which provided for arbitration as the means of settling disputes. By applying for a stay of the action, it was attempting to keep the option of litigation in place while remaining in breach of the agreement. This could not be accepted by a court. Accordingly, Aveng's application for a stay could not be accepted.

The application was dismissed.

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

A JUDGMENT BY PONNAN JA (HARMS DP, MAYA JA, SHONGWE JA and TSHIQI JA concurring)
SUPREME COURT OF APPEAL
17 MARCH 2011

2011 (4) SA 276 (A)

A provision exempting a party from liability in the event of defective performance does not assist that party in circumstances where that party has failed to perform at all.

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.

* The clause is reprinted at the end of this summary

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 DECISION

The first issue for consideration was whether the standard conditions of sale and credit, on the reverse of the credit application form, formed part of the agreement. Assuming in favour of Hirsch that Chickenland was bound by the conditions of credit set forth on the reverse of the credit application, the question was what construction was to be placed on the non-liability clause contained in it. The agreement had originally been framed to provide for the supply of machinery and equipment, not the supply of spices. In view of this, and since one was dealing with non-performance as opposed to defective performance, clause 4.1 was inapplicable and did not assist Hirsch. If clause 4.1 did not apply, then clauses 4.2 to 4.6, which were linked to and dependent upon it, likewise could not assist Hirsch. In any event, these sub-clauses were so gratuitously harsh and oppressive that public policy could not tolerate them.

As far as Chickenland’s counterclaim was concerned, Chickenland was clearly entitled to return of sums already paid to Hirsch. As far as its claims for damages for breach of contract were concerned, one was for the wasted expenditure incurred by Chickenland in having to recall the affected product, and the

other was for the wasted expenditure incurred by Chickenland in having to replace the affected product that had been recalled. The issue for decision was whether it could be accepted that the breach of contract proved caused the losses sustained by Chickenland.

From the commonly known circumstances it could reasonably be supposed that the parties contemplated when they contracted that if the spice packs were delivered by Hirsch with an illegal contaminant, Chickenland would be obliged to recall and replace all of the products affected by that contaminant that it, in turn, had supplied to its distributors, and that Hirsch would be taken to have assumed liability for all such costs directly linked to that recall and replacement. It followed from this that Chickenland had established Hirsch's liability for those special damages.

As far as the claim based on the failure of Hirsch to detect the presence of the contaminated colourant and take steps to withdraw the product from the market was concerned, Hirsch had a duty to withdraw the contaminated product from the market. There were strong policy considerations why Hirsch should be held liable.

The action succeeded.

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 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.

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 or other damages whatsoever.

4.3 Notwithstanding anything to the contrary contained or 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 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.

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'.

UNITRANS AUTOMOTIVE (PTY) LTD v TRUSTEES OF THE RALLY MOTORS TRUST

A JUDGMENT BY FISCHER AJ
FREE STATE HIGH COURT
10 MARCH 2011

2011 (4) SA 35 (FB)

An owner's right to claim return of the item it owns may be defeated by estoppel if the owner has negligently given the impression that it does not own that item.

THE FACTS

On 2 November 2002, a certain Mr Kok purchased a vehicle from Unitrans Automotive (Pty) Ltd for R359 000. The sale was concluded at the premises of Unitrans, and on that day it arranged for the issue to Kok of the registration papers in respect of the vehicle. On the following day, Kok returned to the premises to effect payment.

Kok indicated that he wished to make payment by means of electronic transfer of funds using a computer at the premises of Unitrans. After having used the computer, he produced a confirmation of a successful beneficiary payment which he handed to the sales person. Kok was given the vehicle and he departed with it.

It later appeared that the funds were not transferred to Unitrans' bank account. Unitrans made further investigations, and then discovered that on 3 November 2002, Kok had sold the vehicle to the Trustees of the Rally Motors Trust for R295 000. Kok had presented the vehicle's registration papers to the trust which had then registered the vehicle in its own name.

Unitrans brought an application against the trust based on its rights of ownership and claiming return of the vehicle. The trust defended the application on the grounds that Unitrans was to be estopped from asserting its rights of ownership.

THE DECISION

The trust's defence depended on it showing that negligence on the part of Unitrans caused it to be misled into the erroneous belief that Kok had the right to dispose of the vehicle. The trust had to discharge the onus of proving that negligence on the part of Unitrans was the cause of the trust's erroneous belief that Kok was the owner of the vehicle.

Having regard to the manner in which Unitrans dealt with Kok, and the extent to which Kok was entrusted with the signs of ownership, ie the vehicle, its ignition keys, the certificate of registration and the motor-vehicle licence and licence disc, evidencing that the vehicle had been transferred into the name of Kok, it must be accepted that Unitrans had provided Kok with all the surrounding evidence with which Kok was able to represent to the trust that he was entitled to dispose of the vehicle, and that the trust was entitled to purchase it from him.

Without such surrounding evidence provided by Unitrans to Kok, Kok would have been unable to persuade the trust to act to its own detriment, and purchase the vehicle. The trust purchased the vehicle, and was able to register it in its own name, by virtue of the signs of ownership provided to it by Kok. Unitrans' provision of those signs was done in circumstances where it acted negligently, and contrary to normal practice and procedure, in parting with the vehicle before receiving payment. Unitrans was also negligent in not foreseeing that Kok could, and in fact did, deal with the vehicle as his own property.

In these circumstances, Unitrans could be estopped from asserting its rights of ownership. The application failed.

GROBBELAAR v SHOPRITE CHECKERS LTD

A JUDGMENT BY MALAN JA (BRAND JA, NUGENT JA, LEWIS JA AND MAJIEDT JA concurring)
SUPREME COURT OF APPEAL
11 MARCH 2011

2011 SACLR 82 (A)

Cession of rights may take place by tacit agreement. The fulfilment of a suspensive condition which suspends the operation of the agreement in which such a cession is agreed entitles the cessionary to exercise its rights as from the date of the agreement.

THE FACTS

On 23 November 1995, Shoprite Checkers Edms Bpk purchased the businesses of Sentra Koop Handelaars Bpk and Megasave (Edms) Bpk. These two companies were buying organisations which operated as broker between suppliers and the dealer. Agreements in restraint of trade were concluded at the same time with Grobbelaar, who was a shareholder and managing director of both companies, and the other two appellants who were shareholder and employee respectively.

In terms of the retraint agreements, the signatories agreed not to have an interest in any entity engaged in similar activities to Shoprite and not to engage in specified activities considered to be detrimental to Shoprite's interests.

In August 1998, the business assets and rights of Shoprite Checkers (Edms) Bpk were sold to a subsidiary in the Shoprite Group, OK Bazaars 1929 (Pty) Ltd. The sale operated with retrospective effect from November 1997. From that date, Shoprite Checkers (Edms) Bpk managed the business as agent of Shoprite Checkers Ltd, pending the fulfilment of a suspensive condition that the approval of the Commissioner of Inland Revenue to the transactions be approved. Approval was obtained in October 1998.

In April and May of 1998, Grobbelaar and the other appellants left their employment with Shoprite. The restraint conditions then applied with effect until May 2001 in the case of Grobbelaar and April 2000 in the case of the other two appellants.

In September 1999, Shoprite Checkers Ltd concluded a cession agreement under which it took cession of the rights established in the restraint agreements.

Shoprite Checkers Ltd alleged that Grobbelaar and the other appellants breached the restraint conditions in consequence of which it had suffered damages which arose by virtue of the resignation of members of the buying organisations. It brought an action against them claiming payment of its damages.

THE DECISION

Grobbelaar contended that Shoprite Checkers Ltd did not acquire rights under the restraint agreement, and even if it had, had acquired them after the events giving rise to the claim for damages took place. However, this contention was not correct. Shoprite Checkers Ltd acquired these rights by virtue of the agreement of August 1998 which operated with retrospective effect from November 1997. The fact that the cession agreement was concluded at a later stage, in September 1999, did not affect the fact that these rights had been so acquired. By concluding the purchase of the businesses and taking them over, a tacit cession agreement was also concluded.

Grobbelaar also contended that he and the other appellants had not breached the restraint conditions at a time when Shoprite Checkers Ltd held any rights in respect of the restraint conditions. This contention could equally not be accepted for the same reason: Shoprite had acquired the rights under the restraints when it acquired the businesses, which was before the breach took place. The fact that a suspensive condition operated in respect of the sale of the business did not affect this conclusion because once the suspensive condition was fulfilled, the sale was enforceable as from the date on which it stated its inception was to be, ie November 1997.

By having made out a prima facie case that the cause of the resignation of the members of the buying organisation was the breach of the restraint provisions, in order to avoid the conclusion that this had been the cause, Grobbelaar and the other appellants had been obliged to show that some other cause had brought this about. However, no alternative causes had been shown to have operated in this respect and in consequence, Shoprite Checkers Ltd had adequately demonstrated that their breach was the cause of its loss.

Shoprite Checkers Ltd was therefore entitled to whatever it could prove was the extent of its loss.

The real agreement of cession was concluded tacitly and pursuant to the rationalisation scheme followed by the SCEB sale which was implemented by SCEB taking possession and managing the entire business on behalf of the plaintiff. Only its effect was suspended pending fulfilment of the condition precedent. Whether or not the rights arising from the restraints formed part of the 'SC business' as defined is irrelevant: they formed part of the business of SCEB.

S. v GARDENER

A JUDGMENT BY HEHER JA (CACHALIA JA and SERITI JA concurring)
SUPREME COURT OF APPEAL
18 MARCH 2011

2011 (4) SA 79 (A)

Companies

When company directors deliberately withhold information material to the affairs of their company from the board of directors, there is, in the absence of an explanation for such conduct which may reasonably be true, an a priori case of fraudulent non-disclosure.

THE FACTS

LeisureNet Ltd owned a Health and Racquet Club business which operated 85 health clubs in South Africa, and which held 57,8% of the ordinary issued share capital in Healthland International Ltd, a company registered in Malta. Healthland was the holding company of LeisureNet's offshore operations.

In April 1999, Dalmore Ltd sold its 50% shareholding in a Healthland subsidiary, Healthland Germany Ltd, to LeisureNet Ltd for DM10m. The purchase price was paid in cash, from funds which had been earmarked for the development of fitness clubs in Spain, and DM4m of it was transferred from Dalmore to two companies created for the benefit of two directors of LeisureNet Ltd, Gardener and Mitchell, the second applicant. These two companies were registered in the British Virgin Islands and administered and controlled by the Insinger Trust, registered in Jersey.

Dalmore was owned by three companies, each with the same registered office as Dalmore. Two of the beneficial owners of some of the shares in those companies were Gardener and Mitchell. They were charged with fraud in that when Dalmore sold its shareholding to Leisurenet they failed to disclose their interest in Dalmore and intended thereby to prejudice Leisurenet.

THE DECISION

The State had to prove beyond reasonable doubt that the Gardener and Mitchell withheld disclosure of their interest in Dalmore, with intent to deceive the board of LeisureNet, and thereby to induce it to act on the misrepresentation to its prejudice. The case for the State was built on the cumulative effect of the objective probabilities. The contention, was that the weight of such probabilities was sufficient to disprove beyond a reasonable doubt the truth of the explanations furnished by the appellants in evidence for their non-disclosure throughout the period April to December 1999. Once that finding was made, an intention to defraud followed as the only reasonable inference.

What Gardner and Mitchell ought to have disclosed was that they they possessed a financial interest in Dalmore, and the extent of that interest. By their own admissions, the knew of that duty: as directors of LeisureNet, they owed a duty to disclose situations of actual or potential conflict of interest, and did not deny the applicability of that duty to any of their dealings between Dalmore and the LeisureNet group.

When company directors deliberately withhold information material to the affairs of their company from the board of directors, there is, in the absence of an explanation for such conduct which may reasonably be true, an a priori case of fraudulent non-disclosure. This is because they know that the company can only make decisions through a board properly informed, and that by withholding proper information they render it unable to perceive the factors which affect its interests. In such circumstances, both prejudice and intention to prejudice are proved beyond reasonable doubt.

In the present case, Gardener and Mitchell deliberately withheld knowledge of their interest in Dalmore from the board of LeisureNet, intending the other board members to believe that no such connection existed. The only purpose in so doing and, therefore, by necessary inference, their intention, must have been that they feared or mistrusted the steps which the board, properly informed, might take and intended to preclude such action.

They were therefore properly convicted of fraud.

Companies

PFE INTERNATIONAL INC (BVI) v INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LTD

A JUDGMENT BY MOTALA AJ
KWAZULU-NATAL HIGH COURT
1 NOVEMBER 2010

2011 (4) SA 24 (KZD)

Rule 38 of the Uniform Rules of Court is no bar to the requirement that a party give information to which it is entitled under the Promotion of Access to Information Act (no 2 of 2000) if the information is required at a time when the Rule is not yet enforceable by that party.

THE FACTS

In September 2001, PFE International Inc (BVI) acquired 40% of the shares in SA Fibre Yam Rugs Ltd from the Industrial Development Corporation of South Africa Ltd (the IDC). As part of this transaction, the fourth and fifth applicants became directors of SA Fibre. While they were directors of this company, PFE obtained shares in Domo SA, a company registered in Belgium. The acquisition agreement was subsequently terminated, with the result that PFE retransferred its shares in SA Fibre to the IDC. The fourth and fifth applicants simultaneously resigned as directors of SA Fibre.

SA Fibre brought an action against the second and third applicant in which it alleged that they had breached their fiduciary duties as directors in failing to obtain the shares in Domo SA for it. It claimed an order that PFE and the other applicants disgorge in its favour the profits made from their shares in the company. As part of the pre-trial proceedings, it requested further particulars from PFE and the other applicants.

PFE contended that the information necessary to respond to some of the further particulars requested was contained in certain documents in the possession of the IDC, and that the information in those documents and records was peculiarly within the knowledge of the IDC. It contended that it was entitled to obtain these documents under the Promotion of Access to Information Act (no 2 of 2000). In March 2007, PFE brought an application for an order that the IDC produce the documents. The IDC resisted the application on the grounds that the Act does not entitle a person to obtain documents relating to a request for production of, or access to, a record for the purpose of pending criminal or civil proceedings.

THE DECISION

Section 7(1) of the Act provides that the Act does not apply to a record of a public body or a private body if the record is requested for the purpose of criminal or civil proceedings, is so requested after the commencement of such criminal or civil proceedings, and the production of or access to that record for that purpose is provided for in any other law.

It was clear that the jurisdictional requirements of this section had been met. The only question was whether or not the third requirement was fulfilled, ie whether or not the production of the records within the possession of the IDC were provided for in any other law. The IDC contended that it was, in that Rule 38 of the Rules of Court provide for the procuring of evidence for trial.

