Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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A JUDGMENT BY JP COETZEE AJ
SOUTH GAUTENG HIGH COURT
6 FEBRUARY 2012

2012 (5) SA 515 (GSJ)

Companies

A court may not grant an order of business rescue unless it is satisfied that there is a reasonable prospect of rescuing the respondent company or, that there is a prospect that the future rescue plan will achieve the alternative object of section 128(b)(iii) of the Companies Act (no 71 of 2008), ie a better result than immediate liquidation.

THE FACTS

AG Petzetakis International Holdings Ltd was the shareholder of Petzetakis Africa (Pty) Ltd. The latter was in financial trouble and unable to pay its debts. Its assets amounted to some R60m. Its liabilities amounted to some R225m. It ceased trading in 2010, and from the middle of 2011, it ceased paying its employees.

Petzetakis Holdings applied for an order placing Petzetakis Africa under business rescue as contemplated in ch 6 of the Companies Act (no 71 of 2008).

Marley Pipe Systems (Pty) Ltd was a creditor of Petzetakis Africa. Their concurrent claim amounted to some R45m. They were not cited as a respondent in the rescue application and sought to intervene in the rescue application. Marley counter-applied for the liquidation of Petzetakis Africa. The National Union of Mine Workers (NUMSA) also sought to intervene in the rescue application.

NUMSA based its position on section 128(1)(b) of the Act. In terms of the definition in section 128(1)(b) of the Act ‘business rescue’ means proceedings to facilitate the rehabilitation of a company by providing for (i) temporary supervision; (ii) a temporary moratorium; and (iii) the development of a rescue plan aimed at restructuring the company, to enable it (a) to continue its existence on a solvent basis; or (b) if that object cannot be achieved, to result in a better return for creditors or shareholders than would result from immediate liquidation.

NUMSA sought a postponement of the matter on the grounds that further evidence of Petzetakis Holdings might demonstrate a prospect of continued existence of Petzetakis Africa, alternatively a better return for creditors or shareholders than would result from immediate liquidation.

THE DECISION

In terms of section 131(4)(a) the prerequisites for a rescue order are that (1) any one of the requirements of its three sub-sections[*] must be fulfilled, and (2) the court must be satisfied that there is a reasonable prospect of rescuing the company concerned.

A proper application of this section requires that a reasonable prospect of rescuing the company must be present. The requirements for the granting of a section 131 rescue order include that the company under consideration must have a reasonable prospect of recovery. Once a company is under business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation.

In the present case neither of the two objects referred to in s 128(1)(b)(iii) was achievable. The papers certainly did not demonstrate the existence of a reasonable prospect that Petzetakis Africa could successfully be rescued. The founding affidavit painted the picture of a company which was beyond rescue unless it received a large financial injection. There was no indication of a reasonable probability that such a financial injection would be received. The papers also did not demonstrate a reasonable prospect of a rescue plan which would achieve a better return than immediate liquidation.

On the evidence as presented and the known evidence to be presented in the event of a postponement as disclosed, the court could not be satisfied that there was a reasonable prospect of rescuing Petzetakis Africa or, that there was a prospect that the future rescue plan would achieve the alternative object of section 128(b)(iii), ie a better result than immediate liquidation.

[*] (i) the company is financially distressed;
(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
(iii) it is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company

ENGEN PETROLEUM LTD v MULTI WASTE (PTY) LTD

Companies

A JUDGMENT BY
BORUCHOWITZ J
SOUTH GAUTENG HIGH COURT
25 OCTOBER 2011

2012 (5) SA 596 (GSJ)

An application for business rescue should not be brought on the short form notice of motion but on the long form, and should be brought on notice to all affected parties.

THE FACTS

The business of Multi Waste (Pty) Ltd was to purchase fuel to supply to Multi Fleet Logistics (Pty) Ltd to enable it to conduct a cargo- haulage business. The companies were substantially indebted to Engen Petroleum Ltd in respect of fuel purchases, their joint indebtedness amounting to approximately R8m.

To secure its position, Engen obtained a cession of the book debts of both companies and a deed of suretyship, and a written acknowledgment of debt in favour of Engen in which they jointly undertook to discharge their outstanding indebtedness by means of instalments. This undertaking was breached.

Engen encountered difficulties in collecting the outstanding debtors book. The parties met to reach agreement on ways in which Multi Waste and Multi Fleet would overcome their cash-flow problems.

Ten days later, Engen received notice that a resolution envisaged in s 129 of the Companies Act (no 71 of 2008) to voluntarily begin business rescue proceedings had been passed by the board of directors of each of Multi Waste and Multi Fleet. Engen successfully obtained an order setting aside the resolutions on the ground that they had lapsed for want of compliance with certain procedural requirements laid down in the Act.

Various employees and the sole shareholder and director of the companies, in their capacities as affected persons in terms of s 128(1)(a) of the Act applied, on an ex parte basis using the short form notice of motion, to commence business rescue proceedings in terms of s 131(1) of the Act. Engen intervened to oppose the application.

THE DECISION

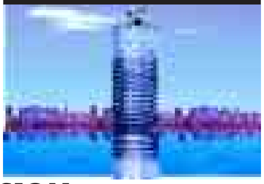
Section 131 of the Act provides that unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. An applicant must (a) serve a copy of the application on the company and the Commission, and (b) notify each affected person of the application in the prescribed manner. Each affected person has a right to participate in the hearing of an application in terms of the section.

It is clear from this section, that notice to interested parties is required. However, an ex parte application, or an application using the short form notice of motion, is used either because it is not necessary to give notice to the respondent, or the relief claimed is not final in nature. Such a procedure is not consistent with the requirements of section 131 which requires notice. An application brought on the short form notice of motion and ex parte, constitutes an irregularity.

An applicant must satisfy the court that all reasonable steps have been taken to notify all affected persons known to the applicant, by delivering a copy of the court application to them. This the applicants in the present case had not done. There had not been compliance, or even substantial compliance, with the notification requirements laid down in the Act and Regulations.

The application was dismissed.

INVESTEC BANK LTD v BRUYNS



A JUDGMENT BY ROGERS AJ
WESTERN CAPE HIGH COURT
14 NOVEMBER 2011

2012 (5) SA 430 (WCC)

The defence to actions for enforcement of debts which companies may raise under business rescue proceedings in terms of section 133(1) of the Companies Act (no 71 of 2008) is not a defence which a surety for such companies can raise against a party seeking to enforce payment of such debts against it.

THE FACTS

Investec Bank Ltd brought an action against Bruyns based on a claim for repayment of money lent to Bruyns and various companies for which Bruyns had stood surety. The companies were Golf Development International Holdings (Pty) Ltd and Winners-Circle 111 (Pty) Ltd and they were both in liquidation. It was assumed that business rescue proceedings in respect of the two companies had commenced as contemplated in s 132(1)(b) of the Companies Act (no 71 of 2008).

In summary judgment proceedings, Bruyns defended the action brought against him as surety on the grounds that (a) section 133(2) prohibits claims against parties who have executed suretyships in favour of a company undergoing business rescue proceedings, (b) a defendant as surety can claim the benefit of the moratorium afforded to the companies by section 133(1), and (c) the amount of the principal debt is rendered uncertain by the fact that it may be compromised in terms of an approved business rescue plan.

The court considered whether this constituted a sufficient defence for the purposes of summary judgment proceedings.

THE DECISION

Section 133(2) provides that during business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

The question whether a defendant as surety can raise as a defence the statutory moratorium in favour of Golf Development International Holdings (Pty) Ltd and Winners-Circle 111 (Pty) Ltd depended on distinction between defences in rem and defences in personam. In the case of the former - as opposed to the case of the latter - the defence would be available to the companies as the principal debtor as well as Bruyns as surety.

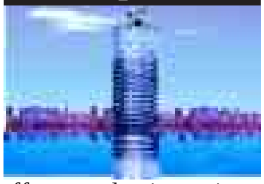
The defence available to the two companies was a defence available only to them. The moratorium provided for in the section was therefore not available to Bruyns as surety.

As far as the potential compromise of the principal debt was concerned, it was pure conjecture as to whether this would happen at all. It was not known whether an order placing the companies under business rescue would be granted. Without such an order, none of the further conditions which could result in the compromising of claims by way of a business rescue plan had any prospect of occurring.

Summary judgment was granted.

GAFFOOR N.O. v VANGATES INVESTMENTS (PTY) LTD

Companies



A JUDGMENT BY VAN HEERDEN,JA (MTHIYANE DP, LEACH JA, TSHIQIJA AND NDITA AJA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2012

2012 SACLR 139 (A)

An invalid transfer of shares from a shareholder does not divest the shareholder of ownership of the shares. A company's register of members may be rectified to reflect the true owner of shares purportedly transferred from that member by invalid transfer.

THE FACTS

Prior to his death, Mr C.E. Gaffoor was a shareholder in Vangates Investments (Pty) Ltd. The company had been established to develop a shopping mall using land owned by the municipality of Cape Town. By the time of his death in October 2002, the development project had stalled, and was no longer continuing.

In 2004, the other shareholders of Vangates took steps to revive the development project. They requested the executors of the deceased estate and the heirs, to effect payment of the investment amounts undertaken by the shareholders. No response was forthcoming from either. An outside investor with expertise in property development, Zenprop, was brought into the development, and financing was obtained from Barclays bank. The executors in the deceased estate resigned their position.

The other shareholders then determined that as a result of the lack of participation of the deceased estate, the shares it held could be transferred to them. In August 2004, the register of members was amended to reflect that transfer and the company secretary signed the share transfer forms on behalf of the deceased estate. The company passed a resolution to take up the deceased's shares at a valuation of R19 434 as determined by the auditors of the company as at date of death.

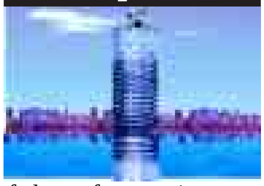
In 2008, Gaffoor and the second appellant were appointed executors in the deceased estate. They contended that the shares were invalidly transferred from the deceased estate and claimed an order that the company's register of shares be rectified by deleting the transfer of shares previously registered in the name of Mr C.E. Gaffoor and reinstating the deceased estate with the shares.

THE DECISION

The shares in the deceased estate were invalidly transferred from it because there was neither any contractual basis for the transfer nor any intention on the part of the executors to relinquish the shares. The resolution to take up the deceased's shares was also not valid because at that time, there were no executors of the deceased estate which meant that no notice of the resolution could have been properly given.

In such circumstances, the argument that prescription had run against the claim for re-transfer of the shares could not prevail. Although the purported transfer of the shares from the deceased estate had taken place in August 2004, and the claim for their reinstatement was made in 2008, the claim being made was not for the shares themselves since the deceased estate had never lost ownership of them. The claim was for rectification of the register of shares so as to properly reflect their ownership by the deceased estate.

The executors claimed the rectification of the register of members in terms of section 115 of the Companies Act (no 61 of 1973). This section confers on the court a broad discretion to order rectification of the register. In determining whether to grant or refuse an application for rectification, the court makes a judgment in the light of all the relevant considerations. In the present case, these considerations included the financial commitments made by both the deceased and the other shareholders, the degree of risk each undertook, the delay in bringing the application for



rectification and the manner in which the shareholders purported to transfer the shares from the deceased estate.

Taking all of these factors into account, justice and equity demanded that the register of members be rectified to reflect the deceased estate as shareholder.

LA LUCIA SANDS SHARE BLOCK LTD v FLEXI HOLIDAY CLUB

JUDGMENT BY BORUCHOWITZ AJA (MPATI P, HEHER JA, MALAN JA AND NDITA AJA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2012

2012 SACLR 163 (A)

An association which is formed for the benefit of its members and not for profit is not an association referred to in section 30 of the Companies Act (no 61 of 1973) even if the association forms part of a group of companies which are engaged in profit-making activities.

THE FACTS

Flexi Holiday Club was a voluntary association which operated a property time-sharing scheme. It had some 60 000 members. It was not operated as a profit-making enterprise but was controlled by its two founding members who also controlled a group of companies involved in the leisure and vacation industry which made considerable profits in that business. Its constitution stated that the objects of the Club were to acquire holiday property for the use and enjoyment of its members.

The Club held shares in La Lucia Sands Share Block Ltd. They entitled it to exclusive use of units in the share block scheme. La Lucia disposed of the Club's shares when it refused to pay certain levies. The Club brought an action against La Lucia claiming return of the shares, alternatively damages.

La Lucia defended the action on the grounds that the Club was formed in contravention of section 30 of the Companies Act (no 61 of 1973) in that it had been formed for the purpose of gain. Section 30 provides that no company, association, syndicate or partnership consisting of more than twenty persons shall be permitted or formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate or partnership, or by the individual members thereof, unless it is registered as a company under the Act.

THE DECISION

The purpose of section 30 is to prevent large trading undertakings from being carried on by large fluctuating bodies, so that persons dealing with them do not know with whom they are contracting. The question was whether this provision applied to the Club on the grounds that the club was formed or was carried on for the purpose of conducting a

business that had for its object the acquisition of gain by either the club or the individual members thereof.

The fact that the Club held a portfolio of properties was no indication that it was formed for this purpose. The fact that the value of the portfolio increased over time was equally no indication of this. The members of the Club might have been able to trade in the points held by them as members of the Club, and even make a profit in their sale, but this did not indicate that the Club itself engaged in such transactions, nor that it could make a profit from them.

The Club was formed for the purposes defined in its constitution. Its business was to acquire holiday accommodation and time-share interests for the benefit of its members and in exchange for such acquisitions to issue members with points. It was purely a vehicle for the holding of holiday accommodation which it made available to its members. It did not trade in the properties it held, and it was not the intention of the Club to sell the properties in order to derive a profit or gain.

Section 30 of the Companies Act therefore did not apply to the Club.

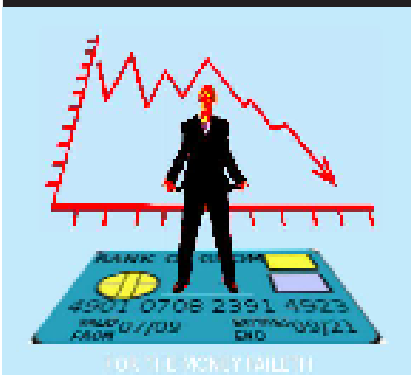
Reduced to its essentials, the business of the club is to acquire holiday accommodation and time-share interests for the benefit of its members and in exchange for such acquisitions to issue members with points. The club is purely a vehicle for the holding of holiday accommodation or stock which it makes available to its members, and it does not trade in the properties held by it. It is clearly not the intention of the club to sell or dispose of the properties in order to derive a profit or gain. Members also do not join the club for the purpose of managing its affairs but rather to secure holiday accommodation and to have access to the club's extensive portfolio of properties. As Mr Olsen put it for the respondents, the members associate in the club for the flexibility that it provides. Nor do members join the club in order to sell their points at a profit or to trade-in points.

BARNARD N.O. v IMPERIAL BANK LTD

A JUDGMENT BY WEINER J
SOUTH GAUTENG HIGH COURT
1 NOVEMBER 2011

2012 (5) SA 542 (GSJ)

Insolvency



The liquidator of a company has locus standi to sue on behalf of the company in liquidation and may bring an action on behalf of the company either by citing himself in his capacity as liquidator or the company in liquidation.

THE FACTS

Barnard and the other applicants were the joint liquidators in the estate of Pro Med Construction CC. They were cited in that capacity as the plaintiffs in an action they brought against Imperial Bank Ltd.

They applied for an amendment of their particulars of claim to substitute their citation as the plaintiffs with a citation of the plaintiff as 'Pro Med Construction CC (in liquidation) (Pro Med) (Master's Reference G27/50/04) duly represented herein by Barnard' and the other joint liquidators.

Imperial Bank opposed the application on the grounds that the liquidators were not entitled to institute the actions in their own names, they were not the creditor as envisaged in terms of s 15(1) of the Prescription Act (no 68 of 1969), service of the summons did not interrupt the running of prescription, Pro Med's claim had become prescribed and the effect of the proposed amendment was to seek substitution of Pro Med as the plaintiff in the action.

The liquidators contended that the objection should not be sustained because the liquidators did not institute the action in their own names but in a representative capacity for and on behalf of Pro Med (in liquidation).

THE DECISION

Legal authority is divided as to the correct manner of citation of the plaintiff in proceedings brought by the company or its liquidator. In *Fey N.O. v Lala Govan Exporters (Pty) Ltd* 2011 (6) SA 181 (W) it was held that any action brought by the liquidator pursuant to his powers under s 386(4)(a) must be brought in the name of the company and not by the liquidator in his representative capacity. However, in KwaZulu-Natal, in *Shepstone & Wylie v Geyser* 1998 (1) SA 354 (N) it was held that the citation of the liquidator in his capacity as such does not represent a defect sufficient to non-suit the plaintiff. And in *Fundstrust (Edms) Bpk (in Likwidasie) v Marais* 1997 (3) SA 470 (C) it was held that that a company could not sue in terms of s 424 and that only the liquidators had locus standi.

Most of the authorities referred to deal with the statutory powers of the liquidator. There was a stronger case, in that instance, for the liquidator to be cited as the plaintiff, as it is clear from the particular sections referred to that the liquidator (as opposed to the company in liquidation) is specifically given such power.

In the present case, the court was dealing with the locus standi of the liquidator in terms of section 386(4)(a). The section empowers the liquidator to bring proceedings. That empowerment vests the liquidator with locus standi. The requirement encompassed in section 386(4)(a) relates to the citation to be used. If this is done incorrectly, this does not detract from the locus standi of the liquidator.

The citation of the plaintiffs, even based upon a strict interpretation of s 386(4)(a), was a mere misdescription. Since the liquidators in their capacity as such had locus standi at the inception of the proceedings, prescription would not apply.

The amendment was granted.

EXCELLENT PETROLEUM (PTY) LTD (IN LIQUIDATION) v BRENT OIL (PTY) LTD

Insolvency

A JUDGMENT BY PRINSLOO J
NORTH GAUTENG HIGH COURT
22 MAY 2012

2012 (5) SA 407 (GNP)

A court may order that payments made by a company after an application for its winding up have been made and up until its provisional liquidation should be validated.

THE FACTS

From September 2005, Excellent Petroleum (Pty) Ltd began doing business with Brent Oil (Pty) Ltd. Excellent ordered diesel fuel and illuminating paraffin from Brent Oil which it then distributed at a profit. Brent Oil required payment before delivery of the fuel.

During the period 3 April 2006 to 8 June 2006 Excellent made payments to Brent Oil in the aggregate sum of R4 091 974,66. Brent Oil supplied the fuel for which payment had been made.

On 3 April 2006, an application for the winding up of Excellent was made to court. On 31 May 2006, the company was placed under provisional liquidation, and later placed under final liquidation, and liquidators were appointed.

The liquidators took the view that the payments made by Excellent after 3 April 2006 were void because of the effect of section 341(2) of the Companies Act (no 61 of 1973). This section provides that every disposition of a company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders.

The liquidators brought an action claiming payment of R4 091 974,66. Brent Oil defended the action on the grounds that in selling and supplying fuel to Excellent, it did so in the normal course of business and in the bona fide belief that Excellent was conducting business in solvent circumstances. To the best of Brent Oil's knowledge and belief, Excellent retailed the fuel in the open market, required the fuel to continue to operate its business for profit, and utilised the proceeds of the sale of the fuel supplied during the period 3 April 2006 to 8 June 2006 to finance further purchases from Brent Oil during this period.

Brent Oil contended that the proviso to section 341(2) should apply and the court should order that the dispositions were not void.

THE DECISION

The undisputed evidence was that Brent Oil had no idea of Excellent's financial difficulties or of the liquidation proceedings having been launched and a provisional order having been granted. On the probabilities, the bona fides of Brent Oil were beyond question.

It could hardly be argued that the moneys now being reclaimed were paid to the defendant to the detriment of other creditors. The money was paid in the normal course of trade in exchange for corresponding quantities of fuel. The company had been trading on this basis for a considerable period of time, having conducted its business of purchasing fuel for the sale to clients at a profit. This normal commercial activity was aimed at keeping Excellent afloat and swelling its cash resources, even if it turned out that by April 2006 Excellent was commercially insolvent.

In these circumstances, the payments made up until 31 May 2006 were made under transactions which should be validated. An order to that effect was made.

HUANG v BESTER N.O.

A JUDGMENT BY SATCHWELL J (MAYAT J and TSHABALALA J concurring)
SOUTH GAUTENG HIGH COURT
30 MAY 2012

2012 (5) SA 551 (GSJ)

The enquiry as contemplated in s 423 of the Act can be delegated to a commissioner in terms of s 418 thereof.

THE FACTS

Derry Properties (Pty) Ltd, was wound up in terms of s 344(h) of the Companies Act (no 61 of 1973). Bester, the executor in the deceased estate of a 50% shareholder in Derry Properties applied for and was granted an order for an enquiry to be held before a commissioner in terms of ss 418 and 423 of the Act for purposes of questioning Huang. Huang had been the financial manager of the company.

The court was asked to determine whether or not the enquiry as contemplated in s 423 of the Act could be delegated to a commissioner in terms of s 418 thereof.

Section 423 provides that where in the course of the winding-up of a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or has been guilty of any breach of faith or trust in relation to the company the court may, on the application of the Master or of the liquidator or of any creditor or member or contributory of the company, enquire into the conduct of the promoter, director or officer concerned and may order him to repay or restore the money or property or any part thereof, with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retention, breach of faith or trust as the court thinks just.

Section 418 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.

THE DECISION

Section 418 is stated in very broad terms. The only limitation upon the type of enquiry to which a commissioner may be appointed is that it must be ‘under this Act’ and ‘in connection with the winding-up of any company’.

Whatever the implications for the admissibility of evidence obtained at an enquiry under these sections, a determination that the enquiry as contemplated in s 423 of the Act can be delegated to a commissioner in terms of s 418 thereof merely requires that a judge, applying his or her mind judicially, may decide to delegate certain powers to a commissioner. Such delegation does not render more persons vulnerable to these more informal procedures, does not create further inroads into the usual adversarial procedures, and does not deprive an individual of rights to representation. Such delegation still requires the court to retain overall control of the process and the report of the commissioner will have to be dealt with by the court in accordance with appropriate procedure and evidential rules.

The enquiry as contemplated in s 423 of the Act can be delegated to a commissioner in terms of s 418 thereof.

EDKINS v REGISTRAR OF DEEDS, JOHANNESBURG

A JUDGMENT BY MOSHIDI J
GAUTENG SOUTH HIGH COURT
9 MARCH 2012

2012 (6) SA 278 (GSJ)

Property

A purchaser of fixed property at a sale in execution is entitled to transfer of the property into his name despite the property owner having given notice of his intention to surrender his estate when the owner waits until the sale is completed before giving such notice.

THE FACTS

Mr T Mthethwa owned certain fixed property. It was bonded to Absa Bank for R1.1m. Mthethewa fell into arrears in repaying the bond, in consequence of which the bank brought foreclosure proceedings against him. In February 2010 the bank obtained default judgment against him, and an order declaring the fixed property to be specially executable. In August 2010, the immovable property was sold in execution to Edkins by the sheriff for R530 000.

Three days later, Mthethwa published in the Government Gazette and the local newspaper, a notice of his intention to surrender his estate in terms of the provisions of s 4(1) of the Insolvency Act (no 24 of 1936). On 3 October 2010 the voluntary surrender of the insolvent estate was accepted by the North Gauteng High Court, Pretoria, and placed under sequestration in the hands of the Master of the High Court.

The trustees of the insolvent estate took the view that notwithstanding the sale in execution, the ownership of the immovable property sold in execution vested in them upon their appointment as trustees by virtue of the provisions of s 20 of the Insolvency Act. They also took the view that Edkin's right to claim transfer of the property prior to sequestration was an unsecured personal right, and that based on the principles pertaining to a concursus creditorum, which came into existence upon sequestration, they would treat Edkin's claim as one of the claims of creditors as if existed prior to sequestration.

Edkins claimed the right to take transfer of the property.

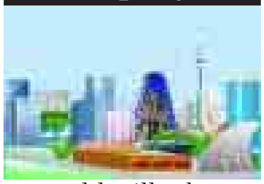
THE DECISION

Section 20(1)(c) of the Insolvency Act provides that the effect of sequestration is that as soon as any sheriff or messenger, whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, to stay that execution, unless the court otherwise directs. In the present case however, there was no evidence that the estate of the insolvent ever vested in the master at the time of the sale in execution before the appointment of the trustees. There was also no evidence that either Edkins or the sheriff was aware of the insolvent's notice to surrender his estate, which occurred after the sale in execution.

There was also no evidence regarding the circumstances under which the decision was made by Mthethwa to apply for the surrender of his insolvent estate. It was therefore to be reasonably accepted that he knew full well about the attachment and the imminent sale in execution but waited until after the completion of the sale in execution before he decided to apply for the surrender of his estate, and prior to the publication of the relevant notices of surrender. In so doing, he was not bona fide. There was also no evidence that Edkins acted in bad faith when he purchased the property.

It followed that section 20(1)(c) did not apply in the present circumstances.

As far as the argument based on the concursus creditorum was concerned, there was no evidence of the claims of creditors other than that of the bank. Given the price at which the property was sold, there would be no surplus available for any other creditors.



In the light of this, the trustees had not made out a case to justify their decision to reject the sale agreement concluded at the sale in execution.

In the present case, the surrender had been made to thwart the sale in execution. Mthethwa concealed the true facts until well after the sale in execution, when he published the notices to surrender his estate. In any event, in terms of s 5(1) of the Insolvency Act provision is made that, in the event that a sale in execution were to take place before publication of the notice of voluntary surrender, the transfer of the property could still take place. The publication of the said notice can therefore effectively stop a sale in execution that has not taken place, but not the transfer of the property after the sale has taken place.

Edkins was therefore entitled to transfer of the property into his name.

The provisions of s 20 of the Insolvency Act (as do the provisions of s 5 of the same Act, which I deal with later herein) in the context of the present matter require that in their construction the plain meaning of their language must be adopted, unless it leads to some absurdity, inconsistency, hardship or anomaly. See Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape2001 (3) SA 582 (SCA) (2001 (6) BCLR 545) para 10. With this in mind, it is clear that the legislature could not have intended to nullify a valid sale in execution which occurs before an insolvent surrenders his estate in terms of the provisions of s 4(1) of the Insolvency Act. There is no evidence that the estate of the insolvent ever vested in the master at the time of the sale in execution before the appointment as trustees of the third respondent and the fourth respondent. There is no evidence that either the applicant or the sheriff was aware of the insolvent's notice to surrender his estate, which occurred after the sale in execution. If the sheriff was aware of the insolvency, he or she would probably have complied with the provisions of s 20(1)(c) which provide, as stated above, that 'as soon as any sheriff or messenger . . . becomes aware of the sequestration of the insolvent estate, to stay that execution, unless the court otherwise directs'.

MINISTER OF MINERALS AND ENERGY v AGRI SOUTH AFRICA

Property

A JUDGMENT BY WALLIS JA (NUGENT JA, HEHER JA, MHLANTLA JA AND LEACH JA concurring)
SUPREME COURT OF APPEAL
31 MAY 2012

2012 SACLR 215 (A)

The effect of the Mineral and Petroleum Resources Development Act (no 28 of 2002) was not to effect an expropriation of the property of mineral rights holders, whether such persons were holders of unused old order rights or holders of rights then being exploited.

THE FACTS

On 1 May 2004, Sebenza Mining (Pty) Ltd held the coal rights pertaining to a farm which it owned. These rights consisted in its common law mineral rights for which no prospecting permit or mining authorisation was issued in terms of the Minerals Act (no 50 of 1991). On that day, the Mineral and Petroleum Resources Development Act (no 28 of 2002) ('the Act') came into force, superseding the Minerals Act.

The effect of the Act was to change the position existing under the Minerals Act by conferring on the Minister custodianship of all mineral resources, and requiring individuals who wish to obtain prospecting and mining rights to apply to her for them. The Act provided for transitional arrangements in regard to rights already existing when it came into force. In respect of 'unused old order rights' - a category under which Sebenza's coal rights had fallen - these were to subsist for a period of one year, but the holder had the exclusive right to apply for a prospecting right or a mining right in terms of this Act, failing which the unused old order right would cease to exist.

Sebenza did not apply for the continuation of its coal rights within the year of the Act's enactment. It ceded its coal rights to Agri South Africa.

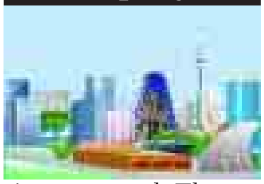
In March 2006, Agri claimed compensation for the loss of these rights from the Department of Minerals and Energy. The Minister rejected the claim. Agri claimed that the effect of the passing of the Act was to deprive Sebenza of its coal rights so as to amount to expropriation entitling it to compensation. It contended that in terms of section 25(2)(b) of the Constitution, it was entitled to compensation as a result of the expropriation.

THE DECISION

Sections 2 and 5 of the Act make it clear that anyone who wishes to prospect for or mine minerals in South Africa may only do so in terms of rights acquired and held under the Act. In order to determine whether their effect on Sebenza was to expropriate its property, it was necessary to determine what an expropriation was in terms of section 25(2) of the Constitution, what rights were enjoyed by holders of mineral rights prior to the coming into force of the Act, and whether or not those rights were expropriated in terms of the provisions of the Act.

Acquisition of property by an expropriating authority is a characteristic of an expropriation in terms of section 25(2). However, in the case of property taking the form of mineral rights, the more important question is what the nature of those rights was prior to the alleged expropriation, since if they are found not to be such that they would have vested in the holder in the same way that common law rights so vest, then it is questionable whether expropriation could have taken place. Historically, mineral rights have been referred to as common law rights, but this terminology is a result of the role of the courts and the changing legislative context in which they have been defined, rather than an accurate characterisation of their true nature.

The applicable common law principle is that the rights of the owner of immovable property extend up to the heavens and down to the centre of the earth - expressed in abbreviated form as



the *cuius est solum* principle. However, there is little indication that mineral rights find their origin here because from inception, their content has been founded upon their separation from the right of ownership in land. Upon a survey of all the legislation governing mineral rights, from pre-Union times to the present day, it appears that the underlying assumption was always that the right to mine was a right which the State asserted for itself and controlled. In consequence, the value of mineral rights has flowed from the holders' entitlement to mine, as allowed under the applicable legislation. Further, changes in legislation governing the right to mine will affect those who have already received authorisations under the current system differently from those who merely have the right to apply for such authorisations, but have not yet done so.

The Act provides for the State to authorise those who apply for the right to mine to exercise the right to mine. Existing mineral rights are relevant only in relation to the transitional provisions of the Act. The effect of the Act was to vest the power to allocate the right to mine in the State. The Act was therefore merely the latest in a long line of legislation and statutory instruments in South Africa affirming the principle that the right to mine is controlled by the State, and allocated to those who wish to exercise it. The right to mine remains under the control of and vested in the State. It followed that the first requirement of an expropriation, namely that there be a deprivation of property, had not been established insofar as the right to mine is concerned. The right never vested in the holders of mineral rights, but was vested in the State and allocated to those holders in accordance with the legislation applicable to it from time to time. It could not therefore be expropriated although rights flowing from the State's allocation of the right to mine could.

The aim of the Act is to afford security of tenure. This was largely achieved by the mechanism of translating existing mineral rights into old order rights and providing for their conversion. Whereas it is possible that instances of expropriation may be proved to have taken place in the implementation of this Act, given the nature of Sebenza's right as it existed at the time the Act was passed, no expropriation of its right took place.

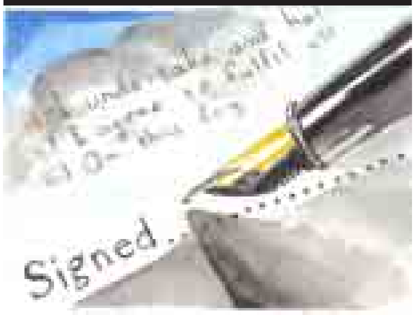
The appeal was upheld.

INDWE AVIATION (PTY) LTD v PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (PTY) LTD (NO 1)

A JUDGMENT BY BLIGNAULT J
WESTERN CAPE HIGH COURT
21 JULY 2010

2012 (6) SA 96 (WCC)

Contract



It is possible to establish that an agreement to agree has been concluded by applying the test of the reasonable man (arbitrium bono viri) to the actions of the parties between whom the alleged agreement to agree has been concluded.

THE FACTS

Petroleum Oil And Gas Corporation of South Africa (Pty) Ltd operated two offshore platforms approximately 100 nautical miles off the coast of George. The platforms were involved in the drilling for and production of gas and crude oil. For a number of years, it regularly transported technical and administrative personnel to and from the platforms by utilising helicopter services provided by CHC Helicopters (South Africa) (Pty) Ltd. CHC also undertook to provide certain auxiliary services such as managing respondent's operational base at George Airport and handling all passengers. The agreement initially endured for a period of two years but the term was extended for two periods of six months each. On 31 May 2008 CHC assigned its rights and obligations under the agreement to Indwe Aviation (Pty) Ltd.

Petroleum Oil And Gas Corporation of South Africa (Pty) Ltd was a wholly owned subsidiary of CEF (Pty) Ltd, a company of which the state was the sole shareholder. Petroleumt owned, operated and managed the state's assets in the petroleum industry.

On 11 March 2009 Indwe put a formal proposal to Petroleum for a two-year contract with an option for another two years. An amended proposal was not accepted by Petroleum. On 22 June 2009 Indwe agreed to a further extension of the agreement to June 2010. The parties continued in negotiations but on 30 June 2010 Petroleum instructed Indwe to cease all operations by midnight that day. It advised that Petroleum would not extend Indwe's contract any further and that the South African Air Force would be tendering the service from 1 July 2010. Indwe then ceased all operations under the contract from 1 July 2010.

Indwe applied for an interim interdict, pending the final determination of relief, that Petroleum be prohibited from implementing any formal or informal agreement for the provision of the aircraft and auxiliary services provided by it to Petroleum as at 30 June 2010, and ordering Petroleum to allow it to continue providing such services on the terms and conditions which pertained at 30 June 2010.

THE DECISION

A standard such as the reasonable man could be applied to the conduct of a contracting party who undertakes an obligation to negotiate a further agreement. Such a party would be obliged to act honestly and reasonably in the conduct of the negotiations and a court would be able to determine whether it complied with such standards. Such a standard could apply in the present case in respect of the agreement which Indwe alleged had to be concluded between the parties. Indwe had established, at least prima facie, that the alleged agreement to negotiate a further agreement was not too vague to be enforceable.

It was not possible on the papers to determine finally whether such an agreement was in fact concluded, as all the relevant evidence had not yet been presented. However, Petroleum had attacked the alleged agreement mainly on the legal basis that it lacked certainty, and not on the ground that the facts alleged by Indwe were incorrect. It could therefore be accepted that Indwe had established on a prima

facie basis that it concluded a preliminary agreement with Petroleum to negotiate a further agreement.

The agreement in question was for the acquisition by a public authority of goods or services by way of a tender or by way of a contract. In this case, public money was being spent by a public body in the public interest. Petroleum was not in this case acting in terms of an existing contract or the common law, and its actions constituted administrative action. As such, Indwe had a legitimate expectation of continuation of the agreement.

The interdict was granted.

A second point of difference between the present case and United Group Rail Services is the absence of an arbitration clause in the preliminary agreement in this case. The presence of such a clause appears to have played a role in the decision in United Group Rail Services.

[30] In my view, however, the absence of an agreed reference of a dispute to an arbitrator is not a vital point of distinction. The arbitrator would in such a case be expected to apply standards of reasonableness and good faith to the conduct of the negotiating parties. It seems to me that the process of the application of such standards by a court would not in principle differ from that to be applied by an arbitrator.

[31] It seems to me therefore that applicant has established, at least prima facie, that the alleged agreement to negotiate a further agreement is not too vague to be enforceable.

TEB PROPERTIES CC v THE MEC FOR DEPARTMENT OF HEALTH & SOCIAL DEVELOPMENT, NORTH-WEST

A JUDGMENT BY PETSE AJA
(LEWIS JA AND BOSIELO JA
concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2011

2012 SACLR 123 (A)

A public officer deviating from the requirement of a process of inviting competitive bids may not depend on Treasury regulations 13.2.4 and 16 A 6.4 when concluding a lease following upon such a deviation if it is not clear that the circumstances of the lease's conclusion warranted such a deviation. Section 217(1) of the Constitution provide no ground for avoiding such a competitive bid process if no rational reasons for the conclusion of the lease can be offered.

THE FACTS

In 2008, the Department of Health and Social Development, North-West, was looking for new office accommodation for its head office personnel as its existing lease was to expire in August of that year. It entered into negotiations with TEB Properties CC with a view to concluding a lease which would provide it with such accommodation. The acting head of the Department, Ms Kgasi, invited the managing member of TEB, Mr Bozwana, to submit a rental proposal to it.

After six months of negotiations, the parties concluded a lease in terms of which the Department hired office accommodation from TEB comprising 21612 square metres for a period of nine years and eleven months at a monthly rental of R3 241 800 exclusive of VAT. The lease was to begin on 1 December 2009. During negotiations, TEB was assured by Kgasi that due to the urgency of concluding a lease, it was not practical to procure the office accommodation required through a system of open tender. Despite approving the lease, the Department of Public Works expressed the view to TEB that 'a lease agreement of this magnitude is normally subjected to an open tender process with a view of maximizing good value for the government and ensuring economic and effective service from the market'.

During the currency of the lease, the new head of the Department terminated the lease on the grounds that it had been concluded irregularly because it failed to comply with applicable statutes, because TEB 'knowingly participated in an irregular acquisition of accommodation and/or office space', and because TEB failed to provide any proof of its participation in a public bidding system for the office space.

TEB brought an application for an order declaring that the termination of the lease wrongful. The Department opposed the application on the grounds that the lease was invalid for failing to comply with peremptory provisions of the Constitution, relevant Acts and Treasury Regulations.

THE DECISION

The applicable statutes were section 217(1) of the Constitution, the Public Finance Management Act (no 1 of 1999) and the Treasury Regulations issued in terms thereof and the North West Tender Board Act (no 3 of 1994).

Regulation 13.2.4 of the Treasury Regulations provides that the accounting officer of an institution may, for the purposes of conducting the institution's business, enter into lease transactions without any limitations provided that such transactions are limited to operating lease transactions. Regulation 16 A 6.4 provides that if in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded by the accounting officer or accounting authority.

TEB contended that these two regulations provided the basis for the deviation from the bidding process since Ms Kgasi had exercised discretionary powers which were fair and in accordance with the law and with the requirements of empowering legislation. In consequence there was a valid conclusion of the lease. However,

in the circumstances of this case, these regulations provided no authority for the deviation from the bidding process required for the lease.

TEB also contended that in the light of section 217(1) of the Constitution, taking into account the facts that Kgasi was, as the acting head of the department, its accounting officer; and in that capacity, had the authority to deviate from the bidding process, TEB was not obliged to enquire as to whether internal procedural requirements pertaining to procurement of goods or services without any reference to a bidding process had been complied with by Kgasi. Section 217(1) provides that when an organ of state in the national, provincial or local sphere of government, or any other institution in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

This argument could not be sustained. If the head of a department, as the accounting officer, deems it prudent to deviate from the requirements of the bidding system he would still be obliged to provide ‘rational reasons for that decision’. As held in *Chief Executive Officer, SA Social Security Agency NO v Cash Paymaster Services (Pty) Ltd* [2011] 3 All SA 23 (SCA) para 15, this is a material requirement.

As far as the provisions of section 4(1) of the North West Tender Board Act were concerned, they made it plain that the exclusive power to, inter alia, arrange the hiring and letting of anything on behalf of the Government vests in the Provincial Tender Board. It followed that, as found in *Eastern Cape Provincial Government* 2001 (4) SA 142 (SCA), this disables a province from acting autonomously in that respect.

TEB also relied on the Turquand Rule and estoppel. However, neither of these could assist it in circumstances where the lease had been concluded in breach of peremptory statutory prescripts.

The appeal failed.

When the head of a department, as the accounting officer, deems it prudent to deviate from the requirements of the bidding system he would nonetheless still be required to provide ‘rational reasons for that decision’ as this is a material requirement. The rationale for this requirement was described as ‘obvious’ in Chief Executive Officer, SA Social Security Agency *NO* .

NELSON MANDELA METROPOLITAN MUNICIPALITY v NGONYAMA OKPANUM HEWITT-COLEMAN

Contract

A JUDGMENT BY MALAN JA (BRAND JA, BOSIELO JA, MAJIEDT JA AND BORUCHOWITZ AJA concurring)
SUPREME COURT OF APPEAL
14 MARCH 2012

2012 SACLR 189 (A)

A mistaken payment by a party which is aware that the necessary approval for payment has not yet been given does not amount to an intention to pay irrespective of whether such approval will be given. Such a payment may be considered excusable when both parties are aware that final payment is dependent on such approval.

THE FACTS

The Nelson Mandela Metropolitan Municipality decided to renovate the Matthew Goniwe Hostel in Kwazakhele, Port Elizabeth. It resolved that a managing agent be appointed to prepare and motivate an application for funding and to supervise completion of the project..

The municipality did not have the funds for the project, and so it resolved to apply for funding from the Provincial Housing Board (the PHB). The managing agent was directed to prepare and motivate an application for funding from the PHB. Following the appointment of the managing agent, in July 1996 Ngonyama Okpanum Hewitt-Coleman and the other defendants were appointed as primary consultants, ie as architects, quantity surveyors, consulting and electrical engineers, land surveyors and town planners. Their fees were stated to be subject to PHB approval.

After 1996 and until 1999, the defendants received payment for their services. During this period, the PHB gave its approval on an incremental basis and by means of three resolutions, for payments to the defendants. A total of 102 payments was made. The defendants were overpaid by R810 481,19. This figure was calculated, having regard to the nature and extent of the work actually executed, the nature and extent of the services provided and the maximum amounts permissible in accordance with the agreed ratios provided for in their agreements with the municipality. The payments were made in accordance with standard procedures followed by the municipality and after the managing agent certified the relevant claim made by one of the defendants for it.

The municipality claimed repayment of the amounts it had overpaid. It alleged that the overpayments had been made by mistake, and based its claim for repayment on the condictio indebiti.

THE DECISION

The defendants contended that the municipality's mistake in making the payments was inexcusable. In the context of the condictio indebiti, the requirement of excusability has been called into question. However, it was not necessary to consider this issue in the present case because it was possible to conclude that the mistaken overpayments were excusable.

Since the PHB had not given a prior blanket approval for the payment of the defendants' fees, and their fees were subject to its approval, it was clear that the municipality might make payments which exceeded that approval, or were made without approval having been given. This was something which was known to all parties during the performance of the agreements. The municipality made payment in anticipation of the PHB's approval. It did not intend to pay the claims submitted whether or not they were due. Although it made payment without verification beyond the managing agent's certificate, this did not mean that the municipality was indifferent or reckless.

It was also clear that the defendants, who knew that their fees had to be approved, were not under the impression that they were entitled to the amounts claimed, because it knew that the municipality did not have the means of verifying the true facts. The municipality's failure to do so could not be construed as an indifference as to whether the money was due or as an intention to pay whether it was due or not.

In these circumstances the municipality had shown that its mistake was excusable.

DEMETRIADES v PERIVOLIOTIS

JUDGMENT BY MTHIYANE DP (BRAND JA, CLOETE JA, MHLANTLA JA AND BORUCHOWITZ AJA concurring)
SUPREME COURT OF APPEAL
14 MARCH 2012

2012 SACLR 290 (A)

A party which must tender performance required in terms of a contract in order to assert its rights against another party who is obliged to counter-perform, must do so prior to the other party accepting the repudiation of the contract by that party.

THE FACTS

Perivoliotis sold two hundred shares in Thinamy Entertainment Ltd to Demetriades for R3.5m. In terms of the agreement, a balance of R2.5m was payable in monthly instalments beginning on 7 October 2003. The share certificates, cession of loan account, and all books documents and records in the possession of Perivoliotis relating to the company or the business were to be delivered to Demetriades by 30 September 2003.

Demetriades short-paid the first instalment, and failed to pay any further instalments. Perivoliotis sued for payment of the balance outstanding. Demetriades defended the action on the grounds that the documentation to be delivered by 30 September 2003 had not been delivered. He contended that this failure constituted a repudiation of the agreement, and he accepted the repudiation.

Perivoliotis tendered delivery of the documentation, but later withdrew the tender. He contended that in view of the earlier tender, he was entitled to payment as claimed.

THE DECISION

The tender made by Perivoliotis came after Demetriades accepted his repudiation of the agreement. The agreement came to an end upon the acceptance by Demetriades of the repudiation. The tender could not revive a cancelled agreement.

In any event, the effect of the withdrawal of the tender was to deny Perivoliotis the right to depend on such tender. It was not possible for him to rely on a tender that was withdrawn and retroactively enforce rights which might have existed prior to the cancellation of the agreement.

The claim failed.

LIBERTY GROUP LTD v SINGH

A JUDGMENT BY SWAIN J
KWAZULU NATAL HIGH COURT, DURBAN
7 JUNE 2012

2012 (5) SA 526 (KZD)

Credit Transactions

The cession of a claim for payment from a creditor as security for indebtedness which might arise is not a 'secured loan' as defined in the National Credit Act (no 34 of 2005).

THE FACTS

Liberty Group Ltd and Singh concluded a broking agreement in terms of which the Singh, trading as KwaZulu-Natal Financial Services, would submit proposals from clients for various contracts to be issued by Liberty. Singh would be paid commissions on premiums received by Liberty during the currency of the contracts.

Clause 10 of the agreement provided that any advances made to the brokerage at any time against commission to be earned or amounts advanced to it for any other purpose whatsoever, would constitute debts owed by the brokerage to Liberty, which Liberty could call upon to be paid at any time. As security for any present or future indebtedness to Liberty the brokerage ceded to Liberty its claim to all amounts to which it might from time to time become entitled. Liberty was entitled to set off any amounts owing to it by the brokerage from any cause whatsoever, against any indebtedness of Liberty to the brokerage.

Liberty alleged that Singh owed it R466 780.77 in respect of advances made to it in terms of the agreement. It alleged that it had advanced unearned commission to the brokerage in respect of contracts issued by it on proposals submitted by the brokerage prior to Liberty receiving any premiums in respect thereof. The contracts in respect of which unearned commission was advanced to the brokerage lapsed or went out of force, with the result that unearned commission that was paid in advance to the first defendant had become repayable.

Singh defended Liberty's action for payment on the grounds that the debt it sought to recover was a 'secured loan' as defined in the National Credit Act (no 34 of 2005) and that Liberty had failed to allege that the demand required in section 129 of that Act had been complied with.

THE DECISION

A 'secured loan' as defined in the National Credit Act is an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person (a) advances money or grants credit to another, and (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement.

What Singh ceded to Liberty were the commissions which Liberty was liable to pay to Singh. The debts, the payment of which Liberty sought to secure by the cession, were advances made by Liberty to Singh in respect of these commissions. Consequently, in terms of the cession, Singh ceded his claim for payment of commission against Liberty to Liberty as security for the loan made by Liberty to Singh.

The crucial issue was whether this particular type of cession was one included in the definition of a 'secured loan' in the Act. The Act requires a cession of an 'other thing of value as security for all amounts due under that agreement'. It is clear that the 'thing of value' has to be something other than the 'amounts due under that agreement', and not simply a 'thing of value' other than 'any movable property'. What was due by Singh under the agreement was advances of unearned commission by Liberty, and the 'thing of value' which had been ceded was Singh's claim to payment of that very commission when it became due and payable. The cession was accordingly not one which fell within the definition of a 'secured loan' in terms of the National Credit Act.

ABSA BANK LTD v MKHIZE

A JUDGMENT BY OLSEN AJ
KWAZULU NATAL HIGH COURT, DURBAN
6 JULY 2012

2012 (5) SA 574 (KZD)

A notice to a debtor in terms of section 129 of the National Credit Act (no 34 of 2005) must come to the attention of the debtor. A credit provider may employ whatever means necessary to achieve this and must give proof of having done so.

THE FACTS

Absa Bank Ltd sent notices in terms of section 129 of the National Credit Act (no 34 of 2005) to Mkhize and other of its debtors. In each case, a track and trace report stated that the letter had reached the correct post office, but that the registered item had been returned unclaimed.

The court raised the question whether sufficient notice to the debtors had been given, as required by *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC), and if not what order should be given under s 130(4)(b)(ii) of the Act as to the steps to be taken to obtain judgment

THE DECISION

Absa argued that what *Sebola* determined was that the credit provider need do no more than prove that it took reasonable measures to ensure that the notice reached the debtor's address so that, if the debtor acted reasonably, the notice should have come to his or her attention.

However, *Sebola* does not allow a court to ignore the evidence that the notice has not in fact reached the debtor. Actual notice to the debtor is required. In the present case, evidence that the debtors had not received the section 129 notice was before the court. Accordingly, the court could not give judgment in favour of Absa.

The appropriate order was therefor that Absa give notice to the debtors by whatever means would achieve that object, whether by despatching a letter to them by ordinary post or otherwise.

In the case of Mkhize, service was effected on the daughter of the two defendants at the address selected for service. In the case of Chetty, the summons was served on the defendant's father at the selected address.

[75] In the case of Mlipha, service was effected by affixing a copy to the outer or principal door of the premises at the chosen address. But, Absa engaged the services of a tracing agent, whose evidence is before me on oath, and whose investigations revealed that the defendant, who is self-employed, continues to reside at the selected address but that he is doing his very best to avoid his creditors, apparently in particular because he owes arrear levies with respect to his property of about R80 000.

[76] It accordingly appears that in each of these cases, if a letter is sent by ordinary post to the selected address, as long as it arrives there it is likely to come to the attention of the consumer. And, of course, in each of those cases Absa may be able to identify other addresses to which it is worth sending a notice by ordinary mail.