This contention could not be accepted. It was abundantly clear from a plain reading of the Rule that a subpoena could only be issued thereunder after a trial date had been fixed. The references in the Rule to the purpose of a subpoena being to secure the attendance of a person ‘to give evidence at a trial’ and the production of any deed, instrument, writing or thing ‘to the court at the trial’ put this beyond doubt. The request for information in the present matter was made in January 2007, at a time when a date for trial was neither established nor ascertainable. In these circumstances Rule 38 could not be said to have provided for a right of access to, or to production of, the records sought by PFE for its specific purpose. In any event, since the IDC was not a party to the pending civil proceeding, and a trial date not having being established, PFE could not obtain production of or access to the required information in terms of the Rules, at the stage at which it required such access.

GIANT CONCERTS CC v MINISTER OF LOCAL GOVERNMENT, HOUSING AND TRADITIONAL AFFAIRS, KWAZULU-NATAL

A JUDGMENT BY MNGUNI J
KWAZULU-NATAL HIGH COURT
26 MAY 2010

2011 (4) SA 164 (KZP)

Property

Property will not be considered freely alienable by a municipality if the municipality's right to ownership depends on a reversionary right which is not yet exercisable.

THE FACTS

The Ethekweni Municipality held certain property which it decided to sell. A portion of the property was the municipality's by virtue of a reversionary right entitling it to reclaim ownership from the government in the event that the property was no longer needed for military purposes. The municipality secured that right by an arrangement with the government under which the Natal Command then occupying the property was to be transferred to Salisbury Island. It obtained a valuation of the property, which determined its value at R71m. The executive committee of the municipality accepted a recommendation that the property be sold to Rinaldo Investments (Pty) Ltd for R15m, and resolved to sell it to that company following statutory advertisements of the proposed sale.

On 12 December 2003 the statutory advertisement relating to the proposed sale was published in English only in two newspapers. It notified the public, in terms of section 234 of the Local Authorities Ordinance 25 of 1974 (Natal), that it was the intention of the municipality to sell the property to Rinaldo, advising that the copies of the sale agreement would be available for inspection at the head office, and advising that interested parties could lodge any objections and make representations regarding the proposed sale on or before 29 December 2003. On the same day as the advertisement of the sale, the agreement of sale of the property was signed by the municipality and Rinaldo.

On 29 December 2003, Giant Concerts CC objected to the sale. The municipality considered the objection, but decided to approve the sale agreement to Rinaldo. After advertising the sale and obtaining the approval of the Minister of Local Government, Housing and Traditional Affairs in terms of section 235(1) of the ordinance, the municipality and Rinaldo signed a final sale agreement.

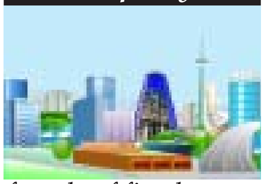
Giant objected the sale on the grounds that the purported sale of the property was ultra vires the provisions of section 233(8) of the ordinance, because certain material portions of it were not owned by the municipality, but by the State, thus rendering the transfer of those portions not freely alienable, because of the restrictions placed on them.

THE DECISION

Even though Giant was not a party to the sale agreement, it had locus standi to sue in relation to it because the purpose of section 233(8) of the ordinance was to give an opportunity to the public to have a say about the disposal of a public asset.

Section 233(8) of the ordinance provides that the council may sell or lease any immovable property by private bargain if the council is satisfied that the interests of the borough will be better served than by a sale or lease by public auction or public tender, or that other circumstances connected with the proposed transaction, justify such a course. The definition of 'immovable property' is defined in section 233(1) as 'immovable property of the council which is freely alienable and includes any right, interest or servitude therein or thereover.'

The question therefore was whether or not the property the municipality had sold was property which was freely alienable. Since portion of the property was not the



municipality's but subject to a reversionary right in its favour, it could not be said that the property was freely alienable. To the extent that there was a reversionary right, for so long as the property is used by the Defence Force for the purpose it was intended to be used, the municipality could not dispose of it. The property was not 'freely alienable'.

In any event, the sale did not comply with section 234(1) of the ordinance which requires advertising of a sale of fixed property prior to the conclusion of the sale. In the present case, the agreement had already been signed on the date of the advertisement. Furthermore, there had been no compliance with section 234(3) which requires that a copy of the terms and conditions in both official languages of the sale had to be kept at the town office and be available for inspection by the public during office hours.

The proper reading and analysis of the ordinance on this issue reveal that the ordinance only directs what the second respondent is required to do, and it does not prescribe that only persons with a direct and a substantial interest may lodge an objection. Its key purpose, in my view, is to give an opportunity to the public to have a say about the disposal of a public asset, in terms of s 233(8). In casu, *the applicant H lodged its objection to the proposed sale timeously. I am in agreement with the proposition advanced by the applicant's counsel, that, once the right to object is conferred and the decision is adverse to the objector, it follows that a person is entitled to approach a court for appropriate relief. Applying the principles enunciated in* Logro Properties, *supra, and I* Qaukeni Local Municipality, *supra, I am satisfied that the applicant has demonstrated that it has a sufficient legal interest or standing in the outcome of this application.*

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

Property

JUDGMENT BY LEWIS JA (HARMS DP, PONNAN JA, MALAN JA AND THERON JA concurring)
SUPREME COURT OF APPEAL
17 MARCH 2011

2011 SACLR 75 (A)

There is no common law rule preventing a co-owner of fixed property from selling and transferring its undivided share in such fixed property.

THE FACTS

Caribbean Estates (Pty) Ltd held a 46% share in certain fixed property. Bonheur 76 General Trading (Pty) Ltd held the remaining 54% share in the property. On 25 September 2008, Caribbean sold its 46% share to Wedgeport (Pty) Ltd and transfer of the property was registered some two months later.

Bonheur brought an application to set aside the sale on the grounds that there existed a right of pre-emption which conferred on it a prior right to purchase Caribbean's share of the property. It contended that the right of pre-emption arose from the Articles and Memorandum of the Association governing an adjoining commercial property, alternatively a co-owners' agreement concluded in respect of other properties prior to the transfer of the shares in the property to Caribbean and itself, alternatively a letter of intent signed by the parties which referred to a proposed co-ownership agreement.

Bonheur contended that under the common law, Caribbean was prevented from alienating its share in the property. It also contended that because the shareholders and directors of Wedgeport were also the shareholders and directors of Caribbean, and the purchase price was not actually paid but effected by cash advances and loan account and book entries, the sale to Wedgeport and the associated transactions of loan and mortgage were sham transactions.

THE DECISION

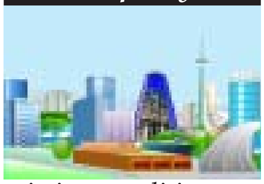
Since Caribbean was not a member of the Association, it was not bound by its rules. It was not a signatory to the co-owners' agreement which in any event, related to other properties. The agreement referred to in the letter of intent was never signed, and so could not form the basis of any claim by Bonheur against Caribbean.

As far as the argument based on the common law was concerned, section 34 of the Deeds Registries Act (no 47 of 1937) goes directly against it. That section permits the alienation of an undivided share in fixed property without the consent of a co-owner. Although Bonheur contended that the sale of Caribbean's undivided share might result in jeopardy to it, through for example Caribbean's failure to pay its share of municipal rates, this possibility was entirely speculative and provided no ground for reversing the sale of Caribbean's share in the property.

As far as the contention of sham transactions were concerned, there was no evidence to indicate that Caribbean's intention had been anything other than what the sale and associated transactions represented.

The application was dismissed.

VAN RENSBURG N.O. v NAIDOO N.O.



A JUDGMENT BY NAVSA JA and MHLANTLA JA (HEHER JA, VAN HEERDEN JA and SALDULKER AJA concurring) SUPREME COURT OF APPEAL
26 MAY 2010

2011 (4) SA 149 (A)

Property owners are entitled to be consulted on an Administrator's decision to amend or alter restrictive conditions of title. A municipality's policies and zoning regulations do not supersede the rights of owners derived from their title deeds.

THE FACTS

The Hobie Trust owned property in Port Elizabeth which neighboured on property owned by the Shan Trust. The title deeds of both properties contained the restrictive condition that it was to be used for residential purposes only, that only one house designed for the use as a dwelling for a single family, together with such outbuildings as are ordinarily required to be used therewith, was to be erected on them, that no more than half the area of the property was to be built on, and that no building or structure or any portion thereof except boundary walls and fences were to be erected nearer to the street line forming a boundary of the property than the building indicated on the diagram of the property.

The Shan Trust effected alterations and additions to its property in order to operate a guesthouse with 11 rooms for hire. As none of the alternations and additions were done with prior approval of building plans by the Port Elizabeth municipality, the Hobie Trust brought an application for an order that the buildings be demolished. The Hobie Trust was represented by its trustee, Van Rensburg, and the Shan Trust was represented by its trustee, Naidoo.

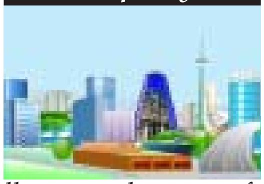
Before Hobie Trust's application was heard, the municipality withdrew its special consent to a departure from the zoning regulations, in terms of which it had granted the Shan Trust permission to conduct a guesthouse with 11 rooms. The application succeeded, the judgment holding that any possible permission by the municipality to build or use buildings contrary to the restrictive conditions could not be lawful as restrictive conditions took precedence over the municipality's zoning and planning schemes, and this followed from their characterisation in our case law as praedial servitudes in favour of other erf-holders.

The Shan Trust then successfully applied to the Member of the Executive Council of Local Government and Traditional Affairs, Eastern Cape Province (the MEC), for the removal of the restrictive conditions. The Hobie Trust brought an application to set aside this decision. The Shan Trust brought an application to set aside parts of the order given against it in the Hobie Trust's first application. Both of these applications succeeded. Both parties appealed.

THE DECISION

Property owners are entitled to be consulted on an Administrator's decision to amend or alter restrictive conditions of title. A municipality's policies and zoning regulations do not trump the rights of owners derived from their title deeds.

Restrictive conditions of the kind relating to the properties in this case enure for the benefit of all properties in a township, unless there are indications to the contrary. They are inserted for the public benefit and, in general terms, to preserve the essential character of a township. Landowners who enjoy the benefits which flow from these restrictive conditions cannot have them removed at the whim of a repository of power, without hearing them or providing an opportunity for them to object. Section 84 of the Removal of Restrictions Act (no 84 of 1967) provides for notice to be given to affected persons in the event of a



contemplated removal of restrictive conditions. However, the MEC and the municipality disavowed any reliance on the Act and relied solely on the right reserved to the Administrator to alter or amend the restrictive conditions, as provided for in the title deed.

There was also force in the Hobie Trust's argument, that the power to alter or amend does not include the power to remove or delete, and further, since restrictive conditions are usually inserted to preserve the identity of an area, the municipality might be required to engage with other neighbours and owners in the area.

Hobie Trust's application therefore correctly succeeded.

As far as the Hobie Trust's appeal was concerned, the judgment given against it had directed the municipality to consider plans which, if approved, would legitimise the contravening structures put up by the Shan Trust. But that judgment assumed a power which the judge did not have, ie to declare in final terms, that the earlier order obtained in the Hobie Trust's first application, made by a court of equal jurisdiction, was of no force and effect. The rationale for setting aside the earlier judgment was that it had fallen away because of the subsequent decision made in favour of the Shan Trust by the MEC. However, the intention of the earlier judgment was to be final and to be executed upon. Thre was no case to be made for a rescission of any part of that judgment. The learned judge had correctly concluded that, insofar as the offending structures were concerned, and having regard to the unlawful conduct of the Shan Trust over the years, the time for finality had come.

The application to set aside the order given against the Shan Trust should therefore not have succeeded.

Restrictive conditions of the kind in question enure for the benefit of all other erven in a township, unless there are indications to the contrary. They are inserted for the public benefit and, in general terms, to preserve the essential character of a township. In this regard see Malan *at 38B – C and 39F – G. If landowners across the length and breadth of South Africa, who presently enjoy the benefits of restrictive conditions, were to be told that their rights, flowing from these conditions, could be removed at the whim of a repository of power, without hearing them or providing an opportunity for them to object, they would rightly be in a state of shock.*

[38] Section 84 of the Act provides for notice to be given to affected persons in the event of a contemplated removal of restrictive conditions. In the present case the MEC and the municipality disavowed any reliance on the Act and relied solely on the right reserved to the Administrator to alter or amend the restrictive conditions, as provided for in the title deed.

KWAZULU-NATAL AGRICULTURAL UNION v MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

Property

A JUDGMENT BY PLOOS VAN AMSTEL J
KWAZULU-NATAL HIGH COURT
16 MAY 2011

2011 (4) SA 266 (KZP)

The Minister of Co-operative Governance and Traditional Affairs may not interfere with the rates imposed by a municipality unless he is convinced by evidence that a municipality has imposed a rate on any specific category of properties which is materially and unreasonably prejudicing any of the matters listed in section 16(1) of the Local Government: Municipal Property Rates Act (no 6 of 2004).

THE FACTS

The Kwazulu-Natal Agricultural Union sent a letter to the Minister of Co-operative Governance and Traditional Affairs requested him, in terms of section 16(3)(a) of the Local Government: Municipal Property Rates Act (no 6 of 2004), to evaluate evidence to the effect that the municipal rates imposed on the agricultural sector was materially and unreasonably prejudicing the matters listed in section 16(1) of the Act. The Union requested the Minister to publish a notice in the Government Gazette, limiting the amount in the rand for eight municipalities which had implemented the Act from 1 July 2007, and requested that he should make a determination, limiting the rate on the rand to a maximum of 0,5 cent in the rand on properties used for agricultural purposes.

Section 16(1) of the Act provides that a municipality may not exercise its power to levy rates on property in a way that would materially and unreasonably prejudice national economic policies, economic activities across its boundaries, or the national mobility of goods, services, capital or labour.

The Minister responded by informing the Union that he had decided not to limit the rate imposed by any of the municipalities cited in the letter. The Union brought an application to revicw this decision.

THE DECISION

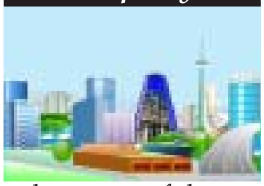
Section 151(4) of the Constitution provides that the national or a provincial government may not compromise a municipality's ability or right to exercise its powers or perform its functions. Section 139 provides for provincial intervention in local government in certain defined circumstances. It follows from these provisions that the Minister's power to interfere with the rates imposed by a municipality.

The Minister cannot prescribe what rates municipalities should levy. If he is of the view that the rates which they have levied are too high, he cannot interfere. The extent to which he can interfere is the imposition of a limit on the rates in accordance with section 16 of the Act, but he can only do so if he is convinced that a rate on any specific category of properties is materially and unreasonably prejudicing any of the matters listed in section 16(1). The Minister must be convinced by the evidence referred to in section 16(3)(a) that a rate on any specific category of properties, or a rate on any specific category of properties above a specific amount in the rand, is materially and unreasonably prejudicing any of the matters listed in section 16(1). There must be a rate which is causing prejudice, and, in terms of section 16(4) a notice issued in terms of section 16(2) must give the reasons why such a rate 'is materially and unreasonably prejudicing' a matter listed in section 16(1).

Since the Minister was not in a position to act in terms of this section, he did not have the power to limit the rate imposed by any of the municipalities cited in the Union's letter. The application was dismissed.

MERIDIAN BAY RESTAURANT (PTY) LTD v MITCHELL N.O.

Property



A JUDGMENT BY PONNAN JA (NAVSA JA and SHONGWE JA concurring)
SUPREME COURT OF APPEAL
23 MARCH 2011

2011 (4) SA 1 (A)

A prior purchaser of property is entitled to claim that property under the doctrine of notice in circumstances where the identity of the property as originally sold has been changed prior to transfer to the party against which the claim is made.

THE FACTS

In February 1998, Wimbledon Lodge (Pty) Ltd took transfer of an apartment, described as section 91 of the sectional plan relating to the Harbour's Edge Sectional Title Scheme, together with an undivided share in the common property apportioned to it in accordance with the applicable participation quota. The apartment was one of a number which formed part of a hotel apartment scheme to be managed by a management company which would control the apartments for that purpose as well as various other sections required for facilities necessary for the operation of the scheme.

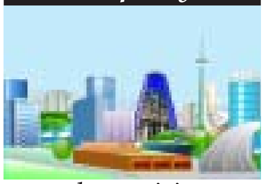
As at the date on which the agreement of sale was signed, the purchaser had acknowledged having perused the approved drawings and that he or his nominee would be obliged to accept delivery of the apartment completed substantially in accordance with the drawings as finally depicted on the sectional plan. The drawings were given in three annexures which set out building specifications, site plans and the layout of the different types of apartments. The drawings did not show as sections certain areas designated as 'commercial properties' because it was not then known what the precise extent of these areas would be.

The sectional plan which was registered and in terms of which Wimbledon Lodge took transfer of section 91 deviated from the annexures which had depicted the property forming the scheme in various ways. A squash court was omitted, as was a dining room and kitchen, and a tavern was converted into a restaurant. Thirty four additional sections were reflected on the sectional plan. The effect of these changes was to reduce the extent of the common property by 5 505 square metres.

Wimbledon contended that some of the thirty four sections were common property and that they should be apportioned to each section in undivided shares. It contended that since the body corporate was the custodian of the common property, it should seek retransfer of the sections and rectification of the sectional plan. At a general meeting of unit-holders, 44 unit-holders voted in favour of a special resolution that the body corporate take action against the developer and Harbour's Edge Commercial Property Holdings (Pty) Ltd which together held a majority of the votes because of their acquisition of the thirty four additional sections later added to the sectional plan. The latter voted against the resolution and as a result, the special resolution was not carried.

Wimbledon applied for the appointment of a provisional curator ad litem to conduct an investigation as to the grounds and desirability of instituting such proceedings as might be necessary to obtain registration of the property as common property, and a claim for damages by the body corporate against the liquidator of the developer of the scheme. The application was granted, and Mitchell was appointed as the curator ad litem.

Mitchell brought the action against the developer and Harbour's Edge as well as against Meridian Bay Restaurant (Pty) Ltd and two banks which had passed mortgage bonds over its property. The action was instituted because after the application for a curator had been brought, the liquidator sold and transferred certain sections of the



scheme to Meridian. Mitchell alleged that at the time that the sale took place Meridian had knowledge of the pending proceedings and took transfer of the sections knowing that proceedings to recover the sections as common property might be instituted on behalf of the body corporate by a curator ad litem. It followed that Meridian acquired, and could assert, no greater right to the sections than Harbour's Edge had at the time of its disposal of the sections and to assert such greater right would constitute a species of fraud upon the curator. The mortgage bonds registered in favour of the banks were registered at a time when they had knowledge of the pending proceedings and registered the mortgage bonds in the knowledge that if such proceedings were successful, the sections would not constitute security for the debts of their mortgagor.

THE DECISION

The developer knowingly and deliberately registered a sectional title plan at odds with the prior purchase and sale agreements concluded with the purchasers. The sectional title scheme so registered established valuable new sections which it appropriated to itself. Thereafter, it sought to place them beyond the reach of the prior purchasers by transferring those to subsequent transferees. These actions amounted to fraudulent misappropriations of the affected sections.

The first question was whether the prior purchasers could assert the doctrine of notice against Meridian. Unlike in the simple case of a double sale, in this case the first act of disposition had the effect of creating new objects of ownership out of the property which was already the subject of a prior personal right. This had happened because the developer had changed the extent of the common property by excising portions of it prior to transfer. Furthermore, in this case, insolvency had intervened.

There was no reason why the reconfiguring of the common property into units to fraudulently place it beyond the reach of the prior purchasers would operate as a bar to the invocation of the doctrine of notice. Meridian Bay knew about the claims of prior purchasers when it entered into the sale agreement with the developer. In such circumstances, the only question is whether or not the first sale would have entitled the first purchaser to a order of specific performance had the second not been concluded. The answer being in the affirmative, the first purchaser had an indefeasible right and should be entitled to the assistance of the court without any further regard to the equities of the second sale.

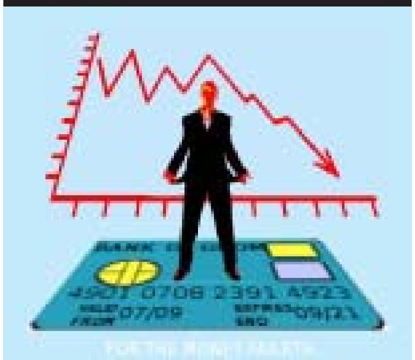
The action succeeded.

REYNOLDS N.O. v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY BLIEDEN J
WITWATERSRAND LOCAL DIVISION
10 SEPTEMBER 2008

2011 (3) SA 660 (W)

Insolvency



A party which brings an action in the name of a liquidator of a company in terms of section 32 of the Insolvency Act (no 24 of 1936) is not able to make discovery under the rules of court. The liquidator alone is able to do so.

THE FACTS

Finsec Financial Consultants CC brought an action against the Standard Bank of South Africa Ltd in the name of the joint liquidators of a company which had been placed in liquidation. The joint liquidators consented to the bringing of the action in their name after Finsec indemnified them against all costs of the action in terms of section 32(1)(b) of the Insolvency Act (no 24 of 1936). Finsec's action was brought to set aside a disposition of property and recover the value of property alleged to be theirs, in terms of section 29 of the Insolvency Act.

The bank called for discovery and in response, were given a discovery affidavit deposed to by the sole director of Finsec. The bank rejected this, contending that only the joint liquidators of the company could make discovery.

THE DECISION

The bank's contention that only the liquidators could make discovery was correct. As is made plain in sections 32(1) and 32(3) of the Insolvency Act, it is only the liquidators who can recover property when the court sets aside any disposition envisaged in section 32(1)(a). In order to proceed to set aside such dispositions, the plaintiffs will have to rely on the books and records of the insolvent company. These cannot be in the control or possession of any creditor acting in terms of section 32(1)(b). It is highly unlikely that any creditor's books and records as envisaged in rule 35(1) could have anything to do with the affairs of the insolvent company. It is only the documents in possession of the liquidators which are relevant, and which have to be discovered in terms of rule 35(1).

It was incorrect to describe the plaintiffs as merely 'nominal plaintiffs'. They were the plaintiffs because they were the only parties entitled to embark on the litigation concerned. The fact that Finsec was given the right to fund and direct such litigation, when the plaintiffs were not prepared to do so, did not detract from the fact that it was the joint liquidators to whom payment would have to be made if the litigation was successful, and who would be liable for costs if it failed.

EVANS v SMITH

A JUDGMENT BY BINNS-WARD J
WESTERN CAPE HIGH COURT
19 MAY 2011

2011 (4) SA 472 (WCC)

Contract

An agreement which novates previous agreements but which is contrary to statute and illegal is null and void. The effect of this is that the previous agreements remain between the parties.

THE FACTS

Evans made a series of loans to Smith. On 17 March 2009, a loan then made meant that the total amount loaned exceeded R500 000. On that date, the parties concluded an agreement which recorded that all previous loans were expressly rendered null and void. The agreement certified that Evans had invested R540 000 with Smith, the purpose of which was to pay customs and taxes due to the Moroccan revenue authority in order to secure the release of gold and diamonds. After the refinement and sale of the gold, Smith was to repay Evans R540 000 plus a further R540 000 as a profit share from the proceeds of the sale.

In the months which followed, Evans requested and demanded that Smith implement the agreement. Smith was unable to comply, and he indicated to Evans by email that he had no funds available to pay Evans in terms of their agreement.

Evans then brought an application to sequestrate Smith's estate. He based his application on the allegation that Smith had committed an act of insolvency in that he had affirmed he was unable to pay his debt. The court considered this question and the question whether or not under the parties' agreement, Evans was a credit provider as defined in the National Credit Act (no 34 of 2005), and since he was not registered as such, the loan agreement was null and void.

THE DECISION

The agreement of 17 March 2009 was intended to novate the previous loan agreements. However, novation could not take place if the later agreement was illegal. Since the later agreement entailed Evans advancing a loan in excess of the R500 000 threshold provided for under the National Credit Act, this would have made him an unregistered credit provider, and the loan subject to nullity under that Act. The later agreement was therefore not lawful and did not have the effect of novating the earlier agreements.

The alternative construction placed on the later agreement by Evans - that it was not a loan agreement but an investment agreement - could not be accepted. The fact that Evans remuneration was described as a 'profit share' did not make the agreement an investment agreement. Such an agreement is not a recognised nominate agreement. Seen in the context of their business relationship, the agreements between the parties were loan agreements.

As far as the act of insolvency was concerned, upon the test of how a reasonable person of business would construe Smith's email message, that message could be understood as Smith notifying Evans that he was unable to pay his debt, and this indication was unequivocal.

The application was granted.

GEROLOMOU CONSTRUCTIONS (PTY) LTD v VAN WYK

Contract

A JUDGMENT BY TUCHTEN J
(RD CLAASSEN J concurring)
NORTH GAUTENG HIGH COURT
31 MAY 2011

2011 (4) SA 500 (GNP)

A settlement agreement concluded as a result of financial pressure brought to bear on one of the parties amounting to undue influence may be set aside.

THE FACTS

Van Wyk performed certain sub-contracting work for Gerolmou Constructions (Pty) Ltd. Gerolomou then owed Van Wyk R48 523.54. It delayed paying him this amount, and as a result of the delay, Van Wyk was put under financial pressure as he needed to pay his workers from the money owed to him.

Gerolomou's project manager then presented Van Wyk with a final account. It recorded the amount owing to Van Wyk, as well as a number of contra charges raised for repairing damaged materials, removing material and stripping out. After subtracting these charges, the amount shown as due to Van Wyk was R19 291.70. The document contained a statement that Van Wyk accepted this amount in full and final settlement for all claims against Gerolomou. The project manager told Van Wyk that unless he signed the document, he would not receive any money at all. Van Wyk protested, but signed the document.

Van Wyk brought an action for damages against Gerolomou. Gerolomou defended the action on the grounds that Van Wyk had accepted R19 291.70 in full settlement of his claim. Van Wyk contended that he had been subject to Gerolomou's power so that he had been forced to agree to an agreement which prejudiced him.

THE DECISION

A settlement agreement is an agreement which is based on offer and acceptance. However, in the circumstances of this case, Gerolomou did not make an offer to Van Wyk. The account was submitted to Van Wyk on the basis that Van Wyk would get nothing unless he signed the document. Van Wyk made it clear that he did not admit the amount cited was the full amount due to him. In consequence, no settlement agreement was concluded.

Even if it was accepted that the document reflected an offer and acceptance, it contained an admission by Gerolomou that a certain amount was owed to Van Wyk. The fact that its admission was hedged with qualifications did not mean that Van Wyk accepted those qualifications.

It was clear that Gerolomou had exercised an undue influence over Van Wyk. While it is permissible for one party to exploit the economic weakness of the other when a genuine settlement of a disputed indebtedness is involved, this is not acceptable when an economically powerful party withholds what is admittedly owing to an economically weaker party, in order to seek commercial advantage. In the present case Gerolomou's conduct imposed on Van Wyk's constitutional right to have his dispute with it adjudicated by fair legal or other process.

Van Wyk had demonstrated that Gerolomou's actions had been unconscionable. If there were a contract of compromise, the plaintiff was entitled to avoid it. Accordingly, the defence of undue influence had to be sustained.

The action succeeded.

AIRPORTS COMPANY SOUTH AFRICA LTD *v* ISO LEISURE OR TAMBO (PTY) LTD

Contract

A JUDGMENT BY VALLY AJ
SOUTH GAUTENG HIGH COURT
31 MARCH 2011

2011 (4) SA 642 (GSJ)

An agreement to resolve disputes by arbitration is ineffective if the actions which are to be subject to arbitration are administrative actions as defined in the Promotion of Administrative Justice Act (no 3 of 2000).

THE FACTS

The Airports Company South Africa Ltd issued a request for proposals from interested parties to tender for contracts to design, develop and operate hotels at three airports. The request stipulated that any participation in the process of proposals and tendering would be subject to the condition that should any unresolved dispute or difference arise between any bidder and the Airports company concerning the content of the request for proposals or of anything required to be done or performed therein, any aspect of the process to anything done or decided thereunder, the validity of an award to any bidder or the failure to award any bidder, then such dispute would be finally resolved by arbitration.

ISO Leisure OR Tambo (Pty) Ltd submitted a tender for the contract in respect of a hotel at the OR Tambo International Airport but was unsuccessful. It brought an application to review and set aside the decision not to award the tender to it, basing its claim on its constitutional right to fair administrative action.

Airports brought an application to stay the proceedings brought by ISO on the grounds that the parties had agreed that any dispute, including the dispute forming the review application, be referred to arbitration.

THE DECISION

Section 7(4) of the Promotion of Administrative Justice Act (no 3 of 2000) (PAJA) provides that all proceedings for judicial review must be instituted in a High Court or the Constitutional Court. Airports contended that this provision did not prevent the resolution of the parties' dispute by arbitration because its actions were not properly categorised as administrative action as defined in the Act.

Airports was listed in Schedule 2 of the Public Finance Management Act (no 1 of 1999) as a 'Major Public Entity'. As such, it was subject to the policies, principles and practices that had to be followed by these public entities. If the action taken by Airports could fall foul of any of them, this would be a weighty factor in determining that its action was administrative action as referred to in PAJA. Airports was constituted as a public company in terms of the Airports Company Act (no 44 of 1993) and under that Act subject to regulatory control which other commercial enterprises are not ordinarily subject to. The fact that Airports was subject to both of these Acts were indications that in awarding tenders its actions were administrative actions, although they were insufficient in themselves to prove that they were administrative actions as defined in PAJA.