BASIL READ (PTY) LTD v NEDBANK LTD

A JUDGMENT BY SALDULKER J
SOUTH GAUTENG HIGH COURT
13 APRIL 2012

2012 (6) SA 514 (GSJ)

Banking

A bank is obliged to make payment in terms of a payment guarantee if all conditions for payment have been met and there is no evidence of fraud. It must do so irrespective of any dispute between the parties to the contract associated with the guarantee provisions.

THE FACTS

Basil Read (Pty) Ltd sought and obtained an urgent interdict preventing Nedbank Ltd from paying African Minerals Ltd some $13m provided for in payment guarantees given by the bank. The guarantees had been given in relation to a construction contract concluded by a subsidiary company of Basil Read, and that company claimed payment from African Minerals in terms of that contract. The parties had entered into negotiations for the payment claimed to be due, but while these were still pending, Basil Read presented the claim for payment in terms of the guarantees to Nedbank without notice to African Minerals.

When African Minerals learnt that the interdict had been granted, it applied to court for a reconsideration and setting aside of the interdict. It contended that Basil Read's failure to join it, and to provide for service of the application and the order on it, rendered the application that was granted fatally defective.

THE DECISION

The advance payment guarantees contractuallyobligthe bankto pay Minerals according to their terms. Thobligation independent of the contract between Read'ssubsidiary and Minerals. existence of an alleged dispute between the subsidiary and Minerals wasno bar to the paying the guarantee upon proper demand being made it. Furthermore, the existence of such a dispute provided no reason why theinterdict cnotbe granted restraining the from paying in terms of the guarantee. contractual dispute between Mineralsand the subsidiary, which not a party to the guarantee, wholly irrelevant to the 'sobligation to make payment. dispute not relate to the advance payments that the subject-matter of the guarantees.

The conditions of payment under the guarantees had been met and there was no suggestion that any fraud had taken place.

Basil Read was seeking to interdict the performance of an established contractual obligation and therefore had to allege and prove that it had such a right. It had failed to establish this on a prima facie basis. The payment of a demand on guarantee — in the absence of fraud — is valid, enforceable and lawful. African Mineral's conduct appeared to have been lawful. Basil Read had not made out a case of fraud on the part of African Minerals.

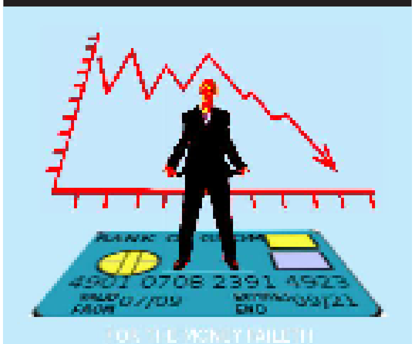
The interdict was set aside.

HANNOVER REINSURANCE GROUP AFRICA (PTY) LTD v GUNGUDOO

A JUDGMENT BY CACHALIA JA (MTHIYANE DP, NUGENT JA, MHLANTLA JA and NDITA AJA concurring)
SUPREME COURT OF APPEAL
30 MAY 2012

2012 (6) SA 537 (SCA)

Insolvency



An application for sequestration should succeed even if the claim on which it is based is disputed unless the debtor can show that the dispute is raised on bona fide and reasonable grounds.

THE FACTS

Gungudoo was employed as a senior investment manager by Hannover Reinsurance Group Africa (Pty) Ltd. While so employed he effected investment trades with a stockbroking firm, Barnard Jacobs Mellet. These were short trades, being the sale of securities not then held by Hannover, with a view to their later purchase at a lower price in order to make delivery in terms of the sale.

As the short trades were unsuccessful, the securities not having fallen in price before delivery was required, substantial losses were incurred. These amounted to R10 840 000. Hannover caused a forensic audit to be carried out. This concluded that Gungudoo was personally responsible for this loss. Hannover alleged that Gungudoo had, with the co-operation of a close corporation which he controlled, committed fraud or theft against it. It brought an application for the sequestration of Gungudoo's estate. Gungudoo opposed the application on the grounds that he had been authorised to effect the short trades and that the losses resulting from them should be borne by Hannover.

After the application had been started, Hannover continued its investigation of Gungudoo's activities, and concluded that as a result of all of the transactions he had initiated, Gungudoo was indebted to it in the sum of R41m. Gungudoo contended that the transactions he had effected were authorised and that the method by which he had effected them involved a short term loan of shares to another party, and were not short sales as alleged. Gungadoo also contended that because the application for his sequestration had not been served on his employees - one security guard, two other security guards who were also drivers, three domestic workers and a bookkeeper-administrator - it failed to comply with sections 9(4A), 11(2A) and 11(4) of the Insolvency Act (no 24 of 1936).

THE DECISION

It was clear that Gungudoo transferred shares to the other party to offset the negative balance in the accounts of Hannover. Assuming that he was authorised to engage in short sale transactions, he produced no proof that the recipient was the beneficial owner of the shares in question. The transaction was therefore an unlawful transfer of shares to that party.

In any event, Gungudoo's assertion that he executed the transactions in issue with the authority and knowledge of Hannover was also inherently improbable. Furthermore, Hannover had demonstrated that Gungudoo had engaged in an elaborate subterfuge to make this transaction between his close corporation and Hannover's subsidiary appear to be legitimate. Gungudoo produced no evidence to show that the party to which the shares had been transferred had been the beneficial owner of these shares at any stage. He had therefore not been able to reasonably and in good faith dispute Hannover's claim that he misappropriated the shares to the value of R10 840 000.

As far as the opposition to the application based on the failure to comply with the Insolvency Act was concerned, the purpose of the relevant provisions of the relevant provisions was to ensure that where a debtor conducts a business, notice of sequestration

or winding-up proceedings must be given to employees of the business. In the present case none of the Gungudoos' employees were employed in a business operation. The consequence of this was that Hannover did not carry any obligation to notify them of the sequestration proceedings.

I turn to consider whether Mr Gungudoo disputes the claims against him on reasonable and bona fide grounds — the second ground of appeal. It was not in issue that the claims against the appellants involving the misappropriation of shares 2 and cash were all liquidated claims. Mr Gungudoo was therefore required, in good faith, to adduce facts which, if proved at trial, would constitute good defences to each of the claims against him. 3 For their part, all that the respondents need establish before us is a single claim in excess of R100, as s 9(1) of the Insolvency Act 24 of 1936 requires, which the appellants are unable to contest on reasonable and bona fide grounds.

HASSAN v BERRANGÉ N.O.

A JUDGMENT BY ZULMAN JA (MPATI DP, FARLAM JA, LEWIS JA and MAYA AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2006

2012 (6) SA 329 (SCA)

An application for sequestration based on a liquidated claim against the respondent may rely on the allegation that the respondent has misappropriated shares whose market value is determinable by reference to the ruling price of the shares at some stage following their misappropriation.

THE FACTS

Hassan was the controlling shareholder in NRB Holdings Ltd (NRBH), a bank which had been registered as such in 1970. It traded under the name New Republic Bank. That bank was placed under curatorship, and then a scheme of compromise was concluded and two receivers were appointed.

In 1998, the New Republic Bank lent R32 658 649,35 to NRBH, the purpose being to acquire shares in Mitrajaya Holdings Berhad, a Malaysian company. By June 1998 NRBH had acquired 14 000 000 ordinary shares and 6 666 666 warrants in Mitrajaya. The shares and warrants were registered in the name of OSK Nominees (Asing) Sdn Bhd, a firm of stockbrokers in Malaysia and was subject to South African Reserve Bank conditions. These conditions included permission to acquire a 26% interest in Mitrajaya and the transfer of up to an amount of Malaysian Ringgit (RM) 24 133 333 in respect of the purchase consideration, and a restriction on the disposal or expansion of its interest in Mitrajaya without its specific approval.

In June 2000, Hassan became engaged in negotiations with L & M Group Investments Ltd to take over the Mitrajaya shares. In April 2002, he procured a resolution from the board of directors of NRBH in terms of which the board authorised any two of the directors to give instructions orally or in writing to OSK Securities Malaysia regarding the sale of securities. In July 2002 NRBH addressed a letter to OSK Securities, the letter being signed by Hassan and another NRBH director, authorising OSK to execute a 'married deal' between NRBH and Khidmas Capital Sdn Bhd of 22 400 000 Mitrajaya shares at RM1,15 per share. The letter instructed OSK Securities to credit the net proceeds of the sale to the buyers trading account as part payment for its purchase of the shares. The shares were sold on 29 July 2002. The purchaser was Khidmas Capital. Hasan was a director of Khidmas Capital and he held 99 999 issued shares in that company.

In its financial statements for the year ending 30 June 2003, Khidmas recorded that it owned marketable securities valued at RM17 388 000. It noted that the aforesaid shares were pledged to a financial institution for a revolving credit facility of RM20 000 000 granted to Hassan. The same financial statements showed that in the year 2002, a director owed the company RM19 140 820. In 2003 this indebtedness - the indebtedness of Hassan to Khidmas - was shown as having been discharged.

During 2002 Khidmas pledged 22 400 000 Mitrajaya shares to Southern Bank. The pledge was security for a loan of some RM20 000 000 granted by Southern Bank to Hassan, who used the proceeds of the loan to purchase shares in a company known as Seacera Tiles. Its shares were registered in Hassan's name. Thereafter, 9 500 000 of the pledged Mitrajaya shares were sold on the instruction of Southern Bank which received the proceeds of the sale. Khidmas sold more of the Mitrajaya shares on the open market.

In May 2003, the receivers of New Republic Bank Ltd instituted winding-up proceedings against NRBH. It was placed under provisional winding up later that year. At the same time, the liquidator, Berrangé, instituted proceedings in Malaysia. He sought an urgent

interlocutory injunction and discovery order from the High Court at Kuala Lumpur, which resulted in an order that the registered holder of 22 400 000 shares in Mitrajaya, was restrained from transferring, selling or disposing of these shares.

Berrangé brought an application for the sequestration of Hassan on the grounds that NRBH had a liquidated claim against him arising from his misappropriation of the shares in Mitrajaya, and arising from him having appropriated money from the company's bank account without giving consideration. Hassan opposed the application.

THE DECISION

Section 228 of the Companies Act (no 61 of 1973) provides that the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of the whole or substantially the whole of the undertaking of the company; or the whole or the greater part of the assets of the company. No such resolution was passed by the shareholders of NRBH to dispose of substantially the whole of NRBH's undertaking, and no such resolution was placed before the board of directors of NRBH for their approval.

It was clear that Hassan had misappropriated the Mitrajaya shares and that the proceeds of their sale ultimately vested in him. The question was whether this meant that the liquidator, Berrangé, acquired a liquidated claim against him in consequence. The Insolvency Act (no 24 of 1936) provides that a liquidated claim is a claim whereof the amount is fixed either by agreement or by an order of court, or otherwise. The intention is that there should be certainty in connection with the amount of the claim. The legal basis and the nature thereof do not affect a claimant's locus standi to apply to court to secure payment of that claim.

The Mitrajaya shares were marketable securities which traded freely on the Kuala Lumpur stock exchange. As such, their market value was readily available on any given day. The measure of the NRBH's loss was therefore the market value of the misappropriated shares. The inescapable inference was that Hasan's attempt to transfer US$100 000 from South Africa to Malaysia, without the knowledge and consent of the respondent, was made with the intent to prejudice his South African creditors, in particular NRBH, or at least to prefer one creditor above another.

The respondent therefore established a claim as referred to in s 9(1) and Hassan committted an act of insolvency in terms of s 8(d). There was reason to believe that it would be to the advantage of creditors if Hasan was finally sequestrated

NEDBANK LTD v BESTVEST 153 (PTY) LTD

A JUDGMENT BY GAMBLE J
WESTERN CAPE HIGH COURT
12 JUNE 2012

2012 (5) SA 497 (WCC)

In exercising its discretion whether or not to grant a business rescue application, a court should take into account that the interests of the creditors, as opposed to that of the company carry more weight when there is no business of the company to be rescued, as might occur when the company owns property but does not trade.

THE FACTS

Bestvest 153 (Pty) Ltd owned commercial property in Cape Town. It embarked on the development of the property by erecting on it a building known as '360 Degrees'. The building was financed by the company with money borrowed from Imperial Bank Ltd , the sum of R26,1m and from Structured Mezzanine Investments (Pty) Ltd, a sum of R6,5m. Both loans were secured by mortgage bonds.

The company was under-capitalised for the project and by mid-2010 it ran into cash-flow problems. It renegotiated the loans, but by October 2011, Nedbank decided that the project could not survive. It applied for the liquidation of Bestvest.

Bestvest accepted that it was commercially insolvent but opposed the application, and also applied for the appointment of a business rescue practitioner under chapter 6 of the Companies Act (no 71 of 2008). Bestvest contended that its short-term cash flow and liquidity issues were a result of the economic recession and that the company's balance sheet was strong and that it had 'the clear ability to trade out of its difficulties, alternatively to achieve a much better return and result for [its] creditors than would result from . . . immediate liquidation'.

THE DECISION

The two factors which a court must consider in exercising its discretion whether or not to grant business rescue are that the company in question is financially distressed and that there is a reasonable prospect that the company will be rescued. In the present case, it was clear that Bestvest was financially distressed. The only question was whether or not there was a reasonable prospect that it could be rescued.

It was argued that an application for business rescue should contain a summary of the proposed business rescue plan in order to place a court in a position where it could decide whether there was a reasonable prospect of the company being saved from insolvency. However, it should be left up to the business rescue practitioner to formulate the rescue package once that person has had an opportunity to properly assess the company, its prospects going forward and the reasons for its commercial distress. This does not mean that a party can approach the court for the appointment of a business rescue practitioner with flimsy grounds in the hope that the practitioner will provide the panacea to its problems. The application must set out sufficient facts, if necessary augmented by documentary evidence, from which a court is able to assess the prospects of success before exercising its discretion. This should, in the present case, include brief reasons for the company finding itself commercially insolvent, what the reasonable cost will be of bringing the building to completion in order that it can be commercially viable, what the prospects are of raising the finances required to so complete the building, and how best the building, when completed, can attain commercial viability.

In the present case, the interests of the creditors, as opposed to that of the company, should carry more weight, because there was no business of the company to be rescued. The benefit of placing the business of the company on its feet again did not arise in this case. Having regard to all the relevant factors, the application for business rescue could not be granted.

NYATHI v CLOETE N.O.

Insolvency

A JUDGMENT BY VAN OOSTEN J
SOUTH GAUTENG HIGH COURT
7 SEPTEMBER 2012

2012 (6) SA 631 (GSJ)

An examination of witnesses in terms of section 417 of the Companies Act (no 61 of 1973) not be by way of written interrogatory in circumstances when the company in question has been placed in liquidation as a result mismanagement or where fraud and theft on the part of the directors and other officers of the company appear to have led to the demise thereof.

THE FACTS

Nyathi was a director and majority shareholder of a company which was placed in liquidation. The liquidators applied to the Master for the holding of a commission of enquiry into the affairs of the company in terms of section 417 of the Companies Act (no 61 of 1973). Cloete was appointed the commissioner.

The liquidators were unable to obtain information and financial records and documents, concerning the company in liquidation. No such documents could be found despite a diligent search. The liquidators stated that such information was necessary to enable them, inter alia, to recover substantial sums of moneys owed to the company. In the report of the liquidators for purposes of the second meeting of creditors, the estimated value of the assets of the company was stated as R705 000. Its liabilities amounted to some R91,8m. The report further stated that the liquidators were unable to meaningfully report on the affairs of the second respondent due to the non-availability of the necessary documents and other information.

At the first hearing, Nyathi and the other applicants were called as witnesses. They applied for an order that they be examined by written interrogatories rather than orally. Cloete refused the application. Nyathi and the other applicants then applied for an order that they be examined in that manner.

THE DECISION

Given the circumstances of the company's liquidation, an enquiry was called for and was rightly ordered by the Master.

A written interrogatory would be appropriate in circumstances where the information sought is merely formal in nature. A written interrogatory as a precursor to oral examination might also, in certain circumstances, be appropriate. But where the liquidation of a company is prima facie the result of mismanagement or where fraud and theft on the part of the directors and other officers of the company appear to have led to the demise thereof, the submission of written questions will undoubtedly undermine the object and purpose of the enquiry. The directors and other officers of the company are the 'only eyes, ears and brains of the company and often the only persons who have knowledge of the workings of the company', and the liquidators, not having any prior knowledge thereof, are strangers to the affairs of the company and therefore reliant on the oral examination and cross-examination of witnesses to delve for and hopefully discover the truth concerning the affairs of the company.

Nyathi had failed to advance any reasons for a preference for the submission of written interrogatories. The sole reason advanced was that the written interrogatories would have substantially shortened the enquiry proceedings. However, given the circumstances of the case this contention could not be accepted.

The commissioner's refusal of the request was fully justified. It followed that the application for a review of his decision had to fail.

BESTER N.O. v SCHMIDT BOU ONTWIKKELINGS CC

A JUDGMENT BY BRAND JA
(SNYDERS JA, LEACH JA,
THERON JA and WALLIS JA)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2012

2013 (1) SA 125 (A)

Prescription

A claim for rectification of a deed of transfer which mistakenly records transfer of property to a particular person is not the enforcement of a debt as defined in the Prescription Act (no 68 of 1969).

THE FACTS

In October 2003, Bou Ontwikkelings CC sold a portion of erf 3117, Sedgefield to Innova Ltd. The attorney attending to transfer of the property mistakenly transferred to Innova both the portion of the erf and the remainder.

Innova passed a mortgage bond over the remainder of the property in favour of Absa Bank Ltd. This took place at the same time as the registration of other bonds in favour of the bank over other properties owned by Innova.

When Schmidt Bou discovered that the remainder of the property had been transferred to Innova, it claimed an order declaring that it was the owner of the property, rectifying the deed of transfer and cancelling the bond passed in favour of Absa.

THE DECISION

Since the transfer of ownership requires both delivery and an underlying agreement, and the latter requires intention to transfer, no transfer of ownership took place in the present case. The intention to transfer was absent. Innova's liquidators however, contended that Schmidt's claim had become extinguished because it had prescribed in terms of the Prescription Act (no 68 of 1969).

A claim for rectification is not a claim for enforcement of a debt because it does not alter the rights and obligations of the parties. The liquidator argued that in the present case, such an alteration would take place because rectification would entail registration of the property in a new name, that of Schmidt Bou, and symbolic transfer of the property to it. However, rectification would not alter the rights and obligations of the parties. It would only correct an incorrect memorial of the agreement between them. never became the owner of the remainder of the property, despite the entry in the deeds registry. Schmidt Bou remained the owner. In consequence, the deed of transfer did not correctly reflect the underlying agreement. The rectification sought would not constitute any delivery, symbolic or otherwise, of the property, and it would not change the rights and obligations of the parties. It would simply correct the erroneous memorial of those rights.

There was therefore no difference, in the present context, between rectification of a contract, and rectification of a deed of transfer. Hence, Schmidt Bou's claim for rectification of the deed of transfer did not constitute a claim for delivery of property in the form of a rei vindicatio, and what Schmidt Bou claimed did not rely on any obligation by Innova to do, or to refrain from doing, anything. As in the case of rectification of a contract, it therefore had no correlative 'debt', as contemplated by the Prescription Act, which could be extinguished by prescription.

The claim succeeded.

VILLAGE FREEZER v CA FOCUS CC

Prescription

A JUDGMENT BY MAKAULA J
(GRIFFITHS J concurring)
EASTERN CAPE HIGH COURT
3 APRIL 2012

2012 (6) SA 80 (ECG)

The effect of deregistration of a close corporation is to prevent the valid issue of summons by such a close corporation. The consequence of this is that prescription of a debt will not be interrupted by the issue of such a summons, even if the close corporation is later re-registered.

THE FACTS

In November 2007, CA Focus CC was deregistered as a close corporation. In March 2008, it issued summons against Village Freezer for payment in respect of services rendered in the period April to September 2006.

In March 2010, CA Focus was re-registered.

Village Freezer raised a special plea to the claim to the effect that CA Focus was not in existence when summons was issued and its claim against Village Freezer had prescribed. It contended that the effect of section 26(7) of the Close Corporations Act (no 69 of 1984) is not to create retrospective judicial personality to perform judicial acts and to validate or revive proceedings which were commenced during the period of deregistration. CA Focus contended that whatever defects existed by virtue of CA Focus' deregistration, these were retrospectively cured by its re-registration during March 2010 when its claim against Village Freezer had been revived.

Section 26(7) provides that the Registrar shall give notice of the restoration of the registration of a corporation and the date thereof in the prescribed manner and as from such date the corporation shall continue to exist and be deemed to have continued in existence as from the date of deregistration as if it were not deregistered.

THE DECISION

The provisions of s 26(7) of the Act and the equivalent provision in the old Companies Act (no 61 of 1973) are distinguishable, in that the latter Act provides for a more stringent and strict process for restoration. It required that an application for restoration be made in court and that notice be given to third parties who may be prejudiced by the restoration order. Section 26(7) of the Act, on the other hand, empowers the registrar to restore a corporation on application by an interested person if he is satisfied that the corporation was carrying on business or was in operation when it was deregistered or that restoration is just.

A summons issued by a company after deregistration is a nullity. There is no reason to conclude that the effect of this would be to change the rules of prescription as provided for in the Prescription Act (no 68 of 1969). The effect of section 26(7) of the Act was therefore not to revive a debt due to the close corporation, which had prescribed during the course of the deregistration period.

The special plea was upheld.

STANDARD BANK OF SOUTH AFRICA LTD v DLAMINI

A JUDGMENT BY D PILLAY J
KWAZULU NATAL HIGH COURT
23 OCTOBER 2012

2013 (1) SA 219 (KZD)

Credit Transactions

A credit provider is obliged to ensure that a person to whom it gives credit understands the termination procedures of the agreement in terms of which credit is given.

THE FACTS

Dlamini bought a Toyota Corolla for R85 745,02 at Starlight Auto Sales, a second-hand car dealership in Pinetown. He paid a deposit of R15 000, and the balance was financed by Standard Bank of South Africa Ltd which in terms of the financing arrangement became the seller of the car.

After leaving the dealership with the car, Dlamini noticed that the vehicle was jerking and smoking. He consulted a mechanic who test-drove the car. After he test-drove the car, he predicted that it would not last for more than 30 km. He discovered that the vehicle had been rebuilt following an accident. As predicted, the car did break down, and Dlamini had it towed back to the dealership.

Dlamini did not notify the bank of the termination of the agreement by fax as prescribed in the agreement. When the bank sought payment of the balance outstanding under the agreement, it contended that because the agreement had not been terminated as required in clause 10.6 of the agreement, the termination constituted a voluntary surrender as provided for in section 127(5)-(9) of the National Credit Act (no 34 of 2005). It claimed payment of any shortfall after sale of the vehicle to a third party.

The issue in dispute between the parties was whether or not Dlamini knew and understood the terms of the agreement. Dlamini was illiterate and did not understand English.

THE FACTS

Dlamini terminated the agreement by returning the vehicle because it was so defective that it could not be driven. There was no evidence to suggest that Dlamini was unable to pay for the vehicle, or that he returned it for any reason other than it being incapable of being driven. The Bank failed to establish a factual basis for any finding that the termination was a voluntary surrender: a voluntary surrender is usually triggered by a consumer's inability to comply with the credit agreement.

Dlamini's mere non-compliance with the procedural formality of faxing a notice of termination did not lead to the inference that he terminated the agreement by voluntarily surrendering the vehicle.

The bank and its agent caused Dlamini to enter into a credit agreement without reading, interpreting and explaining the material terms to him, which he did not know and understand. The question was whether he could nevertheless in law be held to have assented to the agreement by virtue of his signature.

Given the importance of the notice to the bank of the basis for the termination, the bank should have mandated its agent to assist consumers like Mr Dlamini to fax the notices. Even if the bank and its agent provided this service at a fee, it would have been far cheaper than litigating to determine the basis of the termination. Imposing such a duty on the agents would also acknowledge the potential conflict of interest between an agent that sells defective vehicles and the consumer. Although the legal obligation to notify the bank rested on Dlamini, the bank could not absolve Starlight of its duty to act in good faith to notify the bank in the ordinary course of commercial practice. The bank should hold its agent accountable for not reporting immediately that the vehicle was towed back and that it could not be driven.

The claim was dismissed.

NEDBANK LTD v BINNEMAN

A JUDGMENT BY GRIESEL J
WESTERN CAPE HIGH COURT
21 JUNE 2012

2012 (5) SA 569 (WCC)

Proof that a notice of intention to recover a debt has been given to a consumer will be sufficient when it is shown that the notice was delivered to the post office relating to the address given in the domicilium clause of the credit document.

THE FACTS

Nedbank Ltd brought an action against Binneman for repayment of a loan secured by a mortgage bond. Prior to doing so, it despatched by registered post a notice to her that it intended to bring the action.

In terms of the domicilium clause recorded in the bond any notice or other document or legal process to be given, sent or delivered under it would be regarded as sufficiently given, sent or delivered to the Binneman if delivered at the mortgaged property or sent by prepaid registered post to the mortgaged property, in which latter case it would be presumed to have been received on the third day following the date of posting unless the contrary was proved.

The notice sent to Binneman was delivered at the post office relating to the domicilium address. This was recorded in the track-and-trace report given by the post office. Binneman did not defend the action. The bank then sought default judgment against her.

THE DECISION

In the judgment handed down in the matter of *Sebola v Standard Bank* 2012 (5) SA 142 (CC) it was held that a credit provider must take reasonable measures to bring its notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1) of the National Credit Act (no 34 of 2005). This would ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.

The bank had sufficiently complied with the requirements of this judgment in the present case. Accordingly, default judgment could be granted against Binneman.

SEYFFERT v FIRSTRAND BANK LTD

A JUDGMENT BY MALAN JA (CLOETE JA, MALAN JA, LEACH JA, WALLIS JA and NDITA AJA concurring)
SUPREME COURT OF APPEAL
30 MAY 2012

2012 (6) SA 581 (SCA)

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. The effect of this proposal was that the capital debt would not be reduced. Firstrand terminated the debt review.

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

If a debtor has applied for debt review, the debtor and the credit provider are obliged not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the debtors' indebtedness and the prospects for responsible debt-restructuring, but also to participate in good faith in the review and negotiations. The duty to negotiate in good faith does not terminate on the debt counsellor's proposal being referred to the magistrates' court, nor when it is postponed.

The court considering the enforcement of a credit agreement may decide whether there is any benefit in postponing the application for summary judgment in order to determine the advantages of a resumption of the debt review. The conduct of both parties will be relevant inmaking such determination. Moreover, the terms of a proposed rearrangement will then also be relevant to assess whether it is likely to lead to the satisfaction of all responsible consumer obligations, if implemented. It is at this stage that a balance must be struck between the interests of the consumer and those of the credit provider.

Given the fact that the debt counsellor's proposal would not reduce the capital indebtedness, and would have left a substantial part of the debt unpaid, Firstrand had been entitled to terminate the debt review in terms of section 86(10). It was argued in the alternative that an order in terms of section 85 should have been made. However, a court should be slow to exercise its discretion to make either of the orders envisaged in s 85 where the matter has been dealt with by a debt counsellor, or a debt review has justifiably been terminated, and where no material change in circumstances has been demonstrated.

Summary judgment was confirmed.

VOLTEX (PTY) LTD v SWP PROJECTS CC

A JUDGMENT BY BHIKA J
SOUTH GAUTENG HIGH COURT
11 AUGUST 2010

2012 (6) SA 60 (GSJ)

A sale on credit is not subject to the National Credit Act (no 34 of 2005) unless it falls within the definition of a credit facility or incidental credit agreement as defined in the Act.

THE FACTS

Voltex (Pty) Ltd sold goods on 30-days credit to SWP Projects CC. It brought an action against SWP for payment of the goods.

Section 8(3) of the National Credit Act (no 34 of 2005) defines a 'credit facility' as an agreement in terms of which a credit provider undertakes to supply goods or services or to pay an amount or amounts, as chosen by the consumer, and either defer the obligation to pay or repay any part of the cost or bill the consumer periodically for the goods or services supplied; and provide for any charge, fee or interest payable on any deferred amount or an amount billed and not paid within the time provided in the agreement. An incidental credit agreement is an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not paid on or before a determined period or date; or

(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

The court considered whether or not the claim was subject to the National Credit Act.

THE DECISION

All the elements referred to in section 8(3) must be present before an agreement can be defined as a credit facility. The type of credit agreement contemplated by the Act relates not only to facilities such as credit cards or bank overdrafts, where a credit facility may be used at the discretion of the consumer, but also other types of transactions.

The agreements of sale between the parties did not fall within subparas (a) and (b) of the definition of an incidental credit agreement, in that subpara (a) of the definition refers to a fee or interest which becomes payable when payment of an amount charged in terms of that account is not paid on or before a determined period or date. Since no fee or charge became payable at any time, the transaction between the parties was not an incidental credit agreement. The interest payable by SWP was not interest that became payable in terms of the agreement 'when payment of an amount charged in terms of that account was not paid on or before a determined period or date', but became payable as a consequence of the breach of the agreement, as damages payable pursuant to such breach.

Subpara (b) was clearly not applicable, as there was no question of two prices being quoted as the purchase price of goods sold.

The sales were therefore not subject to the Act.

HANO TRADING CC v JR 209 INVESTMENTS (PTY) LTD

A JUDGMENT BY ERASMUS AJA (MTHIYANE DP, VAN HEERDEN JA, MHLANTLA JA and BOSIELO JA concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2012

2013 (1) SA 161 (SCA)

Contract

In order to validly cancel an agreement, the provisions of a breach clause must be adhered to, and there must be proper notice given to the party alleged to be in breach.

THE FACTS

Hano Trading CC sold land to JR 209 Investments (Pty) Ltd for R7.5m. Clause 2.3 of the agreement provided that the balance of the deposit being R750 000 payable in cash or bank cheque or bank transfer directly was to be paid on 12 June 2009.

JR failed to pay the balance of the deposit on due date, but on 23 October 2009, a company on its behalf indicated to Hano's attorneys that it wished to deliver to them a cheque for R750 000 which it had drawn in favour of Hano. The attorneys responded by stating that Hano was not proceeding with the sale and the sale agreement was null and void. JR then tendered the same cheque to the attorneys and contended that the agreement was not null and void as Hano had not invoked the right to cancel the agreement as provided for in clause 14.

Clause 14 provided that 'in the event of the purchaser committing a breach of any of the terms of this agreement and failing to remedy such breach within a period of fourteen days after receipt of a written notice from the seller calling upon the purchaser to remedy *the breach complained of*, then the seller shall without further notice cancel the agreement and the purchaser shall forfeit all moneys paid as a deposit to the seller, and the seller shall claim and recover all damages from the purchaser.'

Hano's attorney inquired whether by tendering the cheque, JR was rectifying the breach, and then despatched a letter to JR notifying it of its breach and requiring compliance within fourteen days failing which the agreement would be cancelled. The letter was addressed to JR 29 Investments (Pty) Ltd and omitted the name of the office park which ws given in the domicilium citandi clause of the agreement. JR's attorney then repeated its contention that the agreement was not null and void for the reason earlier given. Hano's attorney made no reference to its letter notifying of the breach, but inquired what JR intended doing as the agreement had been cancelled due to breach by JR.

JR then brought an application for an order that the agreement remained of full force and effect.

THE DECISION

Clause 2.3 of the agreement required payment in one of three forms - cash or bank cheque or bank transfer. The cheque drawn on the account of the company acting for JR did not qualify as one of these. The question was whether JR's failure to strictly comply with the mode of payment warranted cancellation of the agreement by Hano.

Hano was not entitled to rely solely on this fact to validly cancel the agreement for at least two reasons. First, if this amounted to a breach, the provisions of clause 14 had to be followed. Second, at the time when the Hano's attorney gave its first response, he could not have been aware that the cheque was not a 'valid tender' in terms of the agreement, and in fact at that stage he was not even aware that the balance of the deposit would be paid by cheque, as his view was that the agreement was 'null and void'.

In any event, Hano had not complied with the provisions of clause 14 in that its letter of cancellation had been incorrectly addressed, and had failed to specify the breach complained of.

The agreement therefore remained of full force and effect.

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

Contract

A JUDGMENT BY MPATI P (CLOETE JA, SNYDERS JA, BOSIELO JA and NDITA AJA concurring)
SUPREME COURT OF APPEAL
21 MAY 2012

2012 (5) SA 323 (SCA)

A principal will not 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 but it is clear that the party depending on that representation should have known that it was made without proper authority

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. He did so with the knowledge of his superior, a certain Mr Van Wyk. 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

The only issue was whether Company Unique proved its case against Northern Metropolitan based on the ostensible authority of Du Plessis and Van Wyk. This issue resolved into the question whether Northern made any representation, by word or conduct, which induced Company Unique to act to its detriment by concluding the agreements with Du Plessis.

Van Wyk and Du Plessis were lowly ranked officials in an elaborate administrative structure where authority below the full council was exercised by delegation. Van Wyk and Du Plessis were given offices, but these were not even in the main building and there was no evidence that they were provided with secretaries, or with letterheads or stamps. It was not known where the letterhead on which the resolution was contained came from, so also the stamp whose imprint appears on it. But the fact that the two officials were given offices and might even have had letterheads and stamps did not mean they had authority to bind Northern Metropolitan. What mattered was their seniority in the overall structure of Northern Metropolitan.

There was no evidence of what normally went with the position of Van Wyk as senior superintendent and Du Plessis as superintendent. In the overall administrative structure of Northern Metropolitan, they ranked very low. There was no evidence that the certification of any official document of Northern Metropolitan was done by the security subcluster, which could have given the impression that Van Wyk had authority to certify a resolution of council. Nor was there any evidence that the transactions in issue fell within the category of what may be termed the security subcluster's 'usual business'. It followed that, other than their mere appointments and the fact that they occupied offices and might have had access to letterheads and stamps, and the fact that outsiders such as Company Unique's representatives had

access to them, there was insufficient evidence of a façade of regularity. It followed that agency by estoppel (ostensible authority) on the part of Northern Metropolitan had not been established on the evidence. There was no representation by it.

The acceptance, by Company Unique's officials, of the resolution was also unreasonable. Furthermore, the resolution purported to confer authority on Du Plessis to bind Northern Metropolitan as and when he wished and to conclude agreements for any amount and in respect of any item which may happen to be recorded on a transaction schedule. No reasonable businessman knowing the operations of an entity such as Northern Metropolitan, relating to decision making could be satisfied with such an open-ended resolution. To do so would be unreasonable. Company Unique's officials dealt very casually and superficially with the question of Du Plessis' authority. Their acceptance of the resolution was not reasonable.

The action was dismissed.

One of the factors mentioned by the court a quo as contributing to the creation of a façade of regularity is that the appellant provided its employees with original letterheads, which allowed Van Wyk to use an original letterhead when certifying the existence of a non-existent resolution. The court also observed that the appellant provided its employees with official stamps and allowed these to be used for its official documents. That may be so, but surely were an institution like the appellant to provide one of its employees at its receiving department, where letters and parcels are received, with an official stamp so as to indicate the date on which correspondence was received, it could not be held liable, without more, if another employee were to borrow or steal the stamp for nefarious purposes. Similarly, I do not believe that the law would require a manager in a bank to keep letterheads under lock and key and to take out one for his secretary every time he or she wants the secretary to type a letter, so as to avoid unforeseen fraudulent acts by the secretary. And where a secretary uses letterheads in his or her possession to commit fraud and purports to bind the employer it does not follow that the manager or the institution should be held liable.

CITY OF CAPE TOWN v HENDRICKS

JUDGMENT BY SOUTHWOOD AJA (NUGENT JA, VAN HEERDEN JA, SNYDERS JA and MHLANTLA JA concurring)
SUPREME COURT OF APPEAL
31 MAY 2012

2012 (6) SA 492 (SCA)

A municipality's notice to comply with by-laws does not constitute administrative action for the purposes of Promotion of Administrative Justice Act (no 3 of 2000).

THE FACTS

Hendricks and the second respondent were informal traders who conducted businesses from large, sturdy, temporary structures erected on pavements in Mitchells Plain. A portion of each structure encroached onto a neighbouring property where the Westgate Mall was situated. The owner of the property objected to this encroachment and requested Hendricks and the second respondents to remove their structures.

The City of Cape Town was the owner of the property where the structures stood. The structures were erected there without the City's consent or authorisation and contravened the City's by-laws. The respondents did not have the City's consent or authorisation. On 23 April 2010, a member of the City's Specialised Law Enforcement Unit, issued and handed to each respondent a written notice in which each was informed that the structure placed on the City's property was there without the necessary consent or authorisation of the City, that the respondents were instructed to immediately remove the offending structure from the City's property, and that, in the event of the respondents failing to comply with the instruction by 10 May 2010, a fine could be imposed and the offending structure removed by the City at their expense. When serving the notices, the respondents were informed that the notices did not prohibit them from trading on the property and that the respondents could erect temporary structures at the beginning of the day, but that they would have to dismantle them at the end of the day. The respondents would become entitled to erect such structures only if the City ganted permission.

After receiving the notices the respondents did not seek the City's consent or authorisation, but urgently sought and were granted a rule nisi interdicting and restraining the City from removing their structures or interfering with the respondents' right to trade from those structures. The order was later confirmed.

The City appealed.

THE DECISION

The City had not taken a decision that the respondents had to remove and rebuild their structures daily, and the issue and delivery of the notices did not constitute administrative action for the purposes of the Promotion of Administrative Justice Act (no 3 of 2000), but merely constituted notification to the respondents of its intention to enforce compliance with the by-law. The issue and service of the notice were not reviewable as the notices do not constitute a final decision, did not adversely affect the rights of any person, and had no direct, external legal effect.

Furthermore, the City did not take a decision that the respondents were obliged to remove and rebuild their business structures daily on their trading sites. The notices could not reasonably be construed to mean that, because they simply informed the respondents that they had to comply with the law and informed them of the consequences should they fail to do so. This was not administrative action as defined in the Promotion of Administrative Justice Act.

By issuing and delivering the notices to the respondents, the City's conduct did not have direct and immediate consequences for the respondents; it was a

preliminary step by the City (a notification or warning that it would enforce the bylaws)and did not adversely affect the respondents' rights or have any direct or external legal effect. The City was doing no more than it was entitled to do in terms of the section of the relevant Act.

The appeal succeeded.

It is clear that the City did not take a decision that the respondents are obliged to remove and rebuild their business structures daily on their trading sites, and that the notices cannot reasonably be construed to mean that. The notices simply informed the respondents that they must comply with the law (ie remove the structures which contravene the bylaws and the Ordinance) and informed them of the consequences should they fail to do so. This was not administrative action as defined in PAJA.

[11] As contended by the City, by issuing and delivering the notices to the respondents, the City's conduct did not have direct and immediate consequences for the respondents; it was a preliminary step by the City (a notification or warning that it would enforce the bylaws); and did not adversely affect the respondents' rights or have any direct or external legal effect. The City was doing no more than it was entitled to do in terms of the section of the relevant bylaw

TH RESTAURANTS (PTY) LTD v RANA PAZZA (PTY) LTD

Contract

A JUDGMENT BY YEKISO J
WESTERN CAPE HIGH COURT
8 JUNE 2012

2012 (5) SA 378 (WCC)

A claim based on a cancelled contract to interdict a party from enjoying the rights conferred under that contract may be answered by invoking the rule that where the obligations of a contract are reciprocal, a claimant wishing to enforce its rights must have honoured its own obligations under that contract.

THE FACTS

TH Restuarants (Pty) Ltd as franchisor concluded a restaurant franchise agreement with Rana Pazza (Pty) Ltd as franchisee.

In terms of the agreement, TH was obliged to give advice on the initial opening, advertising and promotional campaign for the business and the supply of point-of-sale and promotional material, advice on initial staffing requirements and staff recruitment; advice and assistance on merchandising of products and general initial advice to enable the franchisee to operate the business efficiently. Rana was obliged to pay franchise fees monthly, without deduction or set off. It was also obliged to attend to the securing of the right to occupy the premises by lease or otherwise, the purchasing or otherwise acquiring and installing of all necessary equipment, obtaining all statutory licences required to conduct the relevant business and obtaining the necessary stationery, promotional literature and signage as stipulated by the franchisor.

TH alleged that for the period May 2010 to August 2011, Rana became indebted to it in the aggregate amount of R446 750,24 in respect of unpaid royalty and franchise fees and advertising costs. TH sued for payment, and later cancelled the agreement.

TH brought an application for an order that Rana cease operating the restaurant franchise, and pay it outstanding franchise fees. Rana opposed the application on the grounds that TH had failed to fulfil its own obligations in terms of the franchise agreement.

THE DECISION

In bilateral contracts the exceptio non adimpleti contractus is available as a defence in those circumstances where the parties' obligations are reciprocal. In the present case, the issue to determine in relation to the question as to whether Rana could invoke the exceptio as a defence, is whether, based on a proper interpretation of the contract, the parties' obligations are so closely linked with one another as to justify a finding that the one obligation has to be undertaken in return for the other. In short, the question was whether or not the parties' obligations were reciprocal. This involved an analysis of the parties' obligations in terms of the franchise agreement.

The payment due from Rana was payment in consideration for the granting of a licence and those continuing obligations which TH undertook to perform at all times during the term of the agreement. TH argued that Rana was not entitled to both withhold payment and continue the franchise. However, the point at issue was whether TH's obligations and Rana's obligation to pay royalty and advertising fees in consideration of those services were reciprocal. The parties' obligations with regard to the issue of rendering services contemplated in the franchise agreement and payment for such services, based on the interpretation of the franchise agreement, were reciprocal despite there being a 'without deduction or set-off' clause in the franchise agreement.

It was therefore not possible to confirm that the franchise agreement had been validly cancelled. There was no basis for an order that Rana cease operating in terms of that agreement.

MOBILE TELEPHONE NETWORKS (PTY) LTD v SMI TRADING CC

A JUDGMENT BY MALAN JA (MTHIYANE DP, TSHIQI JA, PILLAY JA AND PLASKET AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2012

2012 (6) SA 638 (SCA)

Property

In order to assert rights given to it in terms of section 22 of the Electronic Communications Act (no 36 of 2005), a network operator must make a decision to invoke such rights.

THE FACTS

In 1998, Mobile Telephone Networks (Pty) Ltd concluded an agreement for the lease of a site for the positioning of a base station with SMI Trading CC's predecessor in title. Transfer of the property to SMI was registered on 31 March 2008. The lease expired on 31 January 2008.

The parties entered into negotiations for continuation of the lease but these were unsuccessful. MTN's base station remained on the property afer the expiry of the lease. It contended that it was entitled to keep its base station there because it was authorised to do so in terms of section 22 of the Electronic Communications Act (no 36 of 2005). The section provides that an electronic communications network service may enter land and maintain communications facilities thereon.

SMI brought an application for an order that MTN remove its base station from its property.

THE DECISION

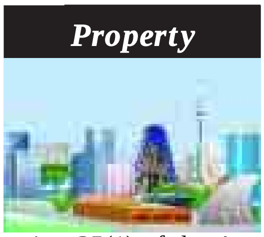
Section 22 of the Electronic Communications Act (no 36 of 2005) does not empower a network operator to appropriate significant portions of land and allow it to construct installations for its network.

Because the lease had expired, MTN's continued occupation of the base station was unlawful and could only be justified by section 22. However, section 22 is concerned with public power, the exercise of which must not be arbitrary. After expiry of the lease MTN unilaterally remained in occupation. There was no evidence that the objects of the Act could not be achieved without depriving SMI of its property. There was no intimation to SMI that MTN was no longer negotiating in order to reach agreement on the rental, but was enforcing its statutory right. It was only when threatened with eviction proceedings that MTN sought to invoke section 22 and, again unilaterally, determined that it could remain in occupation without paying compensation. This was an abuse of a statutory power and constituted arbitrary conduct.

More importantly, MTN's original entry upon the site, its construction and maintenance of the base station took place under a commercial lease. Section 22 came into force only thereafter. These actions at that time could therefor not have amounted to a decision as envisaged in the Act. The question was whether MTN, after expiry of the lease agreement, took a decision to invoke its statutory rights to justify its continued occupation of the base station. There was no evidence that it did so.

MTN's continued occupation of the property was therefore unlawful. It was obliged to remove its base station.

BODY CORPORATE PINEWOOD PARK v DELLIS (PTY) LTD



A JUDGMENT BY MPATI JA (BRAND JA, MHLANTLA JA, TSHIQI JA BORUCHOWITZ AJA)
SUPREME COURT OF APPEAL
1 JUNE 2012

2013 (1) SA 296 (SCA)

Rules of a sectional title scheme which provide for resolution of claims by arbitration, which are consensual rather than compulsory, do not compel parties to a dispute to proceed to resolution by arbitration.

THE FACTS

The Body Corporate, Pinewood Park, issued summons against Dellis (Pty) Ltd for payment of arrear levies in the sum of R123 101, alleging that Dellis had failed to pay this amount despite it being due, owing and payable to the body corporate. Dellis admitted that it was obliged to pay levies imposed in accordance with the Sectional Titles Act (no 95 of 1986), as read with the rules governing the Scheme, but denied that it was obliged to pay the amount claimed. It pleaded further that any entitlement to claim the levies would have arisen more than three years prior to the institution of the action.

At a pre-trial conference, Dellis contended that the jurisdiction of the high court to determine the claim was ousted by virtue of the judgment handed down in the matter of *Body Corporate of Greenacres v Greenacres Unit 17 CC* 2008 (3) SA 167 (SCA). Dellis contended that the effect of this judgment was to compel resolution of the claim by means of arbitration because management rule 17 of the Scheme Rules provided for this. The parties agreed to have this issue argued before the trial court as a point in limine. The trial court answered the point in favour of Dellis. It held that Dellis's denial of liability constituted an arbitrable dispute which should in light of the *Greenacres* judgment be determined by arbitration.

The Body Corporate applied for special leave to appeal against the decision, which had also been confirmed by the full court.

THE DECISION

The Sectional Titles Act and the regulations made under it do not prescribe a procedure for dispute resolution. Section 35(1) of the Act provides that the sectional title scheme shall be controlled and managed by means of rules and section 35(2) directs that the rules shall provide for the control, management and enjoyment of common property and that they may be substituted, added to, amended or repealed by the developer. The fact that the rules may be rejected in part or in toto by a developer, and others substituted for them, by unanimous resolution of a body corporate, indicates clearly that the legislature intended the rules to be of a contractual nature.

The rules were not intended to define or limit the ownership of individual owners of sections, units or common property. The rules, read with the provisions of the Act, contained the constitution of the body corporate and could therefore be properly construed as containing the terms of an agreement between owners inter se and between owners on the one hand and the body corporate on the other hand. When a purchaser purchases a unit in a sectional title scheme after a sectional title register has been opened, he or she would be deemed to have consented, or agreed, to be bound by the existing rules relating to that scheme and to future changes to them introduced by unanimous resolution of that scheme's body corporate. Therefore, the arbitration procedure provided for in management rule 71 could be seen to be consensual and did not provide for compulsory arbitration.

On this basis, the Body Corporate had reasonable prospects of success on appeal and should therefore be given special leave to appeal.

NATIONAL CREDIT REGULATOR v OPPERMAN

A JUDGMENT BY VAN DER WESTHUIZEN J
(MOGOENG CJ, MOSENEKE DCJ, KHAMPEPE J, NKABINDE J and SKWEYIYA J concurring, CAMERON J, FRONEMAN J and JAFTA J dissenting)
CONSTITUTIONAL COURT
21 AUGUST 2012

2013 (2) SA 1 (CC)

Credit Transactions

Section 89(5)(c) of the National Credit Act (no 34 of 2005) is unconstitutional and cannot be applied so as to deny an unregistered credit provider the right of restitution of money lent.

THE FACTS

Opperman, who was not a registered credit provider, lent Boonzaier R7m. Boonzaaier was unable to repay the loan. Opperman applied for the sequestration of Boonzaaier's estate. At the hearing of the application, the high court raised the question whether or not section 89(5)(c) of the National Credit Act (no 34 of 2005) was consistent with the right not to be arbitrarily deprived of property, recognised in section 25(1) of the Constitution.

The high court decided that it was not, and declared the provision unconstitutional.

The National Credit Regulator appealed.

THE DECISION

Section 89(5) provides that if a credit agreement is unlawful in terms of that section, a court must order that-
(a) the credit agreement is void as from the date the agreement was entered into; (b) the credit provider must refund to the consumer any money paid by the consumer under that agreement to the credit provider, (c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either-
(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or
(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

Section 25(1) of the Constitution provides that no-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Section 89(5)(c) provides that in the circumstances described, the rights of a credit provider to recover money paid or goods delivered to the consumer must either be cancelled, or forfeited to the state if the consumer would be unjustly enriched, regardless of turpitude or other factors relevant in a fairness or public policy inquiry. Upon this interpretation, section 89(5)(c) would differ substantially from the common law by taking away a credit provider's right to restitution. Money paid by the credit provider to the consumer under the unlawful and void agreement stays with the consumer, because all the 'purported rights' of the credit provider to recover money are 'cancelled', unless cancellation would 'unjustly enrich' the consumer. The question however, is what happens if the consumer would indeed be unjustly enriched?

Section 89 provides that the loan in question should be considered void. However, this is insufficient reason to deprive Opperman of his right to restitution of the money lent. The recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic.

The effect of the section is to arbitrarily deprive Opperman of his property. The deprivation was not partial but complete. The purpose of the section - to deter unscrupulous money lenders - was insufficient to justify such deprivation. The means chosen to achieve this purpose were disproportionate to the purpose. Thus it resulted in arbitrary deprivation of property in breach of section 25(1) of the Constitution, and could not be justified in terms of section 36(1) of the Constitution.

The appeal was dismissed.