The administrative actions referred to in PAJA are actions which are final and definitive. The decision sought to be impugned by the review application brought by ISO was final and definitive, thus indicating that it might be subject to PAJA. In order to determine finally whether or not its actions was properly categorised as administrative action, a number of factors had to be considered, including whether or not the entity was publicly funded. Airports was a publicly funded company, and this was a compelling reason to consider its action subject to the PAJA.

Section 7(4) prevents the adjudication of a dispute in any forum other than the High Court or Constitutional Court. Accordingly, arbitration proceedings were not a forum in

which the parties’ dispute could be resolved.

The application to stay the proceedings brought by ISO was dismissed.

In my view, the question of whether conduct constitutes administrative action, as contemplated in PAJA, can only be determined by having regard to a number of factors, such as, for example, whether the body carrying out the function is publicly funded, publicly owned, performing functions that would otherwise be performed by a ‘pure’ governmental organ such as a department that is part of the executive, controls public assets, acquires liabilities that ultimately will have to be borne by the public, or acting in the public interest or is subject to the regulation by statute such as PFMA or the ACSA Act. Where more than one of these factors coexist it would be incorrect to hold that any one of them is individually decisive in determining whether the body’s conduct constitutes administrative action. That, I believe, is the only way to give effect to the provisions of the Constitution, especially those contained in the Bill of Rights. In the present case, the fact, that the decision sought to be impugned may fall foul of one or more of the provisions of PFMA referred to above, is a weighty factor that needs to be taken into account H when determining whether such decision constitutes administrative action as contemplated in PAJA. It may well be that the accounting authority of the applicant has committed financial misconduct, as contemplated in PFMA, by virtue of allowing the applicant to take the decision sought to be impugned.

...

By virtue of the fact that these companies are owned by government, they are, ultimately, dealing with public funds. Whether they make a loss or turn a profit, the public purse is affected. This, in my view, provides compelling reason not to interpret the definition of administrative action too narrowly, as is contended for by the applicant. Furthermore, the fact that the conduct is regulated by the provisions of PFMA point to the direction that it falls within the scope of PAJA.

To conclude on this point, the applicant’s invitation to grant the stay application, on the basis of its contention that the rule 53 application is incompetent by virtue of the inapplicability of PAJA, has to be declined.

LA CONSORTIUM & VENDING CC v MTN SERVICE PROVIDER (PTY) LTD

Contract

A JUDGMENT BY MALAN J (VAN OOSTEN J and MOKGOATLHENG J concurring) SOUTH GAUTENG HIGH COURT 17 AUGUST 2009

2011 (4) SA 577 (GSJ)

Evidence which is admissible in terms of section 15(4) of the Electronic Communications and Transactions Act (no 25 of 2002) may include hearsay evidence, but such evidence should also meet the requirements for admissibility provided for in section 3 of the Law of Evidence Amendment Act (no 45 of 1988).

THE FACTS

La Consortium & Vending CC sold cellphones and cellphone services. It did so as a distributor for MTN Service Provider (Pty) Ltd in terms of an Electronic Distribution Agreement and a Prepaid Distribution Agreement concluded between the parties. In terms of these agreements, La Consortium purchased cellphones and airtime from MTN over a period of two years and six months.

In terms of the Electronic Distribution Agreement, LA could place orders by email. After acceptance by MTN, it could effect delivery by electronic delivery, either by email or other format. Delivery would be deemed to have been effected by acknowledgement of receipt by La Consortium or by activation by MTN for use on its service. Clauses 7.7 and 7.8 of the Prepaid Distribution Agreement provided that such returned delivery note, duly signed and stamped, served as absolute and incontrovertible proof of delivery.

MTN claimed claimed payment of R323 701,26 in respect of cellphone kits sold and delivered by it to La Consortium. La Consortium conceded that delivery of the goods referred to in this claim took place. MTN's second claim was for payment of R3 080 202,04, consisting of airtime sold and delivered by it to La Consortium. MTN relied on evidence of its employees and representatives to the effect that deliveries consistent with these claims were made to La Consortium. In doing so, they relied on computer-generated data produced by MTN's accounting software which had been programmed to record order-activations and raise invoices upon conclusion of the sales and services effected under the distribution agreements.

La Consortium contended that MTN should have proved the opening balance of its account with it. It also contended that the evidence presented on behalf of MTN, including certificates furnished in terms of section 15(4) of the Electronic Communications and Transactions Act (no 25 of 2002) (ECT), was hearsay evidence, and was consequently inadmissible. It contended that the evidence relied upon was not the 'best evidence', since no source documentation was presented.

THE DECISION

Section 15(4) of the ECT provides that a data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common-law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract

The definition of 'data message' is sufficiently wide to include hearsay evidence. Such evidence is, in terms of the ECT, admissible to the extent permitted by section 15(1) of that Act, but remains subject to section 3 of the Law of Evidence Amendment Act (no 45 of 1988). Taking into account all of the factors referred to in that section, the data messages could be considered admissible evidence in the present case. In considering the admissibility of hearsay, the court was also obliged to consider the reason why the evidence was not given

by the person on whose credibility the probative value of the evidence depends. A number of people would have had to have testified to prove, for example, the entry of the particulars of the orders placed. No reason was given why they were not called to testify. However, this, was not conclusive of the matter. The margin for error in making the entries was minimal, and a conspiracy could be discounted. Furthermore, the agreements themselves envisaged the placing of some orders and their performance (delivery) by electronic means. In fact, the greater part of MTN's business, certainly insofar as the relevant orders were concerned, was conducted primarily electronically, as opposed to hysically. In these circumstances this evidence was correctly admitted. La Consortium suffered no prejudice by the admission of this evidence. La Consortium could have placed any specific order or delivery in dispute but did not do so. Given these considerations, the evidence relied upon by MTN was correctly admitted.

The originator of the data, ie the person who captured the data on the computer, of the data messages was not one, but several persons, in the employ of MTN. Although they were not identified, and did not give evidence, it could be accepted that they entered the information on the computer duly, and within the scope of their employment, and under the supervision of their supervisors. The data messages contain information of both credits and debits on La Consortium's account. The fact that more than one person contributed to their existence does not constitute a valid objection to the admission of the data messages into evidence.

MTN's claim succeeded.

In considering the admissibility of hearsay, a court is also obliged to consider the reason why the evidence is not given by the person on whose credibility the probative value of the evidence depends (s 3(1)(c)*(v)). A number of people would have had to have testified to prove, for example, the entry of the particulars of the orders placed. No reason was given why they were not called to testify. This, however, is not conclusive of the matter. The margin for error in making the entries is minimal, and some or other conspiracy can be discounted. In addition, the agreements envisaged the placing of some orders and their performance (delivery) by electronic means. Indeed, the greater part of the respondent's business, certainly insofar as the relevant orders were concerned, was conducted primarily within the 'electronic stream', as opposed to the 'physical stream'. In these circumstances the evidence was correctly admitted by the court a quo. The appellant suffered no prejudice by the admission of this evidence, nor can a procedural disadvantage, if any, be regarded as 'prejudice' (s 3(1)*(c)*(vi)). If the interests of justice require the admission of the evidence, a judgment based upon the evidence admitted cannot constitute 'prejudice'. As I have said, the appellant could have placed any specific order or delivery in dispute. Nothing of the kind was done. Given the above considerations, the evidence relied upon by the respondent was correctly admitted*

AB VENTURES LTD v SIEMENS LTD

A JUDGMENT BY NUGENT JA (CLOETE JA, PONNAN JA, SNYDERS JA and BOSIELO JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2011

2011 (4) SA 614 (A)

It is not possible to establish in a delictual claim for economic loss that the defendant's conduct has been wrongful if it is clear that the claimant could have contracted on terms which would have excluded its liability for such economic loss.

THE FACTS

AB Ventures Ltd contracted with Lumwana Mining Company Ltd to construct the Lumwana Copper Mine in northern Zambia. Siemens Ltd designed and manufactured four electrical drive units for installation at the mine in terms of a separate agreement concluded between itself and other parties. Siemens installed and commissioned the drives at the construction site.

After their installation had been completed, they failed. This caused the delay of completion of the construction project and, in consequence, AB Ventures alleged it became liable to Lumwana for penalties or damages under the construction contract, and also incurred additional expenses. AB Ventures alleged that the malfunction of the drives and the resultant loss were caused by negligence on the part of Siemens, and it claimed damages in delict to compensate for its loss.

Siemens excepted to the claim brought against it on the grounds that with respect to AB Ventures, its actions had not been wrongful.

THE DECISION

The extension of delictual liability in cases of economic loss has been accepted in limited cases, but always within the stricture that the wrong complained of must have been wrongful. The question therefore was whether or not Siemens' alleged negligence in the present case could be considered to be wrongful.

Given the fact that when it contracted with Lumwana, AB Ventures had been in a position to stipulate that it would not be liable for loss arising from delay and expenses that might be caused by the default of other contractors, there appeared to be no reason to consider Siemens' alleged negligence wrongful vis-a-vis AB Ventures. It was certainly true that without any contractual relationship with Siemens, AB Ventures could not rely on contractual default by Siemens when seeking to establish its claim against that company. But the fact that it could not proceed in contract against Siemens did not assist AB Ventures in establishing its claim against Siemens on the alternative basis of delict.

The exception was upheld.

CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN SOCIAL SECURITY AGENCY N.O. *v* CASH PAYMASTER SERVICES LTD

A JUDGMENT BY TSHIQI JA (HARMS DP, PONNAN JA, SNYDERS JA AND BERTELSMANN AJA concurring)
SUPREME COURT OF APPEAL
11 MARCH 2011

2011 SACLR 104 (A)

A failure to state reasons for acts done on the authority of regulations promulgated under the Public Finance Management Act (no 1 of 1999) does not result in such acts being void, provided that it is clear what the reasons were and were rational.

THE FACTS

The South African Social Security Agency (Sassa) was established in terms of the South African Social Security Agency Act (no 9 of 2004), its object being to ensure the management, administration and payment of social assistance.

Until April 2006, payments of social grants were effected under contracts with cash payment contractors, one of which was Cash Paymaster Services (Pty) Ltd. In April 2006, Sassa took over these contracts, by cession and delegation. In March 2009, Sassa extended the contract with Cash Paymaster for a further year, and they agreed to negotiate a new consolidated service agreement in relation to cash payments.

In July 2009, Sassa concluded an agreement with the South African Post Office, known as the Letter Agreement, in terms of which any new beneficiaries which had to be paid and which did not have a bank account would be referred to the post office for the purpose of opening a Postbank account. The account would then be used for the payment of social grants, the beneficiary being issued with a bank card for this purpose. Cash payments to beneficiaries were unaffected by this agreement.

Cash Paymaster objected to the Letter Agreement on the grounds that Sassa had not followed a competitive process before concluding it. It contended that this was required by section 217(1) of the Constitution and section 51(1)(a)(iii) of the Public Finance Management Act (no 1 of 1999).

Sassa accepted that it did not follow a competitive process but contended that it was not obliged to do so.

THE DECISION

Treasury Regulations promulgated under the Public Finance Management Act provide that a public entity must develop and implement an effective and efficient supply chain management system for the acquisition of goods and services. The system must be fair, equitable, transparent, competitive and cost-effective. If in a specific case it is impractical to invite competitive bids, the public entity may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority of the public entity.

Sassa had such a supply chain management system, and in terms of the last-mentioned regulation, had deviated from it when concluding the Letter Agreement. This deviation was brought about because Sassa intended to improve grant enrolment and payment services on a cost-effective basis. There were therefore rational reasons for the agreement having been concluded, and while Sassa had not stated its reasons, it was clear from the agreement itself that the reason for it was to provide for collaboration between it and the post office and to improve the provision of services, including the provision of services to those to whom no such services were offered by other entities. Cash Paymaster had adduced no evidence to show that there was anything irrational or unreasonable in the intention and purpose of the Letter Agreement.

The mere fact that Sassa had not recorded its reasons for entering into the Letter Agreement did not

render the agreement void. There was nothing to indicate that the regulations required non-compliance in this respect should result in acts done under them void.

The main object of the PMF Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies (s 2). SASSA and SAPO, as mentioned, are such entities more particularly because they are both funded, fully or substantially, from the National Revenue Fund or by way of tax, levy or other money imposed in terms of national legislation, and they are accountable to Parliament (s 1). The PFM Act, read with the Treasury Regulations, is such legislation. It should be noted that it was not the respondent's case that the PFM Act or the Treasury Regulations were unconstitutional, only that SASSA did not comply with their provisions.

...

SASSA is not obliged to comply with its supply policy in the circumstances set out in reg 16A6.4 and it is accordingly unnecessary to consider the terms of the policy any further. The regulation permits an accounting officer or the chief executive officer to deviate from a competitive process subject to conditions. As mentioned it is not contended that a 'system' may not provide for such deviations. First, there must be rational reasons for the decision. That is a material requirement. Second, the reasons have to be recorded. That is a formal requirement. The basis for these requirements is obvious. State organs are as far as finances are concerned first of all accountable to the National Treasury for their actions. The provision of reasons in writing ensures that Treasury is informed of whatever considerations were taken into account in choosing a particular source and of dispensing with a competitive procurement process. This enables Treasury to determine whether there has been any financial misconduct and, if so, to take the necessary steps in terms of reg 33.

[22] The factual inquiry is whether there was compliance with the provisions of reg 16A6.4. Although the chief executive officer of SASSA did not pen his reasons for entering into the Letter Agreement with these regulations in mind, it appears from the Letter Agreement itself, signed by him, that the agreement was entered into in terms of the Intergovernmental Relations Framework Act 13 of 2005, and that the object of the agreement was to provide for collaboration between two government entities by working together and to integrate their services. The intention, too, was to improve grant enrolment and payment services on a cost effective basis.

SMITH v VAN DEN HEEVER N.O.

Contract

A JUDGMENT BY HARMS DP (NUGENT JA AND BOSIELO JA concurring)
SUPREME COURT OF APPEAL
4 MARCH 2011

2011 SACLR 115 (A)

A defendant can successfully raise the exceptio non adimpleti contractus against a plaintiff's claim, in circumstances where the plaintiff has a competent claim against the defendant but one which only becomes enforceable at a date subsequent to the date on which the defendant's counterclaim arose.

THE FACTS

Agrichicks (Pty) Ltd and Smith concluded an agreement in terms of which Agrichicks was to supply Smith with day-old chickens and feedstuff, and Smith was to rear them. After 45 days, Agrichicks was to retake possession of the chickens and sell them as processed broilers. Delivery of the day-old chickens was to take place at an average period of every 56 days.

Accounting entries of the delivery of the day-old chickens and subsequent re-delivery to Agrichicks was effected by debiting Smith's account with the company whenever the day-old chickens were supplied to him, and crediting his account whenever the reared chickens were collected. Smith was to be paid, 30 days after these transactions were recorded, the difference between the credit and the debit. If the debit exceeded the credit, the difference was to be carried forward to the next cycle, and would become payable after the completion of two cycles.