BALKIND v ABSA BANK

A JUDGMENT BY ALKEMA J
EASTERN CAPE HIGH COURT
12 DECEMBER 2012

2013 (2) SA 486 (ECG)

The effect of* Sebola v Standard Bank of South Africa Ltd *2012 (5) SA 142 (CC) is to require that a credit provider take reasonable steps to ensure that a notice in terms of section 129(1) of the National Credit Act (no 34 of 2005) probably reached the consumer who would have reasonably collected the notice from the post office

THE FACTS

Absa Bank Ltd brought an action against Balkind as surety for payment of R103 173,76. The suretyship agreement upon which it sued cited his domicilium as an address in East London. The notice issued in terms of section 129(1) of the National Credit Act (no 34 of 2005) prior to summons did the same. The bank secured a track-and-trace report which showed that the notice was delivered to the post office in the area of the domicilium address.

At the time of the issue of the notice, Balkind was not resident at the address but had moved to Johannesburg. He was not aware of the notice, nor of the summons when judgment was taken against him. When the warrant of execution was delivered to him, Balkind applied for rescission of judgment. He contended that there had not been compliance with the delivery requirements for the section 129(1) notice as required by *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

THE DECISION

Sebola held that despatch of a section 129(1) notice by registered post is not enough and that proof by means of the post office ‘track and trace’ report, that the registered post reached the correct post office, would constitute proper delivery of the notice to the consumer. The question arises whether, on a reading of *Sebola*, the jurisdictional requirements of section 129 are met on proof of registered post and delivery to the correct post office, or only on proof that the notice came to the attention of the consumer.

Sebola stated that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer. What is required is that reasonable steps were taken by the credit provider to ensure that the notice probably reached the consumer who would have reasonably collected the notice from the post office.

In the present case, it was not disputed that the notice never reached Balkind and did it come to his attention. Since the section 129 notice was not brought to his attention as required by Sebola, and the jurisdictional requirements of section 129 were thus not met, the legal proceedings instituted by the bank were premature in terms of s 129(1)(b).

Rescission of judgment was granted.

FIRSTRAND BANK LTD v OWENS

A JUDGMENT BY LEWIS JA (MHLANTLA JA, TSHIQI JA, ERASMUS AJA and PLASKET AJA concurring)
SUPREME COURT OF APPEAL
23 NOVEMBER 2012

2013 (2) SA 325 (SCA)

A notice in terms of section 129(1)(a) of the National Credit Act (no 34 of 2005) is not required where a notice under section 86(10) has been given.

THE FACTS

Owens bought a Honda vehicle from FirstRand Bank Ltd. The purchase price was to be paid in instalments over a period of 78 months. She took possession of the vehicle but defaulted in making payment. Owens applied for debt review in terms of section 86(1) of the National Credit Act (no 34 of 2005). The process was not completed.

More than a year after applying for debt review, she remained in default in respect of instalment payments to FirstRand. Acting in terms of section 86(10), FirstRand gave notice to her, to the debt counsellor appointed in terms of the section, and to the National Credit Regulator, terminating the debt review. Owens remained in default.

FirstRand then brought an action against her. It asserted that their agreement was terminated and claimed return of the vehicle and costs. Owens gave notice to defend the action. FirstRand applied for summary judgment against her. Owens opposed the application. The court hearing the matter refused summary judgment on the grounds that a credit provider, upon termination of debt review proceedings in terms of section 86(10), is not entitled to enforce the credit agreement without having given notice to the debtor as required by sections 129 and 130 of the National Credit Act.

THE DECISION

A reading of sub-section (1) of each of sections 129 and 130 shows that if the credit provider wishes to enforce the debt, a notice must be given by it to the consumer in terms of section 129(1)(a). That subsection also makes it clear that the credit provider must draw to the consumer's attention the possible methods of resolving the debt default.

By contrast, section 86(10) assumes knowledge on the part of the consumer of these methods: it applies only where the consumer has already applied for debt review. A notice under section 129(1)(a) is thus redundant where the consumer has already taken steps to rearrange her debts. That is why section 129(1)(b)(i) states that in order to commence legal proceedings, a credit provider must give notice either under section 129(1)(a) or section 86(10). The former applies where there has been no debt review. The latter applies where there has been.

It follows that a notice in terms of section 129(1)(a) is not required where a notice under section 86(10) has been given.

NATIONAL CREDIT REGULATOR v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY NUGENT JA (PONNAN JA, MALAN JA, PILLAY JA and SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
15 NOVEMBER 2012

2013 (1) SA 628 (SCA)

The restriction that was imposed on the administration fee under the Usury Act must be taken, under para 7(2), to be imposed on the comparable service fee under section 101(1)(c) of the National Credit Act.

THE FACTS

Standard Bank of South Africa Ltd granted loans at a time when the Usury Act (no 73 of 1968) applied to them. The Act, inter alia, regulated the administration fee which a lender could charge a borrower in respect of such loans.

The bank contended that when the National Credit Act 34 of 2005 came into force, superseding the Usury Act, the the limit imposed on administration fees under the Usury Act did not survive the transition to the National Credit Act so far as extant home loans were concerned, with the result that administration fees on those loans ceased to be regulated.

The National Credit Regulator applied to the South Gauteng High Court for an order restraining the bank from charging administration fees on those loans in excess of the maximum amount set under the Usury Act, alternatively declaring the bank to be entitled to no more than that amount.

THE DECISION

Given the tight regulation under both statutes of the fees that may be charged on the administration of home loans, it would be extraordinary if the drafter of the National Credit Act had chosen to terminate the regulation of such fees on existing loans.

The transitional provisions in the National Credit Act make it clear that the drafter was aware that the regulation of existing agreements had to be provided for. Existing agreements were subjected to the regime of the National Credit Act in certain respects. Paragraph 7 provides for the ‘general preservation of regulations, rights, duties, notices and other instruments’ and sub-section 2 of that paragraph provides that any other right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act which had not been spent or fulfilled immediately before the effective date must be considered to be a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

The restriction that was imposed on the administration fee under the Usury Act must be taken, under para 7(2), to be imposed on the comparable service fee under section 101(1)(c) of the National Credit Act. It remains, however, the administration fee formerly imposed by the Usury Act.

COMMAND PROTECTION SERVICES (GAUTENG) (PTY) LTD v SOUTH AFRICAN POST OFFICE LTD

A JUDGMENT BY BRAND JA (MTHIYANE DP, CLOETE JA, PILLAY JA and SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
16 NOVEMBER 2012

2013 (2) SA 133 (SCA)

Contract

An acceptance of an offer which expressly states that the acceptance is subject to certain conditions being fulfilled cannot result in a concluded contract if those conditions are not fulfilled.

THE FACTS

The South African Post Office Ltd invited tenders for the provision of security services at its post offices. Command Protection Services (Gauteng) (Pty) Ltd submitted a tender proposal. In due course, the post office wrote a letter of acceptance Command stating that the Tender Board had awarded the tender proposal to it. It stated that as a result Command was appointed as the supplier of the service as per the tender proposal. The appointment was subject to BEE improvement and the successful finalisation and signing of a formal contract. A draft contract would be forwarded to Command within seven working days for its comment and to the effect mutually agreed on amendments and finalisation into a formal contract.

While the parties were negotiating the final contract, Command began providing security services in three operational areas.

The post office then informed Command that it had engaged in conduct that had materially and seriously undermined the trust and utmost good faith relationship between the parties, as a result of which it would not continue contractual negotiations, and the existing month-to-month contract would come to an end.

Command considered this to be a repudiation of an existing contract which had arisen when the post office had informed Command that its tender proposal had been accepted. It contended that when the post office issue that letter, this constituted an unconditional acceptance of Command's offer contained in the tender document. Command sued for damages.

THE DECISION

Often when complicated transactions are negotiated, the parties reach agreement by tender (ie offer) and acceptance while there are clearly some outstanding issues that require further negotiation and agreement. Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked the intention to contract because it was conditional upon consensus being reached, after further negotiation, on the outstanding issues. In that event the law will recognise no contractual relationship, despite the offer and acceptance, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail.

Were it not for the fact that the post office's letter to Command stated that the appointment was 'subject to' the two matters stipulated, there was sufficient basis for a concluded contract in the exchange of communications between the two parties. However, these words made it clear that the communications were not sufficiently certain to constitute a provision of a contract, whether in the form of a condition or a term. Though it indicates that the post office was not satisfied with Command's existing BEE status, it is not clear in what respect and to what extent that status would have to improve in order to meet the post

office's requirements. This was therefore clearly a topic on which the post office called for further negotiation and agreement.

The post office's letter therefore did not constitute an unconditional acceptance of the tender, but was intended by the post office and accepted by Command as a counter-offer. The agreement that came into existence when Command accepted this counter-offer was an agreement to negotiate.

The claim failed.

MKHWANAZI v QUARTERBACK INVESTMENT (PTY) LTD

A JUDGMENT BY SPILG J
SOUTH GAUTENG HIGH COURT
12 AUGUST 2011

2013 (2) SA 549 (GSJ)

A contract induced by fraudulent misrepresentation may be declared void, and any transfer of property effected on the strength of such a contract may be re-transferred to the innocent party.

THE FACTS

In 2007, Mkhwanazi contacted Quarterback Investment (Pty) Ltd represented by one Mthebe in order to obtain relief for her debt commitments. Mthebe gave her documents to sign. She signed them without reading them.

Some two years after signing the agreement Mkhwanazi received a municipal utility bill which, for the first time, reflected Quarterback as the account holder. Mthebe told that his company's name was put in for convenience as if they were paying for the water bill. Shortly thereafter, Mkhwanazi discovered that her fixed property had been sold to Quarterback and transferred to that company. She also discovered that the documents she had signed were a sale of property by instalments, the purchase price being R157 000, a lease agreement in terms of which she became the tenant at her property at a rental of R2 500 per month and a power of attorney for the transfer of the property. Upon these documents, Quarterback had paid certain amounts in satisfaction of Mkhwanazi's debts, and had taken transfer of her property.

Mkhwanazi applied for an order setting aside the transfer of her residential property, and declaring the underlying agreement of sale null and void. She also sought an order directing the Registrar of Deeds to transfer the property back into her name.

THE DECISION

The allegations of fraudulent misrepresentation which induced Mkhwanazi to conclude the agreements were uncontradicted. Quarterback therefore could not rely on Mkhwanazi's signature to the documents since her undisputed evidence was that Mthebe fraudulently misled her concerning their contents and lulled her into believing that it was unnecessary to go through them, as they conformed with his previous representations.

Mkhwanazi negotiated for a loan only and at all material times Quarterback, through Mthebe as its duly authorised representative, held out and fraudulently misrepresented to her that she was only concluding a loan agreement and that the documents she was given to sign hurriedly were so limited, knowing that she would rely on and be induced by these misrepresentations to sign, as it turns out she was. Furthermore, Quarterback fraudulently failed to disclose, as it was obliged to, having regard to their earlier negotiations, that the documents she was to sign were not in respect of a loan, but were in fact an out-and-out sale of her property to Quarterback at a unilaterally determined price.

The sale agreement was therefore invalid as it was tainted by fraud. The transfer of the property was to be set aside.

MAKULU PLASTICS & PACKAGING CC v BORN FREE INVESTMENTS 128 (PTY) LTD

Contract

A JUDGMENT BY LAMONT J
(TSOKA J and FRANCIS J concurring)
SOUTH GAUTENG HIGH COURT
28 AUGUST 2012

2013 (1) SA 377 (GSJ)

It is not permissible for a party to prevent another from entering into a contract with a third party if that party's interests are not affected by any contract so concluded.

THE FACTS

Born Free Investments 128 (Pty) Ltd leased its property to the second respondent. It was placed in liquidation. Occupation of the property was then taken by Makulu Plastics & Packaging CC. It and Born Free did not conclude a formal lease but Born Free rendered monthly invoices to Makulu for the rental formerly paid by the second respondent.

Disputes arose between Makulu and Born Free. Born Free then addressed the municipality with the request that it terminate the electricity supply to the property. Makulu attempted to obtain an electricity supply of its own from the municipality but this was refused. Born Free threatened the municipality with an interdict if it should conclude a supply agreement with Makulu.

Makulu then brought an application for orders designed to interdict and restrain Born Free from preventing it from entering into an agreement with the municipality in terms whereof the municipality would provide various services to the property, requesting, instructing or encouraging the municipality to terminate the supply of any services and hindering or obstructing it in respect of access to and use or enjoyment of the property. Makulu also sought relief against the municipality in the form of an order directing it to continue supplying services to the property subject to Makulu making the appropriate payments.

THE DECISION

The acts of Born Free in notifying the municipality of the fact that the property was occupied by a person with whom it had no contractual relationship, if the contractual relationship existed, would constitute an interference by Born Free in the contractual relationship between Makulu and municipality. The fact that the contractual relationship had not been concluded did not affect the position. It would have been concluded but for the interference. In terms of the lease agreement Born Free was by necessary implication, at the very least, to have co-operated with Makulu when it sought to conclude the services agreement with the municipality. It is apparent that the municipality, in consequence of the interference by Makulu, declined to conclude a contract with it. Born Free's conduct in performing acts designed to frustrate the free commercial activity of Makulu constituted a wrongful act.

Makulu had established prima facie that it occupied the property pursuant to a lease, that its occupation was untenable unless it had access to services, hence that the harm was irreparable, that there was no other form of appropriate relief available to the appellant, and the balance of convenience favoured continued occupation of the property by a party who was paying the rent.

The state of affairs had arisen in direct consequence of the correspondence addressed by Born Free to the municipality. There was also some evidence that Born Free was attempting to manipulate a state of affairs to put it in a stronger position to eject Makulu or force it to give in to its other demands.

Born Free was not at risk of being compelled to pay any amount due by Born Free to the municipality. Accordingly, the relief sought by Makulu should be granted.

CROOKES BROTHERS LTD v REGIONAL LAND CLAIMS COMMISSION, MPUMALANGA

Contract

A JUDGMENT BY PONNAN JA
(CLOETE JA, CACHALIA JA,
WALLIS JA and SOUTHWOOD
AJA concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2012

2013 (2) SA 259 (SCA)

A claim brought upon the basis of a provision for mora interest payable in the event of default is not a damages claim.

THE FACTS

Crookes Brothers Ltd sold land to the Regional Land Claims Commission, Mpumalanga, and the other respondents for R200m. In terms of clause 6 of the sale agreement, should any part of the purchase price not be paid on due date, the purchaser would be liable for payment of interest to the seller on the amount outstanding at the rate of interest prescribed from time to time in terms of the Prescribed Rate of Interest Act (no 55 of 1975), which would be calculated from date of default to date of payment. Such interest would be in addition to, and not in substitution for, the rights accorded to the seller elsewhere in the agreement.

The Commission did not provide a written undertaking for the payment of the purchase price within 14 days of being called upon to do so, as required by the agreement. They ultimately did so, and paid the purchase price upon transfer. Crookes then claimed mora interest in terms of clause 6 at the rate of 15½% per annum in terms of the Act, amounting to R22 761 643,85.

The Commission contended that the claim against them was not one which could be brought in terms of the Act because that Act would only have applied to delay in payment following transfer, and that their claim was, properly understood, a damages claim.

THE DECISION

There was no reason why clause 6 would not apply. Of the many obligations imposed on the parties, the two relevant that were imposed on the respondents were first, to furnish a guarantee within 14 days of a written request and, second, to pay the purchase price no later than 10 days after transfer. The second was not an independent and self-standing obligation but was dependent for its fulfilment upon the first. The respondents' obligation to fulfil the second could not have arisen until the first had been satisfied. They breached the agreement by not furnishing the written undertaking for the payment of the purchase price within 14 days of being called upon to do so. That breach caused a delay in effecting transfer of the properties and, as a result, a delay in the payment of the purchase price.

It followed that clause 6 did apply. The claim was not a damages claim. It is an accepted tenet of our law that a party who has been deprived of the use of his or her capital for a period of time has suffered a loss.

The fact that Crookes may have had the benefit of the property was irrelevant because a default-interest clause had been agreed on and the seller's continued possession of the sold property occurred as a consequence of the purchaser's deliberate default.

The claim succeeded.

NORTJE v FAKIE

A JUDGMENT BY SWAIN J (BOOYSEN AJ concurring)
KWAZULU NATAL HIGH COURT
7 APRIL 2011

2013 (1) SA 577 (KZP)

A sale agreement which empowers a conveyancer to give notice of mora to the purchaser requires that the conveyancer and not the seller's attorney give the relevant notice.

THE FACTS

Fakie bought fixed property from Nortje. In terms of the sale agreement, in the event of there being any delay in connection with the registration of transfer for which the purchaser was responsible, the purchaser undertook to pay interest on the purchase price at the rate of 18% per annum, calculated from the date on which the purchaser was notified in writing by the conveyancers of being in mora to the date upon which the purchaser ceased to be in mora.

Nortje alleged that there was a delay in connection with the registration of transfer. His attorney gave notice in writing to Fakie.

In litigation which then ensued between the parties, Nortje contended that he was entitled to enforce the provision in question despite the fact that notice had been given by his attorney and not a conveyancer.

THE DECISION

The clause in question placed the conveyancer in the position to give notice because a conveyancer is best able to determine whether or not a delay has taken place. The conveyancers were pre-eminently qualified to determine, for the purposes of the provision, first, whether there had been a delay in connection with the registration of transfer and, secondly, whether Fakie was responsible for the delay. The provision clearly conferred upon the conveyancers the power to make a value judgment on the conduct of Fakie and to then notify him in writing that he was placed in mora.

Nortje's attorney was therefore not entitled to issue the notice.

SANDOWN TRAVEL (PTY) LTD v CRICKET SOUTH AFRICA

Contract

A JUDGMENT BY WEPENER J
SOUTH GAUTENG HIGH COURT
7 DECEMBER 2012

2013 (2) SA 502 (GSJ)

A party faced with anticipatory breach of contract which initially insists on proper performance of the contract is entitled to change its position and cancel the contract when the breach of contract actually takes place.

THE FACTS

Sandown Travel (Pty) Ltd supplied travel agency services to Cricket South Africa in terms of a contract concluded between the two parties. The contract provided that it would subsist for two years commencing on 1 October 2009. It further provided that either party could give written notice of intention to terminate at least 6 months before the end of the contract date. In the event of such notice not being forthcoming at least 6 months before the end of the contract date then the contract would automatically renew for another year, on the same terms and conditions, subject to the same 6 months notice process applying to the new period.

On 6 April 2011, Cricket wrote to Sandown stating that it wished to terminate the agreement after the effluxion of the initial period of two years, which would be 30 September 2011. Sandown responded with a letter stating that Cricket was obliged in terms of the contract to give it written notice of intention to terminate the contract, at least 6 months prior to 30 September 2011. As the notice to terminate the contract was not given on or before 30 March 2011, the contract was automatically renewed for a further year and would now terminate on 30 September 2012.

Cricket reiterated its position in June 2011 and Sandown responded by reiterating its rejection of Cricket's position. The parties met in order to resolve their difference regarding termination of the contract but reached no resolution. Sandown remained of the view that the contract would subsist between them until 30 September 2012 and Cricket remained of the view that it would not.

On 10 October 2011, Sandown wrote to Cricket stating that since it no longer utilised its services in terms of the contract, but instead utilised the services of Rennies Travel, this together with its termination letter, constituted a repudiation of the contract, which repudiation it accepted.

Sandown claimed damages of R1.64m. Cricket defended the action on the grounds that as Sandown had initially chosen to insist on compliance with the contract, it had not been entitled to cancel the contract.

THE DECISION

The letter of 6 April 2011 constituted a repudiation of the contract. As from that date, and thereafter, Cricket deliberately and unequivocally stated that from October 2011 it intended to no longer be bound by the terms of the agreement. This amounted to a repudiation or anticipatory breach of the agreement on the part of Cricket.

Sandown's response was to insist on performance of the contract. However, on 10 October 2011, it decided to cancel the contract. Cricket contended that Sandown could not 'approbate and reprobate', ie could not keep the contract in existence and then have a change of heart and cancel it. Consequently, it was precluded from claiming damages based on cancellation.

This contention however, did not take into account the right of a party facing anticipatory breach to reconsider its position when the time for performance arrives. The principle, that an innocent party can change his or her mind if the guilty party persists in his or her repudiation at the time when performance in terms of the contract arrives is limited to cases of anticipatory breach of an agreement, ie a

breach of the agreement before the date on which performance is due. This was the situation which had arisen, and therefore Sandown had been entitled to cancel the contract on 10 October 2011.

On the assumption that Sandown was nevertheless bound by its choice to keep the contract alive, even though its cancellation did not include a tender to perform, its particulars of claim still disclosed a cause of action for damages as a surrogate for performance, based on Cricket's repudiation of the contract.

The action for damages succeeded.

The plaintiff's response to the repudiation was clear. It elected to treat the agreement as binding and not to cancel the agreement. This much is clear from the plaintiff's communications to the defendant. Also, in evidence Mr Newall said that as far as he was concerned it was 'business as usual' for the plaintiff. He said during cross-examination that throughout the period April 2011 to shortly before 10 October 2011, the plaintiff sought to persuade the defendant to comply with the provisions of the agreement. The letter of 10 October 2011, in which the plaintiff stated that it accepted the defendant's repudiation and sought to cancel the agreement, is in conflict with its initial election.

Applying the above principles, the plaintiff would ordinarily be bound by its election to enforce the agreement and it could therefore not later cancel the agreement, unless there is another ground upon which the plaintiff can rely.

ACL GROUP (PTY) LTD v QICK TELEVENTURES FZE

JUDGMENT BY SNELLENBURG AJ
FREE STATE HIGH COURT
12 JULY 2012

2013 (1) SA 508 (FB)

A duly registered external company, conducting business in South Africa, cannot be said to be resident in the Republic for purposes of section 28(1) of the Supreme Court Act (no 59 of 1959), even if the cause of action arises from the business activities of the external company in the Republic

Corporations

THE FACTS

Qick Televentures KZE was incorporated in the United Arab Emirates. It was registered as an external company in South Africa.

ACL Group (Pty) Ltd entered into a contract with Qick for the supply of certain subcontracting services relating to horizontal drilling and ancillary services. The agreements provided for the supply of specific services, associated equipment and materials, so as to enable Qick to satisfy its obligations and liabilities under a separate contract with Nokia Siemens Networks.

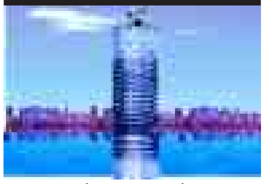
ACL alleged that Qick owed it R4 437 670 arising from their agreement. It applied for the attachment of certain certain movable assets of Qick in order to found or confirm jurisdiction in South Africa.

THE DECISION

In order to succeed with an application for attachment ad confirmandam jurisdictionem, an applicant must prove that (i) it has a prima facie cause of action against the defendant, (ii) that the defendant is a peregrinus, (iii) that the property in which the peregrinus defendant has a beneficial interest is within the Republic, (iv) that the cause of action arose in the area of jurisdiction of the court. In order to succeed with an application for attachment ad fundandam jurisdictionem the applicant must also prove that the property in which the peregrinus defendant has a beneficial interest is within the area of jurisdiction of the court.

Qick admitted that it was a peregrinus but contended that registration as external company, and the designation of a registered address, implied that it carried on business in South Africa and was as such sufficiently resident in the Republic to confer jurisdiction

FINTECH (PTY) LTD v AWAKE SOLUTIONS (PTY) LTD



A JUDGMENT BY VAN OOSTEN J
SOUTH GAUTENG HIGH COURT
8 OCTOBER 2012

2013 (1) SA 570 (GSJ)

A court may exercise its inherent jurisdiction to validate acts done by a company at a time when it was deregistered in circumstances where the company has been reinstated as a company.

THE FACTS

At a time when it had been deregistered as a company, Awake Solutions (Pty) Ltd applied for an order against Fintech (Pty) Ltd that it pay amounts of R72 310,20, allegedly being a profit share payable to Awake, and R437 622,60, allegedly being interest payable to it. The parties reached an agreement on an amount Fintech would pay Awake, and Fintech duly made payment.

At a later stage, the deregistration of Awake was cancelled by the Companies and Intellectual Property Commission under the provisions of the Companies Act (no 71 of 2008).

Fintech then brought an application against Awake for repayment of all amounts it had paid to Awake during the period of its deregistration, a total amount of R1 764 641,34 together with interest thereon. Fintech contended that because Awake was not a legal persona from the date of its deregistration, it could not have acted as it ostensibly did in the litigation, and the payments to Awake were made to a non-existing entity in the bona fide and reasonable belief that the entity in fact did exist.

THE DECISION

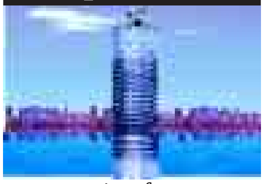
Section 82(4) of the Act read with reg 40(6) of the Companies Regulations provides for reinstatement of registration by the commission. In the present matter, however, the deregistration process of Awake was cancelled. The question which arose was whether there was any difference in meaning between the two concepts. There was this difference: the cancellation of the process connotes an elimination of the entire process, including the initial deregistration, as if it had never occurred, whereas reinstatement implies putting it back in its former position prior to deregistration. On this construction, by the cancellation of the deregistration process, Awake at all times remained a corporate entity. Therefore, on this basis, all acts it performed remained valid and binding at all times.