On 15 May 2002, day-old chickens were supplied to Smith. On 26 June 2002, Agrichicks re-took delivery of them. The accounting records showed that for this cycle, Smith suffered a loss in the sum of R87 154.49.

The next cycle began on 12 July 2002, with the delivery of further day-old chickens to Smith, and a debit entry of R322 088.95 against Smith's account. During the rearing period, Agrichicks informed Smith that it was not able to supply him with the feedstuff and it abandoned the chickens. Smith fed the chickens by his own resources, and at the end of the 45-day period, he disposed of the chickens to third parties.

During the period of this cycle, Agrichicks was placed in liquidation. The liquidators claimed from Smith the balance of the accounting entries recorded according to the agreement between the parties. Smith defended the action on the grounds that as a result of the company's failure to perform under the contract, he was himself excused from performing. He also claimed that as a result of the company's breach of contract, he had suffered damages.

THE DECISION

In asserting its claim against Smith, Agrichicks alleged that it had complied with all its obligations toward Smith. This was so as far as the May 2002 cycle was concerned, but not as far as the July 2002 cycle was concerned, because in the second cycle the company had defaulted and gone into liquidation. In terms of the parties' agreement, the sum of R87 154.49 would not become payable until after the completion of the second cycle. At that stage, any claim for payment by Agrichicks could be met with the defence that the company had not complied with all its obligations toward Smith. Smith's defence was a good one, and a sufficient answer to the claim brought by Agrichicks against him.

In view of the fact that Smith used the feed supplied for the May 2002 cycle, Agrichicks might have been entitled to claim from him a lesser amount than that allowed in terms of their agreement. However, it had not done so, and there was therefore no basis upon which Smith could be ordered to pay such a lesser amount.

As far as the counterclaim was concerned, while Smith might have been entitled to damages as a result of Agrichicks' breach of contract, he had made a profit on

the sale of the abandoned chickens. This exceeded any projected loss he might have been able to recover from the company, and taking into account the amount he owed to the company, and the benefits received from it, the result did not prove that Smith had suffered any damages.

Agrichicks' claim was dismissed as was Smith's counterclaim.

Mr Smith used the feed and this, too, appears to have influenced the full court. Obviously, as was said in Motor Racing Enterprises *in connection with the fourth point mentioned above, a plaintiff who fails to prove full and proper performance is not necessarily remediless. If a proper case is made out for such relief, he may be entitled to claim a lesser amount than that provided for in the agreement. However, unless the lesser amount is claimed, it is not for the court to speculate what the amount should be. In claiming a lesser amount, it is necessary for the plaintiff to allege and prove:*

(a) that the employer has utilised his or her work to the employer's own advantage even though it fell short of the required contractual standards;

(b) the cost of remedying defects and supplementing shortfalls;

(c) that it would be equitable to award the contractor some remuneration even though he or she breached the agreement;

(d) that the circumstances as a whole are such that the court ought to exercise its discretion in awarding the contractor a reduced contract price.

The liquidators did not seek to avail themselves of this alternative and it need not be considered. In any event, it is questionable that they would have succeeded in the light of the facts of the case.

[19] It follows that the plaintiffs' submission that it is immaterial that the company did not comply with its contract after 9 August because Mr Smith's indebtedness was for payment in respect of chickens and goods actually supplied before that date is fatally flawed. This means that the plaintiffs' claim in convention should have been dismissed at the outset and that both courts below have erred in granting judgment against Mr Smith.

ABSA BANK LTD v KERNSIG 17 (PTY) LTD

A JUDGMENT BY SERITI JA (CLOETE JA, CACHALIA JA, SHONGWE JA and MAJIEDT JA concurring)
SUPREME COURT OF APPEAL
31 MAY 2011

2011 (4) SA 492 (A)

Companies

To prove that there has been a contravention of section 38 of the Companies Act (no 61 of 1973) sufficient facts must be placed before a court to show that a company has given financial assistance for the purchase of its own shares.

THE FACTS

Absa Bank Ltd held six covering mortgage bonds registered over the property of Kernsig 17 (Pty) Ltd. They secured a total amount of R1.11m. The mortgage bonds were taken as security for loans given to Karoovlakte Boerdery, a partnership formed by the shareholders of Kernsig.

In September 2005, the partners negotiated a sale of the shares in Kernsig to Mr and Mrs Barnard. They assumed liability for the partnership's indebtedness to Absa which was to be settled by Kernsig upon Kernsig receiving a loan from Absa. After conclusion of the sale, the Barnards obtained a loan of R1.1m for Kernsig from Absa. The covering bonds already registered in favour of the bank stood as security for this loan. The proceeds of the loan were used to pay off the loan and overdraft facility of the partnership.

The Barnards repudiated the share sale agreement and vacated Kernsig's property. Kernsig then sold the property to another buyer. It demanded that Absa cancel the mortgage bonds registered over the property. Absa refused to do so unless it was repaid what it had lent.

Kernsig contended that the loan was made to the Barnards and the mortgage security constituted financial assistance for their purchase of the shares in Kernsig, a contravention of section 38 of the Companies Act (no 61 of 1973).

THE DECISION

Section 38 provides that no company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.

This section is stated in wide terms, but for it to be shown that there has been a contravention of the section, sufficient facts must be placed before a court to establish this. The facts shown by Kernsig were not sufficient to show that there has been a contravention of the section and it could not be held that there had been.

Absa could not be compelled to cancel the mortgage bonds.

KOOTBODIEN v MITCHELL'S PLAIN ELECTRICAL PLUMBING AND BUILDING CC

A JUDGMENT BY ZONDI J
WESTERN CAPE HIGH COURT
16 SEPTEMBER 2011

2011 (4) SA 624 (WCC)

Property

If a seller of property unlawfully repudiates the sale agreement and sells the property to a third party in circumstances that would allow the purchaser an order of specific performance, such an order may be substituted by an order for damages if it appears that injustice will be caused to the third party by an order of specific performance.

THE FACTS

Kootbodien purchased fixed property from Mitchell's Plain Electrical Plumbing and Building CC for R1.8m. The sale was subject to a suspensive condition that Kootbodien obtain written confirmation of a loan secured by a mortgage bond from a financial institution within thirty days. Kootbodien was obliged to pay a deposit of R180 000.

Within the thirty day period, Kootbodien obtained approval of a loan of R1 440 000. He tendered payment of the deposit and a conveyancer was instructed to attend to registration of transfer of the property. Mitchell's Plain alleged that notification was not given to it within the thirty day time period, and it took the view that the sale had failed due to the failure of the suspensive condition.

Kootbodien brought an application for specific performance of the sale. While the application was pending, Mitchell's Plain sold the property to a third party and then transferred it to him. It passed a mortgage bond over the property in favour of a bank, and effected improvements to the property. Kootbodien joined the third party in its application.

THE DECISION

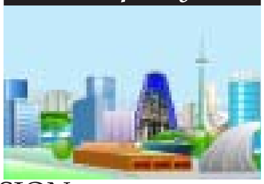
The suspensive condition was incorporated in the sale agreement for the benefit of the purchaser, Kootbodien. He was therefore entitled to waive the benefit before the fulfilment of the condition, and in the circumstances he had done so. He had done so in that when the loan was approved, he had informed Mitchell's Plain of this and had tendered payment of the deposit. This indicated that although Kootbodien knew that the loan had not been approved in full, he still wished to proceed with performance of the sale.

On these grounds, Kootbodien would have been entitled to an order of specific performance. However, the fact that the property had been sold to a third party introduced a complicating factor. Kootbodien contended that this could be dealt with under the rule that if a second sale occurs pendente lite the rights of the first purchaser must prevail against the second purchaser, irrespective of whether the second purchaser acted in good or bad faith.

The sale and transfer to the third party took place after Kootbodien began his application against Mitchell's Plain. It was therefore subject to this rule. In the application thereof, it was irrelevant whether or not the second purchaser was bona fide when he took transfer. However, these were circumstances in which the court should exercise a discretion not to order specific performance against the seller but to award damages. This was so because the third party purchaser had incurred considerable expenses in having the bond registered over the property, transferring the property in its name and improving the property.

BUILDER'S DEPOT CC v TESTA

Property



A JUDGMENT BY VAN EEDEN AJ (NICHOLLS J concurring)
SOUTH GAUTENG HIGH COURT
13 MAY 2011

2011 (4) SA 486 (GSJ)

It is not possible to obtain restoration of possession of property on the basis of a spoliation application if the property was taken by the possessor lawfully and in good faith.

THE FACTS

Builder's Depot CC asserted a builder's lien against the property of a certain Mr Wu, and then brought an action against him and attached the property. Absa Bank Ltd, a bondholder over the property, also brought an action against Wu and also attached the property.

A sale in execution of the bank's judgment then took place and Testa purchased the property At that sale and, in terms of the conditions of sale, the sheriff gave possession of the property to Testa. Builder's Depot alleged that it had been unaware of the sale in execution and brought a spoliation application against Testa after it discovered that he had taken possession of the property.

Builder's Depot brought an application for an order that Testa restore possession of the property to it.

THE DECISION

When the sheriff sold the property in execution to Testa, Builder's Depot lost possession of the property. The sale could not be impeached, the sheriff was bona fide in his actions and no party took the law into its own hands. The property passed into the hands of a bona fide possessor. Builder's Depot could therefore not successfully obtain restoration of possession from Testa.

Even if the sheriff had not been bona fide when transferring possession of the property to Testa, this would not have meant that Testa was also not bona fide. The evidence showed that Testa took possession of the property as an innocent third party, and this would remain the case even if it had taken possession from one who was not bona fide.

The application was dismissed.

OILWELL (PTY) LTD v PROTEC INTERNATIONAL LTD

A JUDGMENT BY HARMS DP (LEWIS JA, PONNAN JA, MALAN JA and THERON JA concurring)
SUPREME COURT OF APPEAL
18 MARCH 2011

2011 (4) SA 394 (A)

Trade Mark

A trade mark should not be considered 'capital' as understood in regulation 10(1)(c) of the Exchange Control Regulations.

THE FACTS

In 1998, the trademark in the word 'Protec' was assigned from Oilwell (Pty) Ltd to Protec International Ltd. In 2007, the trademark was assigned to Protec Auto Care Ltd, a company incorporated in the United Kingdom. This assignment took place without the prior approval of the South African Reserve Bank.

Oilwell took the view that the second assignment was contrary to regulation 10(1)(c) of the Exchange Control Regulations, which provides that no person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose . . . enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic. It brought an application to rectify the register of trade marks to reflect itself as the trade mark holder, basing its application on the contention that the regulation was not adhered to.

THE DECISION

The question was whether or not the 'capital' referred to in the regulation encompassed a trade mark. In the context of the regulation, capital is used in a financial sense. In that sense, it is best understood to be 'cash for investment, money that can be used to produce further wealth'. It cannot mean anything with a monetary value.

Trade mark rights are territorially based, and they are like immovable property in that they cannot be exported. They do not necessarily result in royalties for the trade mark holder. It is therefore incorrect to categorise a trade mark as capital under this regulation.

In any event, a transaction that falls foul of the regulation is not necessarily void. It is always possible to obtain Treasury consent to the transaction, even after the transaction has been concluded. In such an event, the transaction would be enforceable by either party.

The application was dismissed.

COLLETT v FIRSTRAND BANK LTD

A JUDGMENT BY MALAN JA (MPATI P, BRAND JA, MAYA JA AND TSHIQI JA concurring)
SUPREME COURT OF APPEAL
27 MAY 2011

2011 (4) SA 508 (A)

Credit Transactions

The referral of a debt review to a magistrates' court does not prevent the credit provider from terminating the debt review and proceeding to enforce its claim.

THE FACTS

Collett was indebted to Firstrand Bank Ltd in the sum of R677 254,92. She applied for debt review in terms of section 86 of the National Credit Act (no 34 of 2005). Firstrand was provided with a recommendation and this was then referred to the magistrates' court for a hearing in terms of the Act.

Prior to the date of the hearing, Firstrand served a notice terminating the debt review process. It then issued summons against Collett for payment of its claim. In summary judgment proceedings, Collett defended the action on the grounds that the effect of the referral of the debt review to the magistrates' court was to prevent the creditor from proceeding with enforcement of its claim until the magistrates' court had made its determination in terms of section 87 of the Act.

THE DECISION

The question to be decided was whether a credit provider is entitled to terminate a debt review in terms of section 86(10) of the Act after a debt counsellor has referred the matter to the magistrates' court for an order envisaged by section 86(7)(c) and s 87(1)(b), and while the hearing in terms of section 87 is still pending.

Section 86(10) of the Act gives a credit provider the right to terminate a debt review process in the circumstances therein provided. This sub-section must however, be read in the light of section 86(11) under which a magistrates court may order that the debt review resume, if a credit provider has proceeded to enforce the credit agreement.

The purpose of a debt review is not to relieve a debtor of his obligations but to achieve a debt rearrangement either voluntarily or by order of the magistrates' court. Under sections 86 and 87, this is the purpose of the debt review and - unlike other debt review provisions such as those in sections 83 and 84 - this purpose is consistent with a termination of the debt review by the credit provider and the issuing of an order by the magistrates' court in terms thereof.

The mere fact that a debt review has been referred to a magistrates' court therefore does not prevent a credit provider from terminating the debt review process and proceeding with enforcement of its claim.

MINISTER OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE v ZANBUILD CONSTRUCTION (PTY) LTD

JUDGMENT BY BRAND JA
(NUGENT JA, LEWIS JA, MAYA JA AND BOSIELO JA concurring)
SUPREME COURT OF APPEAL
11 MARCH 2011

2011 SACLR 125 (A)

Construction

A construction guarantee may be so worded as to amount to a suretyship agreement. In such a case, the employer may claim from the guarantor no more than it is able to prove it may claim against the contractor.

THE FACTS

Zanbuild Construction (Pty) Ltd undertook to build two pathology laboratories for the Minister of Transport and Public Works, in terms of two separate construction contracts. The Minister required construction guarantees for the due completion of the work, and these were issued in its favour by Absa Bank Ltd.

In terms of the guarantees, Absa guaranteed to provide security for compliance by the contractor, Zanbuild, of its obligations under the contracts, and for the due and faithful performance by the contractor, Zanbuild, of all of its obligations under the construction contracts, subject to a monetary limit of 10% of the contract value in each case. The guarantees provided that any claim under them was to be made in writing accompanied by a signed statement that the contractor had failed to fulfil its obligations under the contract. Absa was entitled to withdraw from the guarantees upon giving the employer thirty days notice of its intention to do so.

On 28 August 2008, Absa notified the Minister that it intended to withdraw from the guarantees, and this would take effect thirty days later. Two days before expiry of that period, alleging that Zanbuild was in default, the Minister gave notice notice demanding payment of the full amount of both guarantees.

Zanbuild sought an interdict preventing the Minister from receiving, and the bank from making, any payment under the guarantees. It contended that the guarantees were in essence suretyship agreements, as such did not stand independently of the construction contracts and consequently required that the Minister demonstrate a monetary claim against Zanbuild under those contracts in order to obtain payment in terms of the guarantees.

THE DECISION

The Minister's claim was not a monetary claim. The question was whether he was nevertheless entitled to exercise its rights under the construction guarantees. The Minister's contention was that these stood independently of the construction contracts themselves, so that in order to enforce them it was unnecessary to demonstrate any claim against Zanbuild.

The proper interpretation of the wording of the construction guarantees indicated that these were essentially suretyship agreements. In their terms they provided security for the compliance of the contractor's obligations in accordance with the contract, and guaranteed the due and faithful performance by the contractor. These were terms normally associated with suretyship agreements.

The Minister argued that the provision that any claim was to be made in writing accompanied by a signed statement that the contractor had failed to fulfil its obligations under the contract indicated that the provision of such a statement would be sufficient in itself to require payment from the bank, and that this indicated the guarantees did stand independently of the construction contracts. However, it was clear that this provision contemplated more than one claim under the guarantee. This was inconsistent with the fact that any breach by the contractor would entitle the employer to claim the full amount guaranteed.

A further indication that the guarantees were essentially suretyship agreements was that they provided for expiry on notice.

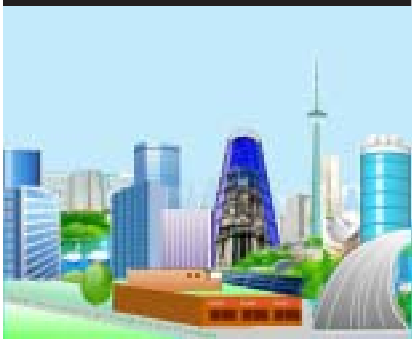
The interdict was confirmed.

BEDFORD SQUARE PROPERTIES (PTY) LTD v LIBERTY GROUP LTD

A JUDGMENT BY HARMS DP (HEHER JA, PONNAN JA, MALAN JA and TSHIQI JA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2011

2011 (5) SA 306 (A)

Property



A servitude embodying a restraint against a particular use of property cannot be declared invalid as being contrary to public policy if it was not invalid on those grounds when created, and no circumstances have changed in relation to the property and its use as affected by the servitude.

THE FACTS

Bedford Square Properties (Pty) Ltd entered into an agreement with Liberty Group Ltd 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 to last for a period of ten years. It was registered as a servitude in the title deeds of Liberty as dominant property and in the title deeds of Bedford as the servient property.

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 agreement was contrary to public policy and unenforceable. Its case was that the restraint became invalid because its existence and enforcement no longer served to protect any legitimate, commercial, legal or other interest of Liberty as owner of the dominant property.

THE DECISION

The guidelines for determining whether or not an agreement in restraint of trade is valid cannot be simply applied to a restraint created by servitude, because the latter restraint affects a particular property only and not a particular person. In the present case, it affected only the property over which Bedford Square had granted the servitude and no other properties which it might own.

Were Bedford Square to have sold the property in question, there would be no doubt that the new owner would be subject to the restraint. There was no reason to place the existing owner, which had initially accepted that the restraint was valid and consented to the registration of the servitude over its property, in any different position. The only reason put forward by Bedford Square was that circumstances had changed. However, it had not demonstrated that any such circumstances existed. There was therefore no warrant for amending the agreement entered into between the parties or cancelling the servitude.

The application was dismissed.

REAL PEOPLE LTD *v* CITY OF JOHANNESBURG

A JUDGMENT BY HORN J (MAYAT J and BAVA AJ concurring)
SOUTH GAUTENG HIGH COURT
9 SEPTEMBER 2010

2011 (5) SA 8 (GSJ)

A local authority is entitled to recover unpaid water and electricity charges imposed in respect of a property from the owner, even if the owner has not concluded a consumer agreement with it.

THE FACTS

Real People Ltd owned certain property which it leased to Isaac Dithakgiso. Isaac Dithakgiso concluded a consumer agreement with the City of Johannesburg for the provision of water and electricity at the property. The account fell into arrears as a result of which the City claimed R137 148,43. It directed its claim against Real People. It alleged that Real People was jointly and severally liable with the occupiers of its property as consumers as referred to in the electricity bylaws, for compliance with any financial obligation or other requirement imposed upon them under and in terms of the electricity bylaws

Real People defended the City's action on the grounds that it had not entered into a consumer agreement with it. It relied on the provisions of section 4 of the Water Services Bylaws, and section 3 of the Standard Electricity Bylaws. They provide that no person, other than a consumer on service level 1, may consume, abstract or be supplied with water from the water supply system, or utilise a sewerage disposal system or any other sanitation services, unless he or she has applied to the City for such services, and such application has been agreed to. An application for the use of water services approved by the City constitutes an agreement between the City and the applicant. The applicant will be liable for all the prescribed fees in respect of water services rendered to him or her until the agreement has been terminated in accordance with the bylaws, and is the consumer for all purposes during the currency of the agreement.

THE DECISION

The question was whether an owner of a property could be held liable for the services used by the occupier, be it a lessee or any other occupier, without having entered into a consumer agreement with the council.

A consumer agreement is not a prerequisite to the owner's liability for the services rendered to the property. This is evident from the provisions of the Local Government Ordinance and the bylaws. The liability of the owner in these circumstances is to be found in statute, not contract or delict. The mere fact, that Dithakgiso had entered into a separate supply agreement with the respondent, does not change the situation.

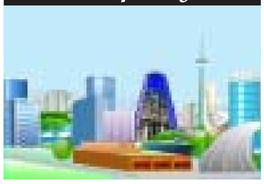
It was held in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) that the consumption of electricity and water by the occupier of property is integral to the use and enjoyment of such property and to its inherent worth. The owner therefore, has a direct interest in the continued supply of electricity and water services to the property, and it need not have concluded a consumer agreement in order to become liable to a local authority for the provision of such services.

The owner's liability for such services also arises from section 49(1) of the Local Government Ordinance which provides that all moneys due for sanitary services, all moneys due as basic charges for water made in terms of section 81(1), all other moneys due for water where any water-closet system on such premises has been installed, and all moneys due as basic charges for electricity made in terms of section 83(1), shall be recoverable from the owner and occupier jointly and severally of the premises in respect of which the services were rendered.

The action succeeded.

STANDARD BANK OF SOUTH AFRICA LTD v SWARTLAND MUNICIPALITY

Property



A JUDGMENT BY LEWIS JA (CACHALIA JA, SHONGWE JA, THERON JA and MAJIEDT JA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2011

2011 (5) SA 257 (A)

A mortgagee is entitled to be joined in an application by a municipality for the removal of structures unlawfully erected on the mortgaged property, but to succeed in dismissing such an application it will have to show good cause why the structures should not be demolished.

THE FACTS

Mr M Brand built structures on his property unlawfully in that, Swartland Municipality, the municipality with jurisdiction, had refused consent to build after building plans had been submitted to it, and in that other structures were built without building plans having been submitted. Some of the structures were built in contravention of the zoning regulations applicable to the land. Before building, Brand had been warned by the municipality not to proceed with the buildings in accordance with the unapproved plans.

Brand obtained a second mortgage bond over the property from the Standard Bank of South Africa Ltd. Within two years, Brand was in default and the bank foreclosed. At the same time, the municipality obtained an order for the demolition of the unlawful structures.

The bank brought an application for an order preventing or staying the demolition of the structures built on Brand's land. It contended that it should have been joined in the municipality's application in which it obtained the demolition order.

THE DECISION

A mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings. However a mortgagee is the holder of a real right in property, which includes buildings on the land, whether built on it lawfully or not. It therefore has more than a financial interest in the outcome of proceedings for the demolition of those buildings. It was therefore necessary that the bank should have been joined in the municipality's application.

The fact that the bank had a right to be joined did not mean that it had the right to the dismissal of the municipality's application. Whether or not it would have succeeded in such a dismissal had it been joined, was speculative.

Since the demolition order had already been given, the only course open to the bank would have been to apply for rescission of the judgment issuing the order. But it had not made such an application. Even if it had, it would have had to show good cause why the order should be rescinded. Given the fact that there was no apparent defence to the claim for demolition of the unlawfully erected structures, no good cause appeared to be demonstrable.

The application was dismissed.

CAPE POINT VINEYARDS (PTY) LTD v PINNACLE POINT GROUP LTD

A JUDGMENT BY ROGERS AJ
WESTERN CAPE HIGH COURT
23 JUNE 2011

2011 (5) SA 600 (WCC)

Companies

An applicant bringing business rescue proceedings under section 131(4)(a) of the Companies Act (no 71 of 2008) is entitled to the costs of the application. Service of such an application on shareholders may include an announcement under the Securities Exchange News Service of the Johannesburg Stock Exchange.

THE FACTS

Cape Point Vineyards (Pty) Ltd brought an application for an order in terms of section 131(4)(a) of the Companies Act (no 71 of 2008) placing Pinnacle Point Group Ltd under supervision and commencing business rescue proceedings.

Service of the application was effected on the Companies and Intellectual Property Commission and Pinnacle, but there was no notification to affected persons as defined in section 128(1)(a) of the Act. The section covers shareholders, creditors, trade unions and employees who are not represented by a trade union. Later, the application was sent by email to all creditors. In relation to shareholders, a SENS (Securities Exchange News Service) announcement was published setting out the nature of the proceedings and the relief sought so that recipients received approximately one week's notice of the proceedings.

Cape Point claimed an order that the costs of the application be borne by Pinnacle. The court raised the question whether or not such an order could be made, and whether or not there had been proper service of the application.

THE DECISION

The 2008 Act contains no express provisions entitling an applicant in business rescue proceedings to recover its costs. However, there is no reason why the legislature would have wanted to deprive the court of its power to make costs orders in these proceedings. The distressed company through its board would be in a position to avoid such costs by timeously passing a resolution in terms of section 129 commencing voluntary business rescue proceedings, in which case an applicant could not seek relief under section 131. If the distressed company fails to take steps under section 129 but an applicant proceeds under section 131, and shows that circumstances are present justifying a business rescue order, the applicant should be entitled to its costs. If the applicant was not granted costs, and if the rescue succeeded and the company were restored to complete financial health, the applicant would be worse off than all other affected persons.

Applying the court's inherent jurisdiction in regard to costs, the court could make a costs order in favour of an applicant bringing proceedings under section 131.

As far as the service requirements were concerned, in the present case there was a pending liquidation application and other circumstances which rendered the application relatively urgent. It was not practically possible for Cape Point to deliver the full application to all shareholders or deliver to each of them personally a notification of the proceedings. Cape Point did publish an announcement via SENS and this announcement gave the date of the hearing, set out the relief to be sought and advised readers that a copy of the application could be obtained from the company or from its attorneys. As the court could have authorised substituted service in advance of the SENS publication, it could equally condone the departure from the strict requirements of the Johannesburg Stock Exchange regulations.

SWART v BEAGLES RUN INVESTMENTS 25 (PTY) LTD

A JUDGMENT BY MAKGOBA J
NORTH GAUTENG HIGH COURT
30 MAY 2011

2011 (5) SA 422 (GNP)

A business rescue application will not be granted if the subject company is hopelessly insolvent and there is no indication that business rescue proceedings will assist the company or its creditors.

THE FACTS

Swart brought an application that Beagles Run Investments 25 (Pty) Ltd be placed under supervision in terms of the provisions of section 131(4)(a) of the Companies Act (no 71 of 2008), and that business rescue proceedings be commenced. Swart was the sole director and shareholder of Beagles whose business consists mainly of a chartering concern, and dealing in exotic wildlife species.

The main assets of the company were aeroplanes and a helicopter. One of the company's creditors, to whom the company owed R11m, had instituted provisional sentence proceedings resulting in an order for the sale of two of the aircraft. The proceeds of the sale were insufficient to cover the debt.

Swart alleged that Beagles was financially distressed, because it lacked the necessary cash flow in order to be able to pay its debts as they fell due, that it was financially distressed as envisaged in section 128(f) of the Companies Act as it was reasonably unlikely that the company would be able to pay all its debts as they become due within the immediately ensuing six months. He alleged that if the company was not placed under supervision, and the execution process of a second creditor was to continue, there was no reasonable prospect that the company could pay its debts as they became due, within the following six months. He submitted that if the company was placed under supervision, and business rescue proceedings commenced, and a business plan implemented in order to rescue the affairs of the company, all the creditors of the company would be fully paid in due course, and the company would be able to proceed with its business.

THE DECISION

The purpose of business rescue is to assist a financially distressed company by means of a business rescue plan, in order to maximise the possibility of the company continuing on a solvent basis, or to achieve a better return for the company's creditors or shareholders, in comparison to a liquidation.

In the present case, none of these objectives had been shown to be achievable. The total assets of the company amounted to R87 843 000 and there were admitted liabilities of R16 148 000, and a shareholder's loan of sum R165 517 000. This indicated that the company was hopelessly insolvent. A business rescue plan was not feasible in the circumstances.

It was also significant that the company had sought to prevent two of its creditors from exercising their lawful rights by giving notice of intention to oppose their winding-up application, but never filing papers therein, by making promises to pay both creditors, but never making payment thereof, and by seeking to prevent the sale of the aircraft by way of auction, by seeking an interdict in this court, notwithstanding the court order and agreement giving rise to such auction, which application was dismissed with costs.

The application was dismissed.

HAITAS v PORT WILD PROPS 12 (PTY) LTD

A JUDGMENT BY TSOKA J
SOUTH GAUTENG HIGH COURT
23 JUNE 2011

2011 (5) SA 562 (GSJ)

A company may be ordered to furnish security for costs of an action it has brought if the interests of justice are served by such an order.

THE FACTS

Port Wild Props 12 (Pty) Ltd brought an action against Haitas and other defendants in 2006. Haitas and the defendants pleaded on the merits and brought a counterclaim of over R1.2m. Despite a date for trial having been applied for in 2008, Port Wild took no further steps to have the matter finalised. For a period of three years, it made no attempt to enrol the matter.

Port Wild was finally liquidated on 21 October 2009. The liquidators took no steps to bring the action to finality.

Haitas and the other defendants contended that the action was instituted mala fide as a ploy not to pay the balance of a purchase price due and payable to them. They applied for an order that Port Wild furnish security for the costs of the action. Port Wild opposed the application on the grounds that the new Companies Act (no 71 of 2008) made no provision for a company to provide security for costs.

THE DECISION

In the light of the facts of the case, the natural question to be asked was whether the interests of justice would be served by requiring Port Wild to file security for costs. The inevitable answer was that the interest of justice would be served in requiring it to furnish security for costs in terms of rule 47.