Assuming however, that Awake was reinstated as a company at the later stage, there was no reason why the court could not exercise its inherent jurisdiction, in view of the absence of enabling statutory provision under the 2008 Act, to validate anything done by or against it between deregistration and its reinstatement, and to make such order it considered appropriate.

The practical need to provide for the retrospective consequences of a reinstatement of a deregistered company was patently clear from the facts of the matter. In the time it was deregistered, Awake in all respects carried on business and was in operation as before, as if it were clothed with corporate personality. The payments made to Awake were all made in respect of an admitted liability. The litigation involving Awake was properly conducted.

There were therefore no grounds for Fintech's application. The application was dismissed.

Corporations



HENNIE LAMBRECHTS ARCHITECTS v BOMBENERO INVESTMENTS (PTY) LTD

A JUDGMENT BY THAMAGE AJ
FREE STATE HIGH COURT
15 NOVEMBER 2012

2013 (2) SA 477 (FB)

A genuine incola plaintiff who has a sustainable case but is impecunious should not be required to give security for costs in any action it has brought.

THE FACTS

Bombenero Investments (Pty) Ltd brought an action against Hennie Lambrechts Architects. The action alleged breach of contract, and claimed some R5.5m.

Hennie Lambrechts counterclaimed, and also applied for an order that Bombenero provide security for costs of the action in the sum of R150 000. Bombenero refused to disclose its financial position, and refused to provide the security claimed. It stated that having to pay the sum of R150 000 would disturb its cash flow.

Hennie Lambrechts sought an order that Bombenero provide security.

THE DECISION

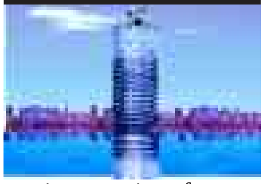
The new Companies Act (no 71 of 2008) does not make provision for a company providing security for costs. However, the common law remains, and the cases based on the old legislation may provide guidance in determining whether or not security for costs should be ordered.

It has been held that mere inability of a plaintiff, who is an incola, to satisfy a potential costs order against him is insufficient in itself in a case of a particular kind to justify an order that he furnish security for his opponent’s costs. Something more than this is required before that can be done. Although the courts have the inherent duty to guard against abuse of court process by vexatious, reckless or impecunious litigation, they should not close their doors to the genuine incola plaintiff who has a sustainable case but is impecunious.

There was no merit in the argument that Bombenero’s failure to show that it was solvent was in itself proof that the litigation was vexatious. An action is vexatious if it is obviously unsustainable. However, this was not the case in the present matter.

The application was dismissed.

LIVING HANDS (PTY) LTD v DITZ



A JUDGMENT BY MOKGABA J
SOUTH GAUTENG HIGH COURT
11 SEPTEMBER 2012

2013 (2) SA 368 (GSJ)

A shareholder owes no fiduciary duty to its company. An investment manager owes a duty to ensure that a party requesting transfer of an investment held with it is properly authorised.

THE FACTS

In May 2002 and September 2004, in its capacity as trustee of a trust, Living Hands (Pty) Ltd invested money with Old Mutual. By 5 October 2004, the amount of this investment stood at R1 124 137 589,46.

In an action brought six years later, Living Hands alleged that on 5 October 2004, Investec and other shareholders in Living Hands concluded a sale-of-shares agreement with Fidentia Holdings Ltd, in terms of which the shareholders sold all the issued shares in Living Hands to Fidentia for R93 million. Clause 4 of the agreement obliged Fidentia to deliver to Investec acting on behalf of the other shareholders, a letter from its bankers confirming to the reasonable satisfaction of the shareholders that it had sufficient funds to pay the purchase price, within three business days after the signature date. The shareholders had to provide signed transfer forms and written resignations of the then directors of Living Hands against payment of the purchase price. Investec did not receive, nor did it insist upon, the letter from Fidentia's bankers as stipulated in the agreement. However, in fulfilment of this condition, Fidentia furnished Investec with a letter from Standard Bank confirming the instruction to transfer R93 million to Living Hands' current account.

The particulars of claim alleged that on 14 October 2004, Living Hands, under new management, appointed Fidentia Asset Management Ltd (FAM) as portfolio manager of the funds. FAM delivered a letter to Old Mutual instructing it to liquidate R150 million of the funds and to transfer the proceeds into FAM's account. Old Mutual informed FAM that it would only act on a signed, written instruction from Living Hands, in which the proper appointment of FAM was confirmed. Living Hands then sent a letter to Old Mutual advising that FAM had been appointed as the investment manager of Living Hands and the Trust with effect from 14 October 2004, that FAM had a 'full discretionary mandate', and that FAM had full authority to deal with the investment portfolio as it saw fit.

They further alleged that on 19 October 2004 the directors of Living Hands were replaced by the fourteenth to seventeenth defendants. Living Hands informed Old Mutual that its board had resolved to call up its entire trust-investment portfolio with Old Mutual with immediate effect, and requested Old Mutual to transfer the funds to it immediately. Old Mutual transferred the funds to Living Hands which then paid the funds over to FAM for investment.

On 22 October 2010, Living Hands brought an action against its directors and against Old Mutual and Living Hands for payment of R1 124 137 589,46. It alleged that the funds were depleted by the alleged maladministration and misappropriation whilst under the administration of FAM. The alleged maladministration and misappropriation are attributable to the four directors who replaced the existing directors on 19 October 2004.

Old Mutual and Investec raised exceptions to the particulars of claim.

THE DECISION

Investec

Living Hands alleged that Investec breached its fiduciary duty and duty of care in its capacity as shareholder by not

preventing the conclusion and implementation of the sale-of-shares agreement. It contended that, at that time, Investec 'knew that Living Hands had granted FAM a mandate containing an unfettered discretion to invest and manage the trust funds. Investec's exception was to the effect that a shareholder does not in law owe the alleged duties to its company, that a shareholder does not in law owe the alleged duties to the beneficiaries of the trust of which its company is the trustee, and that even if Investec owed the alleged duties to it and the beneficiaries of the trust, the duties did not in law extend to a duty to protect Living Hands or the beneficiaries against losses of the kind they suffered in this case.

Living Hands sought to attribute obligations to Investec in its capacity as a minority shareholder selling its shares, which is an act of a shareholder, and not of the company. The duties sought to be imposed on Investec and other shareholders were too widely stated. It is not, for example, alleged that the position of the shareholders vis-à-vis the beneficiary funds created a special relationship between the shareholders and the trust beneficiaries from which a duty of care could be inferred. In the result it could be concluded that no sufficient nexus between Investec's conduct and the dissipation of the beneficiary funds had been alleged to show that there were considerations of policy to justify the extension of the Aquilian liability so as to cover the facts of the present case.

Should liability be extended on the amended particulars of claim as framed, this would have major and far-reaching consequences for company law in general and the duties of shareholders in particular. The risk of indeterminate liability for shareholders generally was real.

Old Mutual

Living Hands alleged that Old Mutual, knowing that the money would be placed under the administration of FAM, caused the funds to be paid to itself during the period from 26 October 2004 to 8 November 2004 without insisting on a 90-day notice period, that Old Mutual knew that FAM did not have the authority of Living Hands to address the request to Old Mutual, that this constituted a fraudulent attempt by FAM, to misappropriate R150m of the funds, that as at 15 October 2004 FAM had not been appointed as investment manager , and its directors did not have authority to deal with the investment portfolio as they saw fit in their capacity as representatives of FAM, alternatively Old Mutual ought to have suspected through the exercise of reasonable care and diligence that it had not received a lawful instruction from a recognised fund administrator addressed to it in the normal course of business.

It alleged in the alternative that Old Mutual ought to have known, alternatively ought to have reasonably suspected that FAM's actions constituted a fraudulent attempt to misappropriate R150 million of the funds, that knowing that an attempt had been made by FAM to fraudulently misappropriate part of the funds, ought not to have released the funds such as it did.

What happened before the funds were transferred was as important as what happened after. Old Mutual was aware, not only of the delicate and vulnerable nature of the funds, but also of its fiduciary duty in relation to those funds. Old Mutual ought have been put on alert by the very tenor of the request to it.

That Old Mutual owed a duty to the trust not to allow the dissipation of the funds could not be seriously disputed. This entailed a duty not to allow another party to gain access to the funds, especially with the knowledge of the circumstances that prevailed during the relevant period. The manner, and the indecent haste with which FAM attempted to gain access to the funds, made the dissipation of funds a reasonable foreseeability. For that reason Living Hands' particulars of claim contained sufficient averments necessary to found a cause of action such that a trial court might find Old Mutual to have been factually and legally partly the cause of the loss, jointly with others. Accordingly this ground of exception could not be upheld.

PROPSPEC INVESTMENTS (PTY) LTD v PACIFIC COAST INVESTMENTS 97 LTD

A JUDGMENT BY VAN DER MERWE J
FREE STATE HIGH COURT
28 JUNE 2012

2013 (1) SA 542 (FB)

A company which is in financial distress will not be placed under supervision for the purpose of business rescue if it cannot be shown that a business rescue practitioner would achieve a better return on the sale of the company's property than a liquidator.

THE FACTS

By way of a so-called 'private placing invitation' Pacific Coast Investments 97 Ltd invited investors to invest in a project for the development of serviced properties. The development would consist of two phases, after which the properties would be sold and the investments repaid.

In respect of the first phase, the purpose of the invitation was to raise funds to finance the company's acquisition of certain property in East London, measuring 16,6 hectares, payment of professional fees relating to the installation of infrastructure on the property, and the necessary private-placing costs and the promoter's fee. In respect of the second phase the purpose was the financing of the installation of electrical, civil and bulk services on the property, as well as the necessary private-placing costs and the promoter's fee.

Linked units were offered for subscription at R1000 per unit. Investors were persuaded to invest in the project by the offer of interest on shareholders' loans of 30% per annum calculated from closing date of the particular offer to date of completion of the project.

The first phase attracted investments in the amount of R26 152 900 and the second phase attracted investments in the amount of R35 711 000. This was in accordance with the projections in the private placing invitation. The two phases were completed and the projected 205 full-title erven and 330 sectional-title erven became available for sale at approximately the projected time. Not a single stand was sold. This caused the company serious financial distress. Payment of accelerated interest ceased and the project ground to a halt.

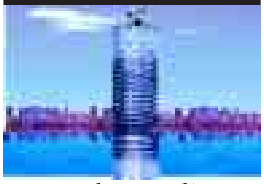
The liability of the company for repayment of shareholders' loans and interest thereon amounted to approximately R85 968 831. Propspec Investments (Pty) Ltd, the promoter of the project, was entitled to promoter's fees of approximately R8 901 197. However, it made a loan to the company in order to enable it to pay interest to the investors that opted for payment of accelerated interest. Other liabilities amounted to R337 046, so that the total liabilities of the company amounted to approximately R93 869 225. Apart from the amount of R40 033 in savings accounts, the property was the only asset of the company. The company has no employees.

Propspec applied for an order placing Pacific under supervision and commencing business rescue proceedings, and for appointment of an interim business rescue practitioner.

THE DECISION

In terms of the private placing invitation the total projected net profit of the project would be distributed as investors' return on investments. Therefore, even after successful completion of the project, the company would be left with no funds and no assets. Prospec's case was that the property should be sold, either as a whole or by sale of individual erven. It follows that there is no practical prospect of the company continuing to exist on a solvent basis.

There was no proper valuation of the property to show that the property or erven may be sold for more than the total liabilities of the company. The best proof of the market value of property is the price actually obtained in the open market. However, no sales of erven took place at all over a

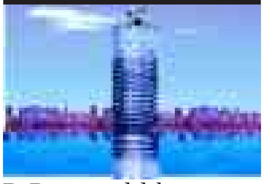


period of approximately 3 years.

The question was therefore whether there was a reasonable prospect that selling of the property by a business rescue practitioner would yield a better return than selling thereof by a liquidator. There was no reason why a sale by a liquidator should be a forced sale. In this matter all shareholders were also creditors and there were no employees. The liquidator must act on the directions of the creditors of the company. The return achieved by a liquidator was therefore no less advantageous than that which a business rescue practitioner might obtain.

The application was dismissed.

The question therefore is whether there is a reasonable prospect that selling of the property by a business rescue practitioner will yield a better return than selling thereof by a liquidator. The applicant says that the problem with the development was the economic downturn, as well as the chilling effect of the National Credit Act on obtaining credit from banks. The applicant says that there is improvement in respect of both these impediments. It says that the economy has improved and that 'the banks now grant 50% loans for the purchase of vacant land and much more favourable building loans'. This may be accepted, but is neutral. There is no reason why these factors would not apply equally to a liquidator and a business rescue practitioner.



STANDARD BANK OF SOUTH AFRICA LTD v R-BAY LOGISTICS CC

A JUDGMENT BY KING AJ
KWAZULU NATAL HIGH COURT
31 OCTOBER 2012

2013 (2) SA 295 (KZD)

If there is no real dispute that a company is deemed to be unable to pay its debts because it failed to respond to a demand in terms of section 69 of the Close Corporations Act (no 69 of 1984), a provisional winding up order may be given against the company. Any counterclaim raised by that company against the applicant may be taken into account by the court in deciding whether or not to grant such an order.

THE FACTS

Standard Bank of South Africa Ltd lent money to R-Bay Logistics CC by way of various instalment sale agreements and overdrafts. The bank delivered a demand for repayment in terms of section 69(1)(a) of the Close Corporations Act, and then brought an application for the winding up of R-Bay.

R-Bay disputed that the debt was due and payable. Its grounds were that a sum of R760 918,73 had earlier been paid to the bank, and it was subsequently discovered that this was not payable then to the bank. R-Bay contended that the claim on which the bank brought the winding up application was based on a debt which was not due, owing and claimable.

The bank's application was based on the provisions of chapter 14 of the Companies Act (no 61 of 1973). It alleged that, as provided for therein, the bank could apply for the winding up of R-Bay on the grounds that it was unable to pay its debts as they fell due.

R-Bay opposed the application on the grounds that the bank had not provided sufficient evidence that it was insolvent and so could not rely on chapter 14 for its application.

THE DECISION

Nothing in the new Companies Act changed any of the provisions of ch 14 of the old Companies Act. Accordingly, for the purpose of winding up an insolvent company, the provisions of that chapter had to regulate the basis upon which R-Bay could be wound up. Of particular relevance is section 344(f) which requires an applicant to prove that the respondent company is unable to pay its debts, as contemplated in section 345 of the old Companies Act. Accordingly, an applicant must establish one or other of the grounds for winding-up contemplated in section 344, including, in particular, that the respondent company is unable to pay its debts.

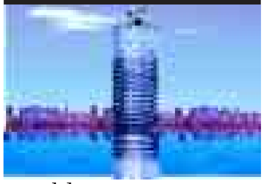
The evidence showed that R-Bay had fallen into arrears in regard to the instalment sale agreements. It was therefore clear that it was indebted to the bank and had not paid debts which were due and payable. The bank was entitled to call up the full amount payable under the instalment sale agreements.

The only answer to this given by R-Bay was that the bank owed it money because it had paid a larger amount at an earlier stage. This however, did not give rise to any real dispute that the bank's claims were due and payable. Hence, there was no real dispute that R-Bay was deemed to be unable to pay its debts because it failed to respond to the bank's demand in terms of section 69 of the Close Corporations Act. Instalments under the instalment sale agreements were unpaid and payment of the full balance owed thereunder was accordingly accelerated. Despite demand, the amounts owed under the two overdrafts were not paid and they accordingly became due, owing and payable as well.

The application was granted.

SCANIA FINANCE SOUTHERN AFRICA (PTY) LTD v THOMI-GEE ROAD CARRIERS CC

Corporations



JUDGMENT BY SNELLENBERG AJ
FREE STATE DIVISION
19 JULY 2012

2013 (2) SA 439 (FB)

An applicant may, in terms of section 9 of sch 5 of the 2008 Act, approach the court for the liquidation of a respondent company or close corporation on the ground of its inability to pay its debts in terms of section 344(f). Section 345 and section 69 of the Close Corporations Act are still deeming provisions. Such an applicant need not prove that the respondent company is insolvent.

THE FACTS

Thomi-Gee Road Carriers CC owed Scania Finance Southern Africa (Pty) Ltd R1 089 659,34. A certain payment was received during February 2012 from a debtor of Thomi-Gee, which was earmarked to be allocated on its arrears. This payment followed a demand made on it in terms of section 69(1)(a) of the Close Corporations Act (no 69 of 1984). No response has been forthcoming.

Scania then applied for the winding up of Thomi-Gee. It based its application on the allegation that Thomi-Gee was unable to pay its debts and was commercially insolvent.

The court raised the question whether in the light of the new Companies Act (no 71 of 2008), Scania could not rely on section 69(1)(a) and had to allege and prove that Thomi-Gee was insolvent. In a previous case. it had been held that the grounds set out in section 81 of the new Act only apply to solvent companies. In that court, it was noted that in order to rely on the grounds for liquidation in ch 14 of the 1973 Act, an applicant must first (and as sine qua non) prove insolvency, ie that the company is not solvent and therefore that section 81 is not applicable. It followed from this that, should an applicant be unable to prove insolvency, such applicant must then make out a case for winding-up in terms of section 81. The failure to respond to a demand in terms of section 69 will in such event constitute a factor that may, or may not, assist such an applicant to rely on the ground that it is just and equitable to liquidate.

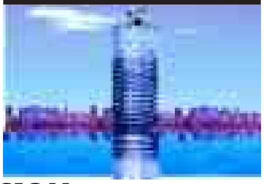
THE DECISION

The reasoning of the judgment in the previous case could not be supported. The misconception of requiring a creditor to prove insolvency before being able to rely on ch 14 of the previous Act was apparent merely from the provisions of section 345, read with section 344 of that Act, which clearly did not provide for factual insolvency, but only a deemed inability to pay debts.

An applicant may, in terms of section 9 of sch 5 of the 2008 Act, approach the court for the liquidation of a respondent company or close corporation on the ground of its inability to pay its debts in terms of section 344(f). Section 345 and section 69 of the Close Corporations Act are still deeming provisions. Such an applicant need not prove that the respondent company is insolvent in order to rely on ch XIV of the previous Act.

The application was granted.

ROESTORF N.O. v JOHNS



A JUDGMENT BY LOPES J
KWAZULU NATAL HIGH COURT
28 JUNE 2012

2013 (2) SA 459 (KZD)

Majority shareholders may not bring an action for damages which properly lies with the company of which they are shareholders.

THE FACTS

Roestorf and the second plaintiff were trustees of a two trusts which owned shares in Two Wheel Investments (Pty) Ltd. The company traded as Tommy Johns Motorcycles in Old Main Road in Pinetown, and held principal dealerships with BMW and Kawasaki.

In April 2004, Johns took up employment with the business. The business went well for approximately the first 18 months. BMW and Kawasaki expressed dissatisfaction with the way in which Johns conducted the business, and cancelled the dealerships. Thereafter, the business went into steep decline and it was closed and liquidated in 2007.

Roestorf and the second plaintiff alleged that the failure of the business was caused by Johns, and claimed from her the sum of R2 742 521,35, being damages sustained by the trusts for the loss of their shares and loan accounts in the company consequent upon its liquidation.

Johns objected to the claim on the grounds that in accordance with *Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189) the action should have been brought by the company and not its shareholders.

THE DECISION

The plaintiffs were the majority shareholders, holding 75% of the shares. They wished to recover the loss in the value of their shares and their loan accounts from the 25% minority shareholder. There is no reason why they could not have passed a resolution authorising the action on behalf of the company to recover the losses sustained by the company as a result of the actions of the defendant.

The plaintiffs had a financial interest in the business of the company. But the fact that their shareholding was affected by the conduct of the defendant did not give them a right of action per se against Johns. They had not demonstrated that their action fell outside the rule, or within any of the exceptions recognised in *Foss v Harbottle*.

In any event, since the action lay in the first instance by the company, then if all the creditors were not paid, any amount recovered by the company could have gone to the creditors who suffered a shortfall. To allow the present action would be to circumvent the liquidation process in its entirety and award a dividend to shareholders which may not have been warranted.

The objection was upheld.

UNION FINANCE HOLDINGS (PTY) LTD v BONUGLI N.O.

A JUDGMENT BY VAN OOSTEN J
SOUTH GAUTENG HIGH COURT
9 MAY 2012

2013 (2) SA 449 (GSJ)

Prescription

A mistaken debit entry on an account gives rise to a claim for correction on the date on which it is made, and therefore the period of prescription should run against the debt so created from that date.

THE FACTS

Bonugli, in his capacity as trustee of a trust, and the other respondents held a cheque account in the name of the trust with Union Finance Holdings (Pty) Ltd.

The trust brought an action against Union Finance alleging that it had incorrectly passed debits against its account during the period from 31 January 2000 to 31 December 2005. It sought an order declaring that the debits were incorrectly passed and that the trust was not liable to Union Finance for the amounts of the debits, an order directing Union Finance to reverse the debits and pass corresponding credits for the amounts of the debits, and an order for payment of the total amount of R77 113 759,50, interest thereon and costs.

In February 2012, Union Finance applied for leave to introduce certain counterclaims based on alleged incorrect accounting. It claimed that the trust's account should be amended by the reversal of a large number of credits and debits, resulting in new and increased debits of some R3m more than the amount of the initial debits, and further included other amounts which had not before been debited to the account.

Bonugli opposed the application on the grounds that the claims had prescribed. Union Finance contended that section 13(2) of the Prescription Act (no 68 of 1969) applied. The section provides that a debt which arises from a contract and which would, but for the provisions of this subsection, become prescribed before a reciprocal debt which arises from the same contract becomes prescribed, shall not become prescribed before the reciprocal debt becomes prescribed.

THE DECISION

Because of the nature of the account, which was operated as a current account, where payments were effected by means of debits or credits from time to time, all entries made on the account are were subject to the laws of set off. Set off could be applied if it could be shown that the respective claims were reciprocal.

Union Finance claimed that the agreement between the parties was an implied agreement. Accepting this to be the case, the debits and credits applied to the account were made in terms thereof, but this did not create an interdependency of obligations in the strict sense, when a reversal of the debts arose. Furthermore, it could not be said that by virtue of the implied agreement, a relationship thereby existed between the parties, which was of such a nature as to indicate that the one was undertaken in exchange for the other. A correction would result in a reversal but that flowed from the mistaken entry and not the nature of the relationship between the parties. No reciprocity of debts had therefore been shown. Section 13(2) of the Prescription Act did not apply.

A period of more than three years had elapsed from the date on which the debts became due until the application was begun. The counterclaims had therefore prescribed.

BRIDON INTERNATIONAL GMBH v INTERNATIONAL TRADE ADMINISTRATION COMMISSION

A JUDGMENT BY BRAND JA (CLOETE JA, MHLANTLA JA, WALLIS JA and SOUTHWOOD AJA concurring)
SUPREME COURT OF APPEAL
30 MAY 2012

2013 (3) SA 197 (SCA)

Competition

Section 35(3) of the International Trade Administration Act (no 71 of 2002) may be applied to disclosure in review proceedings and is not confined to proceedings before the Commission. A court may therefore make an order requiring disclosure of information supplied to it by a company, provided that the order takes into account the interests of the relevant parties.

THE FACTS

In 2007, the International Trade Administration Commission considered an application for the continuation of anti-dumping duties which were then in place in respect of imports of steel-wire rope. The application was made by Scaw South Africa (Pty) Ltd, a competitor of Bridon International Gmbh.

The Commission requested information of these parties, as well as of Casar Drahtseilwerk Saar Gmbh, another competitor. The parties provided the Commission with extensive and confidential information regarding their business activities. The Commission recommended the continuation of and an increase in anti-dumping duties levied on wire ropes exported by some German manufacturers, including exports by Casar. But with reference to exports by Bridon, the Commission recommended that no anti-dumping duties be imposed.

The Commission's recommendations were accepted by the Minister of Trade and Industry. The anti-dumping duties recommended by the Commission were then imposed by publication in the Government Gazette of 13 February 2009. Casar applied for a review of the decision in terms of section 46 of the International Trade Administration Act (no 71 of 2002).

As required by Rule 53 of the Rules of Court, the Commission disclosed the record of proceedings on which its decision was based. In doing so, it divided the information into confidential and non-confidential parts, and disclosed only the non-confidential part.

The court hearing the review application ordered that the confidential parts of the record also be disclosed, but under strict conditions. Bridon appealed against this order. The Commission took the view that the matter was governed by section 35 of the Act and should be dealt with in terms of its provisions. The section provides for the resolution of a conflict of interests between a party wishing access to confidential information supplied to the Commission by another party.

THE DECISION

Section 35(3) of the Act provides that a court may determine whether information alleged to be confidential is confidential or should be recognised as such, and then make an appropriate order concerning access to that information. The section may be applied to disclosure in review proceedings. It is not confined to proceedings before the Commission.

Bridon contended that the basis of confidentiality in regard to sensitive information such as it had provided to the Commission was the public interest. However, it was doubtful whether a party such as Bridon could depend on public privilege, this being something more appropriately available to a public body such as the Commission.