It would be inimical to the interests of justice to expect Port Wild to proceed with the matter to its finality, well knowing that in the event that the defendants succeed and an adverse costs order is made against it, such costs order would not be satisfied. In these circumstances it would also be unfair, unjust and inequitable that an impecunious and insolvent plaintiff would be allowed to proceed with the trial while not on risk. The approach would encourage incola and insolvent plaintiffs to unnecessarily embark on litigation with a clear knowledge that they have nothing to lose. In these circumstances, it would only be the defendants who would be on risk with regard to costs. The fact that there is no statutory exception in the present Companies Act was no bar to the court's inherent power to regulate its own process.

The interests of justice, in circumstances of the present case, demand of the incola insolvent plaintiff to furnish security for costs in terms of rule 47. The application succeeded.

BIDOLI *v* BIDOLI

A JUDGMENT BY PONNAN JA (HARMS DP, NUGENT JA, MALAN JA and THERON JA concurring)
SUPREME COURT OF APPEAL
27 MAY 2011

2011 (5) SA 247 (A)

Contract

An arbitrator may make an award based on a settlement agreement entered into by the parties to the arbitration.

THE FACTS

Bidoli and his two brothers operated in partnership in the construction industry. Because of certain disputes which arose between them, in 2007 they concluded an agreement to submit to arbitration with a view to having an arbitrator determine all of their disputes.

Before the arbitration reached completion, the parties concluded a settlement agreement. Bidoli's brother contended that he had agreed to the settlement by mistake and informed the arbitrator of this. The arbitrator ruled that he would adopt the settlement agreement as his award.

Bidoli applied for an order that the award be made an order of court. Bidoli's brother opposed the application on the grounds that the award was void because the arbitrator's mandate had been terminated upon conclusion of the settlement agreement.

THE DECISION

There is no authority for the proposition that an arbitrator cannot make an award based on a settlement agreement concluded between the parties to the arbitration. If there has been a dispute between the parties and this is the subject of arbitration proceedings, an arbitrator may make an award when the parties settle their dispute. The fact that this is not specifically provided for in the Arbitration Act does not mean that it cannot be done.

The arbitrator here derived his powers from his acceptance of a reference from the parties to the arbitration agreement. He thereby undertook to hear their dispute and to make an award. Only when a final award was made did his authority as an arbitrator come to an end and with it his powers and duties in the reference. The award was therefore validly made.

The application was granted.

MAPHANGO v AENGUS LIFESTYLE PROPERTIES (PTY) LTD

A JUDGMENT BY BRAND JA (LEWIS JA, CACHALIA JA, SHONGWE JA and PLASKET AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2011

2011 (5) SA 19 (A)

No tacit term prohibiting the exercise of the right to terminate a lease for the sole purpose of effecting a rental increase which exceeds the increase provided for can be read into such a lease if the lease makes express provision for rental increases. A court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.

THE FACTS

Aengus Lifestyle Properties (Pty) Ltd was the lessor under leases concluded with Maphango and the other appellants. In terms of the leases, the lessor was entitled to terminate occupancy of the leased premises after expiry of a fixed term.

The fixed term had expired when Aengus gave notice of termination. The notice informed Maphango that if he wished to remain in their flats beyond the termination date, he would have to enter into a new lease agreement at a rental between 100% and 150% more than what he was paying at that time.

Maphango refused to accept the termination of the lease agreement. He contended that a tacit term was to be read into the lease which forbade the use of the termination clause to effect an increase in rental beyond the increment provided for in the lease. He also contended that allowing Aengus to implement a rent increase would be contrary to public policy because (a) the termination would be unreasonable and unfair; (b) it would constitute an infringement of his constitutional right to have access to adequate housing in terms of section 26(1) of the Constitution; and (c) that it constituted an 'unfair practice' as contemplated in the Rental Housing Act (no 50 of 1999).

THE DECISION

Maphango contended that a tacit term prohibiting the exercise of the right to terminate for the sole purpose of effecting a rental increase which exceeds the increment agreed upon, is necessary to ensure the efficacy of the agreements. Without this term the lessor could demand an increase in excess of that agreed upon by simply threatening to terminate the contract. Moreover, without the proposed tacit term, there would be no consensus on an essential term of the lease, ie a definite or ascertainable rental.

This argument was unsustainable. It did not pertain to the position while the lease agreement was in place. During the currency of the lease, the lessee was not at the lessor's mercy insofar as rental increases were concerned. Furthermore, both parties were bound by the terms controlling rental increases. However, once the agreements were validly terminated, the lessor was no longer bound by the express or implied provisions of the lease.

Whether or not a lease agreement was validly terminated depended on the termination provisions. Provided these were adhered to, during the currency of the lease, business efficacy did not require an incorporation of the proposed tacit term. After termination of the lease, the proposed tacit term would be irrelevant.

Maphango also argued that as it had been decided by the Constitutional Court in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) that, as a matter of public policy, our courts will not give effect to the implementation of a contractual provision that is unreasonable and unfair, the termination of the lease was unreasonable and unfair. However, this argument was fundamentally flawed because *Barkhuizen* held that good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. Reasonableness and fairness were not freestanding requirements for the exercise of a contractual right. A court cannot refuse to give effect to the implementation of a contract simply because that implementation is regarded by the individual judge to be unreasonable and unfair.

PRESIDENCY PROPERTY INVESTMENTS (PTY) LTD v PATEL

Contract

JUDGMENT BY HEHER JA
(MPATI P, NAVSA JA, HEHER JA, BOSIELO JA and MAJIEDT JA concurring)
SUPREME COURT OF APPEAL
25 MAY 2011

2011 (5) SA 432 (A)

A claim for reduction of the purchase price may rest on the allegation of fraudulent misrepresentation, but such allegations must amount to actionable misrepresentation and not merely statements made in the course of a sales pitch relating to the future quality of the thing sold.

THE FACTS

Patel concluded an agreement with Presidency Property Investments (Pty) Ltd to buy an apartment in a sectional title development known as 'Meridian' for R2.95m. At the time of the sale, the Meridian was in the process of construction.

Prior to the conclusion of the sale, the estate agent mandated by Presidency to secure sales for apartments in Meridian, assured Patel that the apartment would have an unobstructed view of the sea in the northeast, north and northwest directions. They also assured him that properties in front of Meridian were subject to a height restriction which would ensure this.

Patel alleged that the assurance made by the estate agent was a misrepresentation and it was known by Presidency and by Faircape Property Developers CC, an associated corporation, to be false, in that they intended to construct, on a site adjacent to the Meridian, and to the northeast of it, another five-storey sectional-title development known as Avenue de Calais, which would cause the obstruction of the views from the apartment.

Patel also alleged that at the time of the sale, the building plans in respect of Avenue de Calais had been submitted to the municipality for approval, the construction of Avenue de Calais would commence shortly after approval of the plans, and the construction work on that development would cause nuisance and inconvenience to owners and residents of the Meridian apartments to such an extent that beneficial occupation of those apartments could not take place for a period of approximately six months.

Patel brought an action for damages arising from fraudulent misrepresentation. He claimed a reduction in the purchase price in the sum of R1m, and damages of R100 000 arising from the inability to derive rental income from the property for the six months when beneficial occupation could not take place.

THE DECISION

The evidence showed that the representations were made in the course of a sales pitch by the estate agents and not in answer to direct questions by the respondent. The subject-matter related to the future quality of an apartment in a building still to be constructed, a quality which depended not on the design or location of the building but on the development of other properties in the vicinity of the building over which neither the agents nor the seller exercised control. The estate agents expressed themselves in terms which conveyed no more than their opinion of the future state of the view. None of this made the estate agents party to an actionable misrepresentation, nor Presidency which they represented.

All the matters stated by the estate agents were as apparent to Patel as they were to them. Although the agents made an express representation concerning the height restriction over the property fronting the development, Patel was not misled by this into believing that it extended to the property on which Avenue de Calais was eventually erected, since he knew that Presidency could have no control over the height to which other property owners could construct buildings on their properties. His concern was the agents' alleged non-disclosure of the intended development of Avenue de Calais. However, in relation to the claim for reduction

of the purchase price, the case pleaded against Presidency was not that it withheld disclosure of this intended development but that it had made representations regarding the extent of the view.

The action was dismissed.

So Dr Patel did not regard either the agents' statement or the visual representation of the CD-ROM as grounds for complaint — they were what he expected in the circumstances. What irked him was the failure of the seller to inform him before transfer that at the time the contract was concluded the same developers were intending to erect a building that would obstruct the view from his Meridian apartment.

Taking all the considerations I have referred to in the preceding paragraph into account I am left in no doubt that the agents were not party to an actionable misrepresentation, as indeed the learned judge a quo initially concluded. No more, of course, could the first appellant be held to a 'representation' by its agents which was not actionable.

The case pleaded against Presidency in relation to the view was never that it had fraudulently withheld disclosure that it intended to erect, or contemplated the erection of, a building on the Calais Road site which it foresaw might obstruct the view from the Meridian, and that it was under a duty to disclose that fact to the respondent as a purchaser or prospective purchaser of an apartment in the Meridian. The only relevance of the non-disclosure of its awareness of the development of Avenue de Calais was in the context of the claim for damages arising out of the alleged interference with or deprivation of beneficial occupation.

DALES *v* RHEEDER

Contract

A JUDGMENT BY WALLIS J
KWAZULU NATAL HIGH COURT
1 APRIL 2011

2011 SACLR 159 (KZN)

A sale agreement which leaves determination of the property sold and the price to be paid thereof to some method not contained in the sale agreement may comply with the Alienation of Land Act (no 68 of 1981).

THE FACTS

On 6 May 2002, Dales addressed a letter to Rheeder in which Dales promised to advance a loan to Rheeder in the event of Rheeder successfully purchasing certain property situated between their two homes. The letter confirmed that if that purchase took place, Rheeder would sell to Dales a strip of the land approximately 20m wide running parallel to Dales' property, for approximately one quarter of the price paid by Rheeders for the entire property. Rheeder signed his acceptance of the terms recorded in the letter.

In an action to enforce the provisions of the letter, Dales alleged that Rheeder had purchased the land in question and that Rheeder was obliged to transfer to him the property referred to.

Rheeder excepted to the action on the grounds that the letter failed to comply with the Alienation of Land Act (no 68 of 1981) in that it did not define the property sold and did not adequately specify the price to be paid for the property. A further ground of exception was that Mrs Rheeder, a joint registered owner of the property purchased, was not a party to the agreement constituted in the letter.

THE DECISION

In order to comply with the Act, the material terms of the sale agreement had to be reduced to writing. This meant that the identity of the parties, the purchase price and the identity of the property sold had to be ascertainable without reference to extrinsic evidence. This does not however, prevent the determination of any of these details by a method not contained in the sale agreement, where the agreement shows an intention that this would be the method of determination.

The letter of 6 May 2002 referred to the property to be sold as a strip of land approximately 20m wide running parrallel to Dales' property. It was clear that this strip of land would be adjacent to his property. From this, it was possible to identify the property sold by reference to the survey diagramme of the property which showed the relevant boundary in a length of some 211m. The width specified being 20m, there was sufficient detail for the property to be identified.

As far as the ascertainment of the price was concerned, the letter refers to one quarter of the price paid for the third party's property situated between the two homes. It was possible to construe this term as specifying that the price was to be determined by the ratio of the size of the property sold to the size of the third party's property. This was a possible construction which would ensure compliance with the Act, and based on it, the particulars of claim did disclose the cause of action brought by Dales.

As far as the position of Mrs Rheeder was concerned, it was possible that the doctrine of notice would apply to her since it was alleged that she knew of the agreement contained in the letter of 6 May 2002. Since this agreement preceded the purchase of the third party's property, if it was found to be enforceable against Mr Rheeder, it would be enforceable against her as well.

The exception was dismissed.

EDS SOUTH AFRICA (PTY) LTD v NATIONWIDE AIRLINES (PTY) LTD

A JUDGMENT BY MALAN JA (HARMS DP AND CLOETE JA concurring)
SUPREME COURT OF APPEAL
14 MARCH 2011

2011 SACLR 184 (A)

In order to show that a stakeholder agreement has been concluded, it is necessary to show that the stakeholder has accepted the terms of that agreement.

THE FACTS

EDS South Africa (Pty) Ltd rendered information technology services to Nationwide Airlines (Pty) Ltd. A dispute arose between them regarding the extent of Nationwide's indebtedness to EDS arising from the rendition of these services, and in February 2008 its attorneys addressed a demand for payment to Nationwide.

Nationwide's attorneys responded by informing EDS that the total of certain disputed amounts would be paid by Nationwide into an interest bearing account under their control, and would remain there until directed to pay any of it in terms of a dispute resolution proceeding to be instituted by EDS within two months. EDS's attorneys did not accept this proposal but the attorneys for each party then negotiated an agreement in terms of which the dispute would be referred to arbitration, and the money then held in trust by Nationwide's attorneys would be transferred to a third party on similar terms to that on which it had been held by Nationwide's attorneys. The agreement was signed by EDS and Nationwide.

On 29 April 2008, Nationwide was provisionally wound up. At that stage, the money held in trust by its attorneys had not yet been transferred to a third party. Nationwide's attorneys confirmed that they still held the funds in trust as stated in their letter of February 2008. EDS claimed that when it had timeously instituted dispute resolution proceedings, Nationwide lost control of the funds. This, together with Nationwide's attorneys' confirmation, amounted to a tacit understanding that if no third party was appointed to hold the funds, the funds held by Nationwide's attorneys would be held on the terms provided for in the arbitration agreement. Accordingly, at the time of liquidation the money fell outside the assets of Nationwide.

EDS claimed payment of the money. The provisional liquidators resisted the claim.

THE DECISION

The argument put forward by EDS attempted to establish that a stakeholder agreement had been concluded which made Nationwide's attorneys the stakeholder of funds pending the resolution of the dispute. Such an agreement would require the assent of the stakeholder, Nationwide's attorneys. However, the proposal made by Nationwide's attorneys in their letter of February 2008 was never accepted.

The letter of February 2008 in fact amounted to an offer. The arbitration agreement did not amount to an acceptance of that offer because it provided for the paying over of the funds to a third party. There were no other indications that a tacit agreement that Nationwide's attorneys would be stakeholders had been concluded. As a result of the fact that the arbitration agreement had not been complied with in respect of the funds held in trust, the funds remained with Nationwide and formed part of its assets on liquidation.

The claim was dismissed.

EX PARTE THE MASTER OF THE HIGH COURT SOUTH AFRICA (NORTH GAUTENG)

A JUDGMENT BY
BERTELSMANN J
NORTH GAUTENG HIGH COURT
28 MARCH 2011

2011 (5) SA 311 (GNP)

Insolvency

The Master of the High Court is the only person entitled to appoint provisional trustees, liquidators and judicial managers and, taking into account creditors' directives, trustees, liquidators and judicial managers.