Disallowing disclosure of Bridon's confidential information would effectively deprive Casar of a fair hearing in the main application. Casar's interest in disclosure therefore enjoyed constitutional protection, not only under section 32 of the Constitution, which guarantees everyone's right of access to any information held by the state, but also under section 34, which guarantees the right to a fair public hearing before a court.

By imposing the strict

conditions regarding disclosure, the court hearing the review application had ensured that its order fairly weighed up the competing interests of the parties involved. The order limited access to the confidential part of the Commission's record to legal representatives of the parties in the main application and one independent expert appointed by each party to assist in that application. In addition, these persons would only have access after they have signed a confidentiality undertaking in the form dictated by the order. In terms of that undertaking the signatory pledges not to divulge the information that he or she obtained from the record to anybody outside the stipulated group of persons, which group does not include the parties themselves or any of their employees.

In the circumstances, the order granted by the court was appropriate, and could not be challenged. The appeal failed.

As I see it, the approach to the recognition of public interest privilege on the facts of a particular case in both the United Kingdom and Canada therefore depends on a judicial evaluation of the balance between two conflicting public interests. On the one hand there is the public interest in finding the truth in court proceedings. This is to be weighed up against the countervailing public interest which sometimes requires that the confidentiality of information be maintained. In support of its argument that in this case the latter interest outweighs the former, Bridon relied on evidence produced in the answering affidavit of both itself and the Commission. What this evidence shows, in broad outline, is that, in the same way as in Crompton, the Commission is vitally dependent, in its investigations into anti-dumping, on receiving commercially I sensitive evidence supplied by third parties who may refuse to co-operate if the confidentiality of their information is not ensured.

BRIGHT BAY PROPERTY SERVICE (PTY) LTD v MORAVIAN CHURCH IN SOUTH AFRICA

A JUDGMENT BY HENNEY J
WESTERN CAPE HIGH COURT
31 OCTOBER 2012

2013 (3) SA 78 (WCC)

Companies

Acts performed by a company while it is deregistered cannot be retrospectively validated in terms of the Companies Act (no 71 of 2008).

THE FACTS

In 2006, Bright Bay Property Service (Pty) Ltd concluded an agreement with Moravian Church in South Africa entitling it to mine on Moravian's property. Operation of the agreement began in 2007 when Bright Bay obtained a licence to mine for five years in terms of a permit given by the Department of Minerals and Energy.

In 2010, Bright Bay was deregistered as a company. In January 2011, it applied for its re-registration. Re-registration took place in February 2012. In August 2011, it applied for and obtained a renewed mining permit.

The church took the view that the agreement had lapsed due to failure of the renewal of the mining permit, Bright Bay having lacked the ability to effectively apply for the renewal because it was then de-registered. Clause 11 of their agreement provided that if Bright Bay was not in a position to obtain the required licences and permits, it would no longer have any rights in terms of the agreement.

Bright Bay contended that it had the ability to effectively apply for the renewal because section 73(6A) of the Companies Act (no 61 of 1973) applied. This section provides that the Registrar of Companies may restore the registration of a company which has lapsed due to failure to lodge its annual returns, and thereupon the company shall be deemed to have continued in existence as if it had not been deregistered.

Bright Bay applied for an order that the church comply with its obligations under the agreement.

THE DECISION

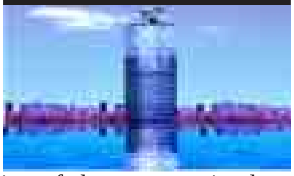
The new Companies Act (no 71 of 2008) replaced the old Companies Act, and in so doing its provisions regarding reinstatement of a de-registered company replaced section 73(6A). The new Act provides only that upon re-registration, a company is to be treated as if it remained registered during the period of deregistration. The new Act does not retain the retrospectivity provisions of the old Act.

The reinstatement of Bright Bay was done under the new Act. This took place after the application for renewal of the mining permit had been made and granted. Those events were however, of no effect because when they took place the company had been deregistered. The effect of that was that the agreement had lapsed in terms of clause 11. Bright Bay could no longer assert any rights in terms thereof. Not being the holder of a valid mining permit, it could not demand specific performance of the church.

The application failed.

EX PARTE GORE AND OTHERS NNO

Companies



A JUDGMENT BY BINNS-WARD J
WESTERN CAPE HIGH COURT
13 FEBRUARY 2013

2013 (3) SA 382 (WCC)

Section 20(9) of the Companies Act (no 61 of 2008) provides a broad basis on which a court may order that the corporate veil be lifted.

THE FACTS

Gore and the other applicants were the liquidators of King Financial Holdings Ltd and 41 other companies which were its subsidiaries. All of the companies had been controlled by three brothers through their control of various trusts.

The business operations of the companies involved selling financial investments in commercial and residential properties to the public. The Financial Services Board investigated their operations and determined that widespread irregularities were involved. It determined that the affairs of the group were in material respects conducted in a manner that maintained no distinguishable corporate identity between the various constituent companies in the group. The entire group was operated as one entity through the holding company. Funds solicited from investors were transferred by the controllers of the holding company between the various companies in the group at will, with no effectual regard to the individual identity of the companies concerned, and with grossly inadequate record-keeping. The King brothers admitted that they treated all their companies as one.

As a result of the chaotic administration of the affairs of the companies, the liquidators encountered difficulty in identifying the companies against which investors might have claims. They therefore applied for an order that the separate personalities of the companies be disregarded and permitting the liquidators to treat the assets of the companies as if they were all those of the holding company.

THE DECISION

South African courts have shown a greater willingness to pierce or lift the corporate veil. They will do so if justice requires it and not only when no alternative remedy is available. It involves the weighing by the court of the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, on the one hand, as against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders, or controllers of a company, on the other.

Section 20(9) of the Companies Act (no 61 of 2008) provides that if a court finds that the incorporation of a company constitutes an unconscionable abuse of corporate personality, it may declare that the company is deemed not to be a juristic person in respect of any right or obligation of the company. The language of this section is cast in very wide terms and is consistent with court decisions made on the subject prior to its enactment. If anything, it broadens the scope for piercing the corporate veil.

In the present case, the section could be applied to the companies in liquidation. The order was granted.

CHETTY v ITALTILE CERAMICS LTD

A JUDGMENT BY MALAN JA
(BRAND JA, PILLAY JA,
SOUTHWOOD JA and ERASMUS
AJA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2012

2013 (3) SA 374 (SCA)

Contract

A claim based on the condictio furtiva must show that the person alleged to have stolen the owner's goods either dispossessed the owner of them or used them unauthorisedly.

THE FACTS

In 2006, Chetty concluded a joint venture and franchise agreement with Italtile Ceramics Ltd. Under the agreement, he conducted the business of a warehouse and retail store selling ceramic tiles to the public. In terms of the agreement, Chetty was obliged to sell the goods on a cash basis only.

Chetty sold goods to some customers on a credit basis. Selected customers were given the option of paying for their goods at month end. In order to conceal the fact that he had sold goods on credit, in the books of account Chetty effected stock entries on the first and last days of each month. On the first day of the month, missing stock was attributed to breakages and customer claims, and on the last day of the month, this would be reversed back.

Italtile discovered that Chetty had supplied goods on credit and terminated the agreement. It then claimed payment of R1 168 340.26 alleging that this was made up of the discrepancy in stock figures and R26 055.62 in bad debt. It based its claim on the condictio furtiva.

THE DECISION

The condictio furtiva is a remedy available to an owner of goods against a thief. It requires proof of theft, either by dispossession or by unauthorised use of the owner's goods.

Chetty did not use Italtile's goods. He made false entries in the books of account in order to mislead Italtile but he did not conceal any unlawful taking of the goods. There was no 'taking' or withdrawal from Italtile of the goods sold on credit. There was therefore no theft in the first sense of the word. As far as unauthorised use was concerned, the goods were lawfully under Chetty's control. Their sale by Chetty could not be seen as unauthorised use since he never intended to return to Italtile what he had sold on credit. He did not intend using it temporarily, as in most cases of furtum usus, but sold it intending to benefit both himself and Italtile. Making the stock available for sale pursuant to the book delivery system Chetty had instituted could be regarded as the use of the goods, since the act of selling the goods, necessarily, includes their use. Buy in every case, the sales were credited to the store. A claim based on the condictio furtiva could therefore not be sustained against Chetty.

As far as the bad debt was concerned, Italtile could have pursued the debtors for payment thereof, but chose not to do so. It was therefore the author of its own loss in this respect.

The claim failed.

FOIZE AFRICA (PTY) LTD v FOIZE BEHEER BV

Contract

A JUDGMENT BY LEACH JA (MTHIYANE DP, CLOETE JA, HEHER JA and SHONGWE JA concurring)
SUPREME COURT OF APPEAL
20 SEPTEMBER 2012

2013 (3) SA 91 (SCA)

A court should determine whether or not a foreign jurisdiction clause should be enforced at a stage when there are sufficient facts before it to enable it to exercise its discretion in making such a determination.

THE FACTS

Foize Africa (Pty) Ltd concluded an agreement with Foize Sales BV in terms of which Foize Africa obtained the exclusive right to sell, market and distribute a product in South Africa. Foize Beheer BV was also a party to the agreement. Both of these companies were incorporated in the Netherlands.

Clause 10 of the agreement provided that Dutch law would apply to it and the courts of Holland would have exclusive jurisdiction in any matter arising from it. Any disputes were to be referred to arbitration in Amsterdam.

Algemeen Beheer Nederland BV, Foize Beheer's sole director, then alleged that it held the intellectual property rights in the product and the marketing rights and that it intended to market the product in South Africa through two other companies.

Foize Africa brought an application against the two Netherlands Foize companies in which it sought to compel them to comply with the agreement. It also sought an order piercing the corporate veil of Foize Beheer and declaring Algemeen bound by the agreement. Its application was also brought against other respondents who were directors and companies which controlled and were associated with the two Netherlands Foize companies. The application sought an interim interdict pending the outcome of final relief.

Foize Beheer and the other companies opposed the application and raised the objection that clause 10 of the agreement precluded a South African court from deciding the matter.

THE DECISION

Since the claim brought against Algemeen Beheer and the directors and companies associated with the two Netherlands Foize companies was not based on the agreement concluded with Foize Sales BV and Foize Beheer BV, clause 10 of that agreement provided no basis for denying jurisdiction to South African courts.

As far as the two Netherlands Foize companies were concerned, it is settled law that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings. Then the court will have to exercise its discretion whether or not to enforce the clause in question.

In the present case, the discretion lay in deciding whether or not the exercise of the court's jurisdiction should be stayed pending the outcome of foreign proceedings or arbitration. Given the fact that Foize Africa sought an interim order in the first instance, it was appropriate not to take a final decision at that stage on whether a South African court should exercise jurisdiction in respect of appellant's proposed action. It was a matter which should stand over for decision by the trial court. On the bare facts available at that stage it was impossible to do justice to either side in regard to the disputed questions arising from clause 10. The dispute was not one in which the arbitration and foreign jurisdiction clauses should be upheld against Foize Africa.

KOPM LOGISTICS (PTY) LTD v PREMIER, GAUTENG PROVINCE

Contract

A JUDGMENT BY KRUGER AJ
NORTH GAUTENG HIGH COURT
5 OCTOBER 2012

2013 (3) SA 105 (GNP)

Negotiations conducted in an effort to reach an agreement to agree may be the subject of administrative review. Disclosure of all documentation relating thereto may therefore be obtained in order to determine whether or not such negotiations have been conducted fairly.

THE FACTS

KOPM Logistics (Pty) Ltd secured a tender for the supply of services in the healthcare sector. The tender award specified that it was subject to the successful conclusion of a mutually acceptable agreement between KOPM and the third respondent.

The parties entered into negotiations for the conclusion of such an agreement but at a certain point, negotiations broke down and the third respondent refused to continue with them. KOPM then brought an application for an order that it recommence and continue negotiations in order to conclude an agreement.

KOPM contended that it was entitled to all documentation in the possession of the third respondent relating to the negotiations which had taken place. Documentation was produced relating to matters leading up to the award of the tender. KOPM contended that this was insufficient as it was entitled to documentation relating to matters following the award and relevant to the negotiations. It applied for an order compelling the third respondent to furnish such documentation.

THE DECISION

The third respondent argued that the second condition indicated that the parties had agreed to agree on terms still to be determined, in effect had agreed to agree. This involved negotiations which would not be subject to administrative law entitling KOPM to review.

However, in the light of Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001(3) SA 1013 (SCA) there was no good reason why the ongoing process (ie negotiations following acceptance of the tender, but preceding the establishment of a contract) should not also be subject to the public duties of fairness and openness. In addition, if in particular circumstances the requirements of administrative justice might have an impact on the contractual relationship itself the nature of the process under consideration could only be that of administrative law.

It was highly improbable that third respondent possessed no documentation which might be relevant for purposes of the main application and the relief sought therein. The duty to negotiate in good faith inter alia implied that the respondents had to keep proper records of all relevant documentation.

The order was granted.

SENTINEL MINING INDUSTRY RETIREMENT FUND v WAZ PROPS (PTY) LTD

Contract

A JUDGMENT BY CLOETE JA (MALAN JA, SHONGWE JA, TSHIQI JA AND SOUTHWOOD AJA concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2012

2013 (3) SA 132 (SCA)

An agreement which provides for the lapsing of an obligation to make a payment upon the happening of some future event, absolves the party obliged to make such payment of the obligation to make payment immediately upon the occurrence of that event.

THE FACTS

Waz Props (Pty) Ltd concluded an agreement with Sentinel Mining Industry Retirement Fund in terms of which Waz undertook to pay Sentinel R115 531.87 being its pro-rata share of a road upgrading project. The project related to a road serving both the properties of Waz and those of Sentinel.

Clause 4 of the agreement provided that Waz would secure its obligation either by transfer of the money into an attorney's trust account, or by furnishing a bank guarantee, or by agreeing to the imposition of a particular restrictive conditions in its title deeds. Clause 5 of the agreement provided that in the event that the road upgrading project was not completed by 1 April 2009, any money transferred was to be repaid and Sentinel was to procure cancellation of the restriction condition.
Waz furnished the bank guarantee.

The project was not completed by 1 April 2009 but was completed on 15 February 2010. Sentinel's attorneys presented the guarantee for payment on 26 March 2010. On 6 April 2010, the bank made payment in terms thereof.

Waz contended that because the project was not completed on the due date, its obligation to make payment had lapsed and Sentinel had not been entitled to present the guarantee. It contended that clause 5 of the agreement contained a resolutive condition which terminated the obligation to pay the amount of R115 531.87 and any further obligations.
Waz brought an application for repayment of the amount paid to Sentinel.

THE DECISION

The obligation to make payment was not independent of the other terms and conditions of the agreement. It had to be read with the obligations imposed on Waz under the options for payment because these would determine the amount to be paid, and these would vary depending upon the option chosen.

The effect of clause 4 was to list the methods by which Waz had to make payment. It contained no express residual obligation to pay the amount due at some future and undefined date. It was therefore exhaustive of the methods by which payment can be made, and it allowed for no payment other than in its terms.

The effect of clause 5 was to terminate the obligation to make payment. If the project was not completed by 1 April 2009, the obligation to pay lapsed. It followed that if the resolutive condition was fulfilled, the amount payable by Waz, and the accrued interest, had to be refunded to Waz.

JOUBERT SCHOLTZ INC v ELANDSFONTEIN BEVERAGE MARKETING (PTY) LTD

Contract

A JUDGMENT BY HEHER JA (BRAND JA, MHLANTLA JA, MALAN JA AND MAJIEDT JA concurring)
SUPREME COURT OF APPEAL
9 MARCH 2012

2013 SACLR (SCA)

Payments made in accordance with an agreement by an intermediary will not be considered to have gone beyond the mandate given to the intermediary provided they remain within the terms of the agreement. A claim for unjust enrichment depends on proof that the claimant has been impoverished.

THE FACTS

Elandsfontein Beverage Marketing (Pty) Ltd purchased a business as a going concern from Goosen and three others. The business assets included moveables and fixed property, both of which were encumbered to creditors, First National Bank Ltd and Standard Bank Ltd. Elandsfontein accepted responsibility in respect of the liabilities of the businesses and the immovable property including any liabilities of Goosen for any obligations secured by any mortgage bonds over the property for the sum of up to R12m only.

Elandsfontein mandated Joubert Scholtz Inc to investigate, negotiate, settle and pay the debts of Goosen and one of the other parties. For this purpose, it paid to Joubert Scholtz certain amounts, and these in total were in excess of the amounts owed to the two banks. Joubert Scholtz was Goosen's attorneys, and it had been introduced to Elandsfontein for the purpose of concluding the sale agreement.

Joubert Scholtz paid Goosen the amounts in excess of those owed to the two banks, the excess being intended for payment to other creditors of Goosen. Elandsfontein contended that in so doing, it exceeded its mandate. It claimed from Joubert Scholtz payment of R800 000,00 and R1 574 024,65 being the amounts in excess of that owed to First National Bank and Standard Bank respectively. It claimed the same amounts from Goosen on the grounds that he had been unjustly enriched.

THE DECISION

Elandsfontein had no particular reason to place a limit on Goosen's authority to pay creditors because it considered Goosen's understanding of the sale agreement accorded with its own and there was trust between them. Joubert Scholtz had accepted that Goosen was entitled to receive up to R12m as his share of the purchase price, and Elandsfontein gave no instruction to Joubert Scholtz which ran contrary to its perception of Goosen's entitlement and authority to deal with the funds as it deemed best.

It followed that Elandsfontein failed to prove that it conferred a mandate on Joubert Scholtz as alleged and, failed to prove either a mandate or a resolution of the company which limited the authority of Goosen, as a shareholder empowered by the agreement and a director whose authority was not impugned or restricted by the board, to determine how the funds deposited with Joubert Scholtz should be used.

As far as the enrichment claim was concerned, Elandsfontein also failed to show that it had been prejudiced by the excess payments made to Goosen, because the effect of these was only to reduce liabilities to Goosen on loan account.

The claim failed.

SOUTH AFRICAN CONGO OIL COMPANY (PTY) LTD v IDENTIGUARD INTERNATIONAL (PTY) LTD

Contract

JUDGMENT BY
BORUCHOWITZ AJA
(MPATI P, CACHALIA JA, LEACH JA AND KROON AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2012

2012 SACLR (SCA)

Enforcement of the attachment of a debt by garnishee proceedings in terms of Rule 45(12) must be preceded by the actual attachment of the debt in terms of Rule 45(8).

THE FACTS

Identiguard International (Pty) Ltd obtained a judgment against the government of the Democratic Republic of the Congo (the DRC) for payment of US$1 961 000. Identiguard obtained partial satisfaction of this debt but a balance remained.

The South African Congo Oil Company (Pty) Ltd (Congo) owed US$2m to the DRC. Identiguard issued two separate notices in terms of Rule 45(12)(*a*) of the Uniform Rules of Court. The first directed the sheriff to attach the debt and the second - a garnishee notice - called upon Congo to pay the amount of the debt to Identiguard. Congo refused to pay the sheriff the amount demanded of it. Identiguard then sought an order in terms of Rule 45(12)(*b*), that Congo show cause why it should not pay the sheriff the amount of the debt in satisfaction of the respondent's writ of execution.

Congo opposed the application on the grounds that enforcement of garnishee proceedings cannot be effected in terms of Rule 45(12)(b) only and that any application for enforcement must attach the debt in accordance with the provisions of Rule 45(8).

THE DECISION

Rule 45(12)(b) provides that if the judgment debtor fails to comply with a notice given in terms of sub-rule (a) the sheriff shall notify the judgment creditor who may then bring enforcement proceedings in court. Sub-rule (a) empowers the sheriff to attach the debts of the judgment debtor, and serve a garnishee notice requiring payment by him to the sheriff of so much of the debt as may be sufficient to satisfy the writ.

Rule 45(8) provides that an attachment shall only be complete when notice of the attachment has been given in writing by the sheriff to all interested parties, and the sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right.

Identiguard contended that Rule 45(8) was complied with when the garnishee notice was served in terms of Rule 45(12)(b). This contention however, could not be sustained. When Rule 45(12) was introduced, it did not dispense with the requirement of attachment, nor did it create a discrete attachment procedure. It established the machinery necessary to oblige the garnishee to pay the attached debt to the judgment creditor. The debt itself needs to be attached, and this was what the Rule sought to provide for.

The words in Rule 45(12) support this interpretation: '[a]ttach the same, and thereupon shall serve a notice on such third person…' envisages two separate jural acts, (a) an attachment of the debt and (b) service upon the garnishee of the prescribed notice.

It follows that it is a necessary requirement of rule 45(12)(a) that the sheriff attach the debt in accordance with rule 45(8)(c).

The application was refused.

FIRSTRAND BANK LTD v LODHI 5 PROPERTIES INVESTMENT CC

A JUDGMENT BY VAN DER BYL J
NORTH GAUTENG HIGH COURT
20 MARCH 2012

2013 (3) SA 212 (GNP)

Insolvency

As a ground for the liquidation of a corporation, t is possible to prove that the corporation is insolvent either on the grounds that it is factually insolvent or commercially insolvent.

THE FACTS

Firstrand Bank Ltd applied for the liquidation of Lodhi 5 Properties Investment CC and other associated companies. The bank had advanced loans to the respondents and alleged that there had been default in repaying the loans.

Lodhi raised an objection to the application on the grounds that as it was brought in terms of the Companies Act (no 71 of 2008) the bank was obliged to prove that the companies were actually insolvent in the sense that their liabilities exceeded their assets.

THE DECISION

In the context of the grounds for liquidation of companies, the Companies Act refers to a solvent company. In so doing, it does not exclude a company which is commercially solvent, as opposed to factually solvent.

The expression ‘solvent company’ in item 9(2) of sch 5 to the new Companies Act relates to solvent companies, being companies that are either not ‘actually (or factually) insolvent’ or ‘commercially insolvent’, envisaged in part G of ch 2 of the new Companies Act, in contrast to companies that are insolvent, being companies that are either ‘commercially insolvent’ or ‘actually (or factually) insolvent’ which are to be dealt with in terms of ch XIV of the Companies Act, 1973.

There is no indication that the new Companies Act excludes the possibility that a company will be considered insolvent because it is commercially insolvent.

The objection was dismissed.

I am, for the reasons dealt with above, of the opinion —

- *that there is, in the absence of an express provision, no indication in the new Companies Act that the legislature intended — particularly, insofar as it left s 345 of the Companies Act, 1973, intact — to do away with the principle that a company (or a close corporation) may be liquidated on the grounds of its ‘commercial insolvency’;*
- *that the expression ‘solvent company’ in item 9(2) of sch 5 to the new Companies Act relates to solvent companies, being companies that are either not ‘actually (or factually) insolvent’ or ‘commercially insolvent’, envisaged in part G of ch 2 of the new Companies Act, in contrast to companies that are insolvent, being companies that are either ‘commercially insolvent’ or ‘actually (or factually) insolvent’ which are to be dealt with in terms of ch XIV of the Companies Act, 1973.*

ROERING N.O. v NEDBANK LTD

Insolvency

A JUDGMENT BY VAN OOSTEN J
SOUTH GAUTENG HIGH COURT
4 OCTOBER 2012

2013 (3) SA 160 (GSJ)

A creditor which has retained the right of ownership over goods sold under a credit agreement cannot assert rights of ownership if the right to do so has not accrued before an application for liquidation of the debtor has been made.

THE FACTS

Between September 2011 and February 2012, Aircrafts Africa Contracts Company (Pty) Ltd bought seven aircraft from Nedbank Ltd on credit under instalment sale agreements. The agreements provided that notice of default entitling Nedbank to cancel required a 10-day period from date of notice to right to cancel. They also provided that Nedbank would remain owner of the aircraft until full payment for them had been made.

On 20 May 2011, Nedbank delivered to Aircrafts notice of default. On 27 May 2011, applications for the winding up of Aircrafts were brought. On 13 July 2011, Nedbank cancelled the agreements. Aircrafts was then placed in liquidation.

Nedbank contended that it remained the owner of the aircraft after the liquidation of the company. The liquidators contended that section 84(1) of the Insolvency Act applied. The section provides that upon liquidation, an instalment agreement shall be considered to create a hypothec over the debtor's property in favour of the creditor, and the property is to be disposed of as provided for in section 83.

THE DECISION

The bank's contention rested on the proposition that section 84(1) only applies to an agreement which is in force when winding up commences, and not to an agreement where the right to cancel has accrued at that time.

The bank's argument could not be accepted. Only a completed accrued right of cancellation can survive the commencement of liquidation, ie the moment a concursus creditorum takes place. If its argument was accepted, it would follow that even if the bank had not made and delivered demand its right of cancellation would have been complete before concursus. All that would have been necessary to effect cancellation would have been the formal act of cancellation and notification thereof. Performance by either the debtor or the liquidators, after the right to cancellation became complete, would neither have been relevant nor could it affect the bank's right to cancel. The logical conclusion from this would be that the completed right of cancellation, which had existed prior to concursus, would have survived concursus. Such a possibility would be inconsistent with section 84(1).