THE FACTS

A practice developed of applicants for the sequestration of individuals or the liquidation of companies or for judicial management of a company, including a request for an order for the appointment of a specific individual as trustee or provisional trustee, as liquidator or as provisional liquidator or judicial manager or provisional judicial manager. The request would often result in the court acceding thereto and granting the order.

The Master of the High Court objected to this practice on the grounds that he alone had the power to appoint a person as trustee, liquidator or judicial manager. He brought an application for a declaratory order that he alone was authorised to appoint such persons in those capacities.

THE DECISION

The Master is in control of the entire process of administration and liquidation of insolvent estates. An important part of this consists in the oversight exercised over the trustees in the performance of their functions as authorised by the Insolvency Act (no 24 of 1936). Every stage of the administration of insolvent estates and companies and close corporations under winding-up is controlled by the Master's office. This ranges from the launching of the sequestration or liquidation application to the rehabilitation of the insolvent or the deregistration of the corporate entity.

The attempt to ensure the appointment of a particular individual by the court may be motivated by the wish to appoint to the relevant position someone perceived to be positively inclined toward the applicant creditor, and also by the challenges that may be experienced in dealing with the administration of the master's office. However, no such evidence had been presented to the court. Even if it had, such considerations could not influence the outcome of the issue raised by the master. The relevant statutes contain sufficient provisions to enable creditors and other interested parties to hold the master and his office to account.

The master performs administrative functions and is therefore subject to the provisions of the Promotion of Administrative Justice Act (no 3 of 2000). Furthermore, the section 151 of the Insolvency Act provides that any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may be taken on review by any person aggrieved thereby.

Therefore, as a matter of law, the Master is the only functionary entitled to appoint provisional trustees, liquidators and judicial managers and, taking into account creditors' directives, trustees, liquidators and judicial managers.

PETERSON N.O. *v* ABSA BANK LTD

A JUDGMENT BY MAKGOBA J
NORTH GAUTENG HIGH COURT
27 JULY 2011

2011 (5) SA 484 (GNP)

Banking

A duty rests on a bank to apply measures which will counteract the use of a bank account for criminal purposes.

THE FACTS

Ovation Global Investment Services Ltd administered funds entrusted to it on behalf of investors. These funds were paid to Ovation Global Investment Nominees Ltd as trust property for the benefit of investors in terms of section 4 of the Financial Institutions (Protection of Funds) Act (no 28 of 2001). The funds remained the property of the investors in terms of the provisions of section 4(5) of this Act.

Ovation Nominees agreed with a financial-service provider named Common Cents Portfolio Strategists (Pty) Ltd that Ovation Nominees would transfer cash amounts into a banking account designated by Common Cents and/or a certain Mr Cruickshank for investment of such funds in cash portfolios. Through a company which he controlled, Cruickshank held all the shares in Ovation Global Investment Services and Common Cents.

Peterson, the curator of Ovation Global Investment Services and Ovation Nominees, brought an action against Absa Bank Ltd alleging that Cruickshank had fraudulently transferred funds from those companies to accounts at Absa and had misappropriated large sums of money from them. Peterson alleged that Absa had unlawfully breached a duty of care owed to it in that it failed to establish and verify the identity of Ovation Services and of Ovation Nominees, had failed to establish that Ovation Nominees had entered into an irrevocable agreement with Ovation Services in accordance with ss (d) of the definition of 'nominee' in section 1 of the Act, had failed to establish and verify whether Cruickshank had the necessary authority to establish the intended business relationship between it, Ovation Services and Ovation Nominees, had failed to ensure that the application forms for the required accounts were properly filled in and accompanied by the necessary supporting documentation, and had failed to peruse these application forms and supporting documents and compare them to the information contained in the application documentation relating to the accounts.

Absa excepted to the claim on the grounds that no such legal duty rested on it and accordingly the particulars of claim showed no cause of action against it.

THE DECISION

Given the high prevalence of crime in South Africa, in particular money-laundering, the notion of justice demands that a bank should not turn a blind eye to the possibility that a customer may be using an account concluded with it for criminal purposes. In the present case, large sums of money are alleged to have been juggled from one account to the other and ultimately withdrawn in large sums either in cash or cheques. In these extraordinary circumstances, a bank should be vigilant.

When considering the existence of a legal duty on the part of a bank, evidence will ordinarily be necessary to appreciate fully considerations of policy and convenience. The court was unable to make a finding at the exception stage as to whether or not Absa followed procedures to monitor accounts, the purpose of such monitoring and what such monitoring indicates. It was also not possible, without evidence, to determine how great a burden recognition of the legal duties contended for will place upon banks. At the exception stage the

court did not have the evidential or factual material with which to reach any decision on this and the factual material would have to be evaluated in the light of such evidence at the trial.

Upon consideration of the particulars of claim as they stand, the particulars of claim did disclose a cause of action.

This case brings to mind what was foretold by Rumpff CJ some 32 years ago in the well-known case of Administrateur, Natal v Trust Bank van Afrika Bpk1979 (3) SA 824 (A), when he said:

'The birth-pangs of such a right of action have endured so long that the time has arrived, perhaps even with a Caesarean section, that the child should be brought into the world. It should immediately be added that it can be foretold that this child will be a problem child. With the necessary love, and especially discipline, it can however play a useful role in legal life.'

The problem child referred to by the learned Chief Justice is none other than the legal principle involved in an action for a claim for 'pure economic loss based on an omission' or 'liability for an act of omission, causing pure economic loss'.

RENIER NEL INC *v* CASH ON DEMAND (KZN) (PTY) LTD

A JUDGMENT BY WILLIS J (SATCHWELL J AND MONAMA J concurring)
SOUTH GAUTENG HIGH COURT
22 MARCH 2011

2011 SACLR 174 (GSJ)

Credit Transactions

A discounting agreement under which the party advancing money to a seller of fixed property and providing for repayment from the transferring conveyancer is not a credit agreement as defined in the National Credit Act (no 34 of 2005).

THE FACTS

Cash on Demand (KZN) (Pty) Ltd advanced money to the seller of certain fixed properties, and took as security, cession of the seller's rights in the properties. In return for the advance, Cash on Demand was entitled to payment of the amount which would have been payable to the seller on transfer of the properties to the purchaser, as well as a discounting fee.

Cash on Demand held the right to appoint the conveyancer who would effect transfer of the properties to the purchaser. It appointed Renier Nel Inc. Renier Nel effected transfer of the properties but refused to pay any money to Cash on Demand.

Cash on Demand brought an application to enforce payment in accordance with the discounting agreement. Renier Nel defended the application on the grounds that the agreement was a credit agreement as defined in the National Credit Act (no 34 of 2005) and failed to comply with the provisions of the Act in that proper notice to it under section 129 had not been given, and the interest charged was such that the transactions amounted to the giving of reckless credit. Renier Nel also defended the application on the grounds that it had not received sufficient payment from the purchasers to pay any money to Cash on Demand.

THE DECISION

The credit agreement in question was one between Cash on Demand and the seller of the properties and did not involve Renier. However, assuming that the agreement involving Renier was subsidiary to that credit agreement, and as such would be illegal if the credit agreement was illegal, the question was whether or not it was illegal.

Having regard to the substance of the agreement in question, a plain reading of the National Credit Act did not support the conclusion that Cash on Demand was a credit provider as defined in the Act. It discounted commercial paper in the property market. It did not supply goods and services and did not agree to a mortgage or lease with the seller, and looked only to the conveyancer for repayment of the money it had advanced. The discounting agreement was therefore not subject to the National Credit Act.

Even if the agreement was considered to be subject to the Act, the resulting illegality would not warrant a refusal to enforce it because there was nothing contrary to public policy or morals in the agreement.

As far as the defence based on a failure to receive funds from the purchasers was concerned, Renier had not substantiated this defence enough for it to be considered a serious defence.

The application was granted.

SLIP KNOT INVESTMENTS 777 (PTY) LTD v PROJECT LAW PROP (PTY) LTD

A JUDGMENT BY WILLIS J
SOUTH GAUTENG HIGH COURT
1 APRIL 2011

2011 SACLR 135 (GSJ)

An increase in interest rate upon default by a debtor is not in itself a penalty which can be rendered ineffective in terms of the Conventional Penalties Act (no 51 of 1962).

THE FACTS

Slip Knot Investments 777 (Pty) Ltd lent R15m to Project Law Prop (Pty) Ltd. The loan was short term bridging finance known as 'mezzanine funding'. The interest rate on the loan was 1.25% per week and, if Project Law became in arrears with its repayments, 1.5% per week.

On 12 October 2008, Project Law became in arrears with its repayments. On 22 May 2009, Slip Knot cancelled the loan agreement. By that time, the amount owing was R11 337 822.54.

Slip Knot brought an application for an order that Project Law, as well as its sureties, were liable to pay it the sum owing. The court considered whether certain legal impediments to the granting of the order should prevent it from granting the order.

THE DECISION

The National Credit Act (no 34 of 2005) was no obstacle to the granting of the order because Project Law was a juristic person with asset value exceeding R1m. Furthermore, the loan was a large agreement as defined in the Act's regulations. The principal debtor was there not protected by the Act.

Since the agreement was not subject to the Act, the sureties for the principal debtor were also not able to invoke the protections provided for in it.

The second question was whether or not the interest rates were so high as to be usurious and unlawful or contra bonos mores. On the authority of Reuter v Yates 1904 TS 855 and later judgments, it could be said that the interest rates were not usurious nor unlawful or contra bonos mores. The parties were business people, dealing with each other at arms length, and their agreement could not be said to be a result of an unequal balance of power between them.

The third question was whether or not the loan was in contravention of the Conventional Penalties Act (no 51 of 1962). What had to be decided was whether or not the increase in the interest rate constituted a penalty.

It is common for creditors to increase the interest rate payable upon the occurrence of default by a debtor. This is because it is recognised that default increases the risk to the creditor. The increase in interest rate was therefore not a penalty as contemplated in the Act. Even if it was considered to be a penalty, it was not out of proportion to the prejudice suffered by Slip Knot upon default by Project Law.

Since Project Law cancelled the agreement, it was entitled to the increased interest rate up until the date of cancellation, and interest according to the Prescribed Rate of Interest Act (no 7 of 1997) thereafter.

ABSA BANK LTD v VAN EEDEN

A JUDGMENT BY WILLIS J
SOUTH GAUTENG HIGH COURT
22 MARCH 2011

2011 SACLR 145 (GSJ)

The sheriff executing a warrant of execution in respect of property pledged, leased or sold under a suspensive condition to or by a third person must give notice of the attachment to that third person. In the case of a motor vehicle, such notice must be given to the title holder and owner as recorded in the registration certificate of the vehicle.

THE FACTS

Absa Bank Ltd sold a vehicle to Van Eeden under an instalment sale transaction. In terms thereof, Absa retained ownership of the vehicle until Van Eeden had paid all amounts due.

Following default by Van Eeden, Absa issued a notice in terms of the National Credit Act (no 34 of 2005) and then issued summons against her. Before obtaining judgment against Van Eeden, another creditor, a certain Mr RD Buck, obtained judgment against her in the magistrates' court, then delivered a warrant of execution to the sheriff. The sheriff attached the vehicle and then sold the vehicle in execution. The vehicle was sold to Langlaagte Truck and Car Hire CC for R69 500.

Prior to the sale in execution, the sheriff obtained a police clearance certificate in respect of the vehicle, but not a certificate of the title holder or owner of the vehicle. Such a certificate was obtainable from the Vehicle Registration and Licensing Department of the Gauteng Provincial Government.

Absa brought an application for an order that the sale in execution be set aside and the vehicle be delivered to it, against payment to Langlaagte of the sum paid to the sheriff.

THE DECISION

Regulation 53 of the regulations promulgated under the National Traffic Act (no 93 of 1996) provides that no person shall dispose of a vehicle unless the registration certificate accompanies the vehicle concerned. Rule 42(2) of the Magistrates' Court Rules provides that if property to be attached is sold under a suspensive condition by a third party, attachment shall be effected by service of the warrant of execution on the debtor as well as the third party.

The sheriff had not complied with regulation 53 nor with Rule 42(2). The effect of non-compliance with the Rule was that the attachment could not have been properly effected. When the Rule was read together with the National Traffic Act, it was clear that the intention was that a party such as Absa should not be deprived of its interest in the property in question without being properly informed before the sale in execution was to take place.

Section 70 of the Magistrates' Court Act provided no answer to this because the section is directed at protecting a purchaser in good faith. In the present case, the purchaser did not claim the right to retain the vehicle and there was no reliance on it having been in good faith. The sheriff, who did oppose Absa's application, was not entitled to rely on the right to which the purchaser may have been entitled.

It is true that public confidence in the process of execution is fundamentally important. However, this does not always mean that a sale in execution must be upheld in all cases. In the circumstances of the present case, it was clear that public confidence would be better served by an intervention in the sale of execution than by its declining to do so. All interested parties, indeed the general public as a whole, should have confidence in a sale in execution. Furthermore, public confidence in the system of registration of vehicles provided for in the National Traffic Act, as well as the credit financing system which depended on it, would be undermined were the requirement of notice to the owner and title holder to be ignored.

The attachment and sale in execution was set aside.

STAEGEMANN v LANGENHOVEN

A JUDGMENT BY BLIGNAULT J
WESTERN CAPE HIGH COURT
1 JULY 2011

2011 (5) SA 648 (WCC)

Prescription

An owner's right to claim return of the thing which he owns persists for a period of thirty years in terms of the Prescription Act (no 68 of 1969).

THE FACTS

Staegemann delivered his vehicle and its registration papers to du Plessis to enable him to show the vehicle to a prospective purchaser. Du Plessis sold the vehicle to a third party and appropriated the proceeds for himself. In February 2006, the third party sold the vehicle to Langenhoven and it was registered in his name. Langenhoven was unaware that Staegemann was the true owner of the vehicle.

More than three years later, Staegemann brought a vindicatory action against Langenhoven for return of the vehicle. Langenhovern defended the action on the grounds that the claim to recover the vehicle had become prescribed in that a period of more than three years had elapsed from the date on which Staegemann obtained knowledge of his claim until this application was launched.

THE DECISION

The answer to the prescription question was to be found in the basic distinction between a real right and a personal right. A claim based on a real right is one which prescribes after thirty years and a claim based on a person right is one which prescribes after three years. The scheme of the Prescription Act (no 68 of 1969) is consistent with the distinction between real rights and personal rights: real rights are subject to acquisitive prescription and personal rights to extinctive prescription.

A contrary interpretation would give rise to an anomalous situation. If the rei vindicatio were to be extinguished after a period of three years, the owner would thereafter be an owner in name only and would not be able to exercise any of the powers of ownership. Langenhoven as possessor, would not be the owner of the thing but de facto he would be able to exercise all such powers except the institution of the vindicatory action.

Staegemann's vindicatory action therefore did not become prescribed after a period of three years.