The question arising was, what was the status of the bank's right to cancellation at the stage of concursus? The demand afforded Aircrafts a period of 10 days to perform before cancellation would be effected. The bank thereby suspended its right to cancel the agreements for a period of ten days. In other words, the bank could not at concursus validly cancel the agreements, because it was then bound by the time period allowed in the demand. Its right to cancellation was incomplete, and only became complete upon non-performance by Aircrafts or the liquidators within the stipulated time and thus only after concursus. It followed that the bank's right of cancellation at the occurrence of concursus was incomplete and that it accordingly did not survive concursus.

CORPORATE MONEY MANAGERS (PTY) LIMITED v KUFA TRADING ENTERPRISE CC

A JUDGMENT BY FARLAM JA (NAVSA JA, PONNAN JA TSHIQI JA AND KROON AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2012

2012 SACLR (SCA)

An application for the liquidation of a close corporation on the grounds that a claim against it is due and payable will not succeed if it can be shown that upon the terms of the agreement upon the claim is not yet due and payable.

THE FACTS

Corporate Money Managers (Pty) Limited (CMM) brought an application for the liquidation of Kufa Trading Enterprise CC. Its application was based on the allegation that it had made loans to Kufa of almost R9m, and Kufa had failed to repay the loans.

In substantiating its claim, CMM furnished an Acknowledgement of Debt signed by Kufa, and a letter of demand addressed to Kufa in terms of section 69 of the Close Corporations Act (no 69 of 1984). CMM also alleged that by purchasing certain earth moving equipment Kufa had misappropriated moneys advanced to it.

In response to the demand, Kufa's attorney had disputed its obligation to repay the loans on the grounds that an underlying agreement concluded between the parties had been breached by CMM and this had given rise to a substantial claim by Kufa against CMM. The underlying agreement related to the provision of administration and support services in connection with building contracts which had been awarded to Kufa. CMM contended that the underlying agreement had fallen away because of fraud when Kufa had misappropriated the moneys advanced to it. Kufa rejected this allegation, contending that the money had been used for purposes envisaged in the underlying agreement.

Kufa furnished a loan agreement between the parties which it said reflected some of the terms of the underlying agreement. Kufa also stated that the earth moving equipment it had purchased was used on the contract as well as on others.

CMM contended that because the loan agreement was not signed, Kufa was not entitled to rely on it in defending the application. Kufa contended that it nevertheless reflected the parties' agreement because it was drafted by CMM and given to it for signature, was then signed by Kufa and handed to a representative of CMM who undertook to furnish him with a copy bearing a counter-signature but this was not done, and was then given to the Kufa's attorney by CMM in response to a written request by Kufa's attorney. A contract in almost identical terms had previously been concluded between Kufa and CMM and this was duly performed by both parties.

THE DECISION

Although the loan agreement was not signed by CMM, its terms governed the relationship between the parties. It followed that CMM could not assert that the amounts due by Kufa were repayable on demand. The demand issued in terms of section 69 of the Close Corporations Act was therefore incompetent as it was not clear that the claim upon which that demand was based had in fact arisen.

The underlying agreement between the parties did not fall away as a result of the alleged misappropriation of money. This was because CMM did not avoid the agreement, and because Kufa denied the alleged misappropriation. This denial could not be rejected on the application papers.

It followed that it had not been shown that Kufa was commercially insolvent, nor that it was factually insolvent.

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD v MICHAEL'S BID A HOUSE CC

A JUDGMENT BY LEWIS JA (THERON JA, PETSE JA, PLASKET AJA and SWAIN AJA concurring)
SUPREME COURT OF APPEAL
15 MARCH 2013

2013 (3) SA 426 (SCA)

Credit Transactions

A lease agreement in which the item leased remains in the ownership of the lessor is not subject to the National Credit Act (no 34 of 2005).

THE FACTS

Michael's Bid A House CC signed a master rental agreement. In terms thereof, Michael's received a printing machine with full maintenance and the supply of toner for 36 months. The rental payable was R2 878.00 per month. The lessor would at all times remain the owner of the machine which would be returned to the lessor upon termination of the lease.

After the machine had been delivered, Michael's alleged that the lessor under the agreement, Sapor Rentals (Pty) Ltd, had breached its terms by inter alia, failing to supply the toner. Sapor ceded its rights under the agreement to Absa Technology Finance Solutions (Pty) Ltd.

Absa brought an action for payment due under the agreement.

The court held that the agreement was not a lease but a credit agreement and subject to the National Credit Act (no 34 of 2005). Accordingly, Absa had been obliged to give notice to Michael's under sections 129 and 130 before bringing action against it.

Absa appealed.

THE DECISION

Section 8(4)(e) of the Act provides that a lease agreement entails that the lessor pass ownership of the leased item to the consumer at the end of the lease period. In contrast to this, the terms of the master rental agreement provided that this would not take place. Parol evidence indicating a term at variance with this was not permissible, given the clear terms of the agreement. Upon the basis of section 8(4)(e) therefore, the agreement could not be considered to be a lease as defined in the Act.

Section 8(4)(f) provides that the Act covers an agreement in which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of (i) the agreement, or (ii) the amount that has been deferred. However, in the case of a lease agreement such as the present one, the lessor does not defer receipt of the amount owing to it. Rentals are to be paid on due date in terms of the agreement and they are not deferred.

The agreement was also not an incidental credit agreement as defined in the Act.

Because the agreement was not subject to the Act, Absa had not been obliged to give notice in terms thereof. The appeal was upheld.

RODEL FINANCIAL SERVICE (PTY) LTD v NAIDOO

A JUDGMENT BY SEEGOBIN J
KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
18 FEBRUARY 2011

2013 (3) SA 151 (KZP)

An acknowledgement of debt may constitute an affirmation of a pre-existing loan agreement and in such a case will not be a novation of that agreement.

THE FACTS

Rodel Financial Service (Pty) Ltd made two loans to Naidoo. After Naidoo defaulted in making the repayments, he signed an acknowledgement of debt for the amounts then due and acknowledged himself to be liable for discounting fees on that sum. The discounting fee was stated to be 4% of the capital sum lent for the first thirty days, and 0.125% per day for the period thereafter.

Naidoo contended that the acknowledgement of debt was a novation of the original loan agreement between the parties and was subject to the National Credit Act. He contended that Rodel had not complied with the Act.

THE DECISION

In the light of Rodel's undisputed allegation that Naidoo had made certain payments in terms of the acknowledgement of debt, the parties merely intended that agreement to confirm the loan agreements entered into between them. It was therefore not a novation of them.

As far as compliance with the National Credit Act was concerned, the discounting fees could not be seen to be interest on the loan.

> *I am of the view that the parties intended the acknowledgment of debt to merely confirm an existing obligation, viz the prior discounting agreement. Bearing in mind the presumption against novation, I am of the opinion that the respondents have failed to discharge the onus resting on them of proving that they had intended a novation of the discounting agreement. I accordingly find that the AOD did not novate the prior discounting agreement.*

RHOODE v DE KOCK

A JUDGMENT BY CLOETE JA (CACHALIA JA, BOSIELO JA, WALLIS JA and PILLAY JA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2012

2013 (3) SA 123 (SCA)

Property

To prove that one has an improvement lien, one must prove that one has actually incurred expenses in improving the property in question, or that the value of the property has increased as a result of the improvements made to it. An owner suing for return of his property is not obliged to tender return of anything owed to the party holding possession of the property.

THE FACTS

De Kock and his wife sold their fixed property to Rhoode. Rhoode paid R400 000 and took occupation of the property. He effected certain improvements to it while he was there.

De Kock alleged that there had been a breach of the sale agreement as a result of which he cancelled the agreement. Rhoode contended that the agreement had fallen away due to the failure of a suspensive condition.

In January 2010, De Kock applied for an eviction order against Rhoode. Rhoode opposed the order on the grounds that he held an improvement lien over the property. The lien had arisen because he had effected improvements to the property amounting to R1 046 319.97, of which R600 000 represented materials and the rest, labour. In substantiation of this allegation, Rhoode submitted a quotation from a third party indicating what the improvements would cost at current market prices. He also contended that De Kock's cause of action against him, which was based on the rei vindicatio, was defective in that it failed to tender return of the R400 000 paid by him.

THE DECISION

The first issue to be decided was whether or not Rhoode had established that he held an improvement lien over the property. This he could do by showing the necessary or useful expenses incurred in respect of it.

The evidence submitted by Rhoode however, did not establish this because it indicated what the improvements would have cost, not what Rhoode actually spent on them. As far as useful expenses were concerned, there was no evidence as to the increase in the value of the property brought about by Rhoode during his occupation.

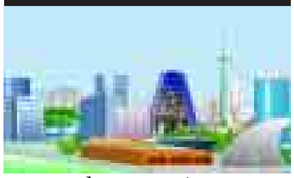
As far as the contention based on restitution was concerned, the mere fact that Rhoode would be entitled to repayment of the R400 000 in order to prevent De Kock from being unjustly enriched, did not mean that he was entitled to resist ejectment until the amount is repaid or tendered. He could do so only if repayment had to take place at the same time that Rhoode was ejected.

Since De Kock's case was based on the rei vindicatio, he needed to do no more than allege and prove he was the owner of the property. The cause of action was not rendered defective by his not tendering return of the R400 000. This did not mean that Rhoode had no claim for return of the R400 000, but De Kock's claim remained effective.

De Kock was entitled to an order of ejectment.

STEVE TSHWETE LOCAL MUNICIPALITY v FEDBOND PARTICIPATION MORTGAGE BOND MANAGERS (PTY) LTD

Property



A JUDGMENT BY VAN DER MERWE AJA (MALAN JA, SHONGWE JA, SALDULKER AJA and MBHA AJA concurring)
SUPREME COURT OF APPEAL
20 MARCH 2013

2013 (3) SA 611 (SCA)

The period for which rates must be paid in the case of a property owner which has become liquidated is two years, reckoned from the date on which the application for a rates clearance certificate is made.

THE FACTS

TNT Trading 23 CC was placed in liquidation. It owned properties bonded to Fedbond Participation Mortgage Bond Managers (Pty) Ltd. The properties were sold by public auction and Fedbond accepted responsibility for paying the municipal rates needed to obtain a rates clearance certificate for the transfer of the properties.

The municipality and Fedbond disagreed about the period over which the rates pertaining to the properties had to be paid. Fedbond contended that this was a period of two years preceding the date on which application for the certificate was made. The municipality contended that the period was two years preceding the date of liquidation.

The two provisions upon which each party based their contentions were section 118(1) of the Local Government: Municipal Systems Act (no 32 of 2000) and section 89 of the Insolvency Act (no 24 of 1936).

THE DECISION

In *City of Johannesburg v Kaplan NO* 2006 (5) SA 10 (SCA) it was held that the applicable period is the period referred to in section 118(1), ie two years preceding the date of application.

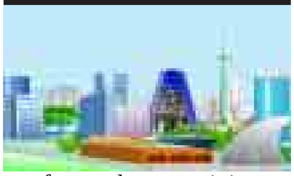
An order was granted on the basis that the municipality's charge under s 118(3) enjoyed preference over the security attached to the mortgage bond over the property in question. It was clear from para 21 of that judgment that an essential part of the line of reasoning that led to that order was the finding that the legislature provided in the first part of section 89(4) for a limitation of an embargo provision. In consequence, in subsequently adding the second part of section 89(4), it intended to similarly limit the preferences arising from security provisions such as section 118(3).

The finding that section 89(4) provides for a limitation of embargo provisions therefore forms part of the ratio decidendi of the judgment in Kaplan. From this finding it necessarily follows that when an embargo period laid down in any other law is effectively shorter than the two-year period in section 89(1), the shorter period continues to apply after sequestration. Because section 89(4) is intended to limit and not to extend embargo provisions, its effect cannot be to extend the embargo period in terms of section 118(1) to a period longer than the period of two years preceding the date of application for a certificate.

The municipality's submission that in terms of section 89(4) the period of the embargo is extended beyond the period mentioned in section 118(1) was inconsistent with the ratio decidendi in Kaplan.

INGONYAMA TRUST v ETHEKWINI MUNICIPALITY

Property



JUDGMENT BY PONNAN JA (MTHIYANE DP, BOSIELO AND THERON JJA AND PETSE AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2012

2012 SACLR (SCA)

Property rates may not be levied in respect of property which is held by the State, and in trust for the inhabitants of the area of jurisdiction of a local authority.

THE FACTS

The Ethekweni Municipality sought an order that the property of the Ingonyama Trust within the area of the municipality was subject to rates which the municipality was entitled to impose in terms of section 3(1) of the Rating of State Property Act (no 79 of 1984).

Prior to 1994, the Trust's property was owned by the State. The Trust was established by the KwaZulu Ingonyama Trust Act 3KZ of 1994, an Act of the KwaZulu legislative assembly. This Act was later amended by a National Act.

Section 3(3)(a) of the Rating Act provides that no rates shall be levied by a local authority on the value of State property held by the State in trust for the inhabitants of the area of jurisdiction of a local authority. The Trust contended that because of this exemption, the Trust's land was State land, so that the municipality was not entitled to impose rates on its property.

THE DECISION

The exemption applies if property is held by the State, and in trust for the inhabitants of the area of jurisdiction of a local authority.

It was clear from the provisions of the KwaZulu Ingonyama Trust Act as amended, that the property in question was held in trust for the inhabitants of the area of jurisdiction of the municipality. The same Act provides that any national land reform programme shall apply to the Trust's land. Similarly, section 2 of the KwaZulu Land Affairs Act (no 11 of 1992) states that the Premier or the Minister may, subject to the provisions of that Act and the Trust Act, sell, exchange, donate, lease or otherwise dispose of any government land which vests in the provincial or national government respectively.

From this, it could be inferred that since the State reserved to itself the right to apply its land reform programme, it would not do so in respect of land that it had divested itself of. The purpose of the KwaZulu Land Affairs Act was to provide for the disposal of government land. Since this was the case, if the Trust's land was not considered to be government land, there would be no need to mention it in that Act.

The Trust's property was therefore State property as envisaged in section 3(3) of the Rating Act.

INVESTEC EMPLOYEE BENEFITS LIMITED v MARAIS

JUDGMENT BY FARLAM JA (CLOETE JA, MALAN *JA*, WALLIS JA AND MCLARENA JA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2012

2012 SACLR (SCA)

Prescription

A claim made in terms of the Pension Funds Act (no 24 of 1956) may prescribe in terms of the Prescription Act (no 68 of 1969) and may not be revived by operation of the powers given to the adjudicator to condone non-compliance with the time limits for lodging complaints as provided for in the Pension Funds Act.

THE FACTS

Marais was an investor member in the Vantage Preserver Provident Fund and the Vantage Preserver Pension Fund. He made single premium payments into these funds in 1996 and 1999. The funds were underwritten by Investec Employee Benefits Ltd.

In 2000, Marais notified Investec of his wish to withdraw the benefits of the funds. In order to comply with this request, Investec requested tax directives from the South African Revenue Services. On 1 February 2001, Investec declared interim bonuses of 9 per cent for the year ended 31 December 2000 and 6 per cent for the year ended 31 December 2001. On 15 February 2001 Marais gave instructions for payment of his withdrawal benefit from the pension fund on or before 28 February 2001, but on 26 February 2001 he stated that in the light of an incorrect directive by the South African Revenue Services payment should be held back until further notice and that the monies be kept on investment.

On March 2001 Investec declared a 0 per cent bonus for the year ended 31 December 2000 and revised the interim bonus for the year ended 31 December 2001 to 0 per cent. These values were confirmed as declared bonuses on 31 May 2001, and were R471 515.00 less than the total of the amounts quoted on 1 February 2001. Investec paid Marais the lesser amount.

Marais claimed he was entitled to R471 515 more than he was paid. An exchange of correspondence took place between the parties' respective attorneys. On 27 June 2001 Investec explained the basis on which the reduced calculations had been arrived at. It stated that the figures as at 30 January 2001 had been based on the interim bonuses while the figures as at 31 May 2001 were based on the declared bonuses. In a letter of 14 September 2001 Investec stated that as a dispute had arisen, the matter had to be subject to arbitration.

Investec heard nothing further from Marais until the end of August 2004. On that date, it learnt that Marais had lodged a complaint on 20 July 2004 in terms of the provisions of section 30A of the Pension Funds Act (no 24 of 1956). The complaint was upheld. Investec applied for an order setting aside that decision. It contended that Marais' claim had prescribed in terms of the Prescription Act (no 68 of 1969).

THE DECISION

In terms of section 30H(3) of the Pension Funds Act, receipt of a complaint by the Adjudicator shall interrupt any running of prescription in terms of the Prescription Act or the rules of the fund in question. It was clear from that provision that receipt of a complaint would interrupt prescription in terms of the latter Act. The use of the word 'interrupt' indicated that prescription would otherwise continue running in respect of the complaint referred to. It followed that the Prescription Act applied to claims such as that made by Marais.

The fact that section 30I empowers the adjudicator to vary the time within which a complaint must be lodged did not imply that the Act empowers him to extend a period of prescription which has already run its course.

In the present case it was clear that whatever claim Marais may have had against Investec had prescribed. Prescription did not only began running when he received payment of a portion of the amount claimed at the end of July 2001. In terms of section 12(3) of the Prescription Act, if he was

entitled to claim the full amount from Investec, the corresponding debt owed to him would be deemed to have been due when he had ‘knowledge of the identity of the debtor and of the facts from which the debt [arose]’. These facts were all set out in Investec’s letter of 27 June 2001. Prescription was therefore already running at least from the time when he received that letter. Prescription had started to run in respect of his claim more than three years before he lodged his complaint with the adjudicator. His claim accordingly prescribed before his complaint was lodged.

The application succeeded.

ABSA BANK LTD v COMPANIES AND INTELLECTUAL PROPERTY COMMISSION

A JUDGMENT BY ROGERS J
(YEKISO J and CLOETE J concurring)
WESTERN CAPE HIGH COURT
19 APRIL 2013

2013 (4) SA 194 (WCC)

Corporations

An interested party may apply for an order that the dissolution of a close corporation be declared void in terms of section 83(4)(a) of the Companies Act (no 71 of 2008) in circumstances where the close corporation was de-registered as a close corporation for failing to lodge its annual returns.

THE FACTS

Voigro Investments 19 CC owned fixed property which was sold in execution at the instance of a municipality. At the time of the sale, Voigro had been de-registered as a close corporation for failing to lodge its annual returns. Deregistration took place in February 2011. The sale in execution took place later that year.

The property had been bonded to Absa Bank Ltd but its head office was not aware of the sale in execution and so had not acted to protect its interests when the sale took place. The property was sold for R200 000 but Voigro then owed the bank some R1.5m.

When the bank learnt that the property had been sold, it applied for an order reinstating Voigro's registration as a close corporation in terms of section 83(4)(a) of the Companies Act (no 71 of 2008) and that its assets re-vest in it with retrospective effect. The application failed on the grounds that reinstatement could only be achieved by following the procedures set out in section 82(4), ie by applying for reinstatement to the Companies and Intellectual Property Commission.

Absa appealed.

THE DECISION

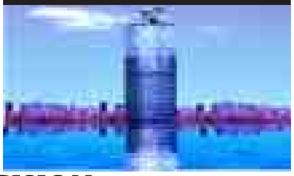
Section 83(4)(a) provides that at any time after a corporation has been dissolved, the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void.

The issue was whether or not this section applies to a corporation which had been de-registered. The ordinary meaning of the section indicates that it does so apply. The previous Companies Act which was superseded by the present Act, maintained a distinction between a de-registered and a dissolved corporation. The fact that the present Act dropped this distinction indicated that for purposes of re-registration, the procedures to be followed would be the same whether the corporation had been dissolved or de-registered due to failure to file its annual returns.

Section 83(4) applies in all cases where a company or corporation's name has been removed from the register in terms of part G of chapter 2 and where the company or corporation has as a result been dissolved. This includes deregistration on any of the grounds set out in s 82(3). Where a company or corporation has been deregistered by the CIPC in terms of s 82(3) rather than in terms of s 82(2)(b), an interested party may either apply to the CIPC for restoration in terms of s 82(4) or to the court in terms of s 83(4).

Absa was therefore entitled to an order that the dissolution of Voigro was void and it was to be reinstated as a corporation. Furthermore, since Voigro did not exist at the time the municipality attached the property, the sale in execution was null and void.

COMMUNICARE LTD v KHAN



A JUDGMENT BY SWAIN AJA (CLOETE JA, CACHALIA JA, MALAN JA and SHONGWE JA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2012

2013 (4) SA 482 (SCA)

Articles of Association should be interpreted in a manner which renders their provisions business-like and so as to avoid any hiatus which might arise from any other interpretation.

THE FACTS

Article 15 of the Articles of Communicare Ltd provided that at the annual general meeting of the company after the first one, one-third of its directors were to retire from office. Those who had to retire were those who had been longest in office. Retiring directors were entitled to stand for re-election, and the company could fill any vacancy by electing a new director.

Only members of the company could vote for the election of a director. Some members of the company were members only by virtue of their position as director.

At an annual general meeting, directors who had retired in terms of article 15 were excluded from voting for the election of new directors because their membership of the company had terminated because they had ceased to be directors. Khan and the other members applied for an order that the election of the directors was invalid and should be set aside.

The order was granted. Communicare appealed.

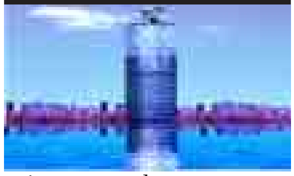
THE DECISION

What had to be decided was whether directors who had retired were entitled to vote in respect of vacancies so created.

The meaning to be given to the provisions of article 15 should be one which is business-like and one which excluded any hiatus between the retirement of a director and his or her replacement. The interpretation given to the article by Communicare was not business-like and did envisage such a hiatus, because it envisaged the possibility that an annual general meeting could begin with one set of members entitled to vote for a new directorship and end with a different set of members so entitled. On a proper interpretation of article 15 the directors who retired at an annual general meeting were entitled to vote as members in respect of the election of individuals to fill such vacancies. The exclusion of the retiring directors from voting was accordingly unjustified and the resolutions appointing replacement directors were correctly declared invalid by the high court and set aside.

The appeal was dismissed.

LIVANOS N.O. v OATES



A JUDGMENT BY WEPENER J
SOUTH GAUTENG HIGH COURT
14 MARCH 2012

2013 (5) SA 165 (GSJ)

An executor acting in terms of section 35 of the Close Corporations Act (no 69 of 1984) is not obliged to refer the valuation of the price at which the member's interest is to be sold for determination in terms of section 36 of the Act as that section is not relevant to the application of section 35 of the Act.

THE FACTS

The executor of a deceased estate, Livanos, sold the deceased's interest in a close corporation to the third applicant for R16m. The sale took place in terms of section 35 of the Close Corporations Act (no 69 of 1984) after the other member of the close corporation, Oates, declined to give his consent to the transfer of the member's interest to the appointed heir.

Livanos notified Oates of the sale by enclosing a copy of the sale agreement in a letter to him. Oates did not exercise his rights in terms of section 34(2) of the Act and also did not consent to the transfer of the member's interest. Oates stated that he wished to acquire the member's interest at an agreed price or a price to be determined in terms of section 36 of the Act.

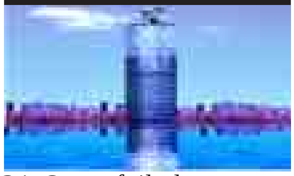
The executor sought an order that the member's interest had been validly sold to the third applicant.

THE DECISION

Section 35(a) of the Act provides that the executor of a deceased estate must cause the deceased member's interest in the corporation to be transferred to a person who qualifies for membership of a corporation in terms of section 29 and is entitled thereto, if the remaining members of the corporation consent to the transfer of the member's interest to such person. Section 35(b) provides that if any consent referred to in para (a) is not given within 28 days after it was requested by the executor, the executor must sell the deceased member's interest (i) to the corporation, if there is any member than the deceased member, (ii) to any other remaining member or members of the corporation in proportion to the interests of those members in the corporation or as they may otherwise agree upon, or (iii) to any other person who qualifies for membership of a corporation in terms of s 29, in which case the provisions of ss (2) of s 34 shall mutatis mutandis apply in respect of any such sale.

The executor had acted in terms of section 35(b)(iii) and so section 34 applied. Sub-section 2 of that section provided that the executor had to deliver to the corporation a written statement giving particulars of the name and address of the proposed purchaser, the purchase price and the time and manner of payment thereof; for a period of 28 days after the receipt by the corporation of the written statement the corporation or the members had the right to be substituted as purchasers of the whole of the member's interest at the price and on the terms set out in the trustee's written statement; and if the interest was not purchased in terms thereof, the sale was to become effective and be implemented.

These provisions did not incorporate any application of section 36 which requires a court to determine a value of a members' interest in the case of a dispute between members. Section 36 has no application to a sale of the members' interest from a deceased's estate. The maxim inclusio unius, est exclusio alterius applied. The provisions referred to in section 36 did not apply. Sections 34(2) and 35 were clear and there was no warrant to read into them the requirement of fair value. The power conferred upon a court in terms of section 36(2) is limited to where the court makes an order in terms of that section, provided the grounds for such relief were present. There was no reason to transpose that power into section 35.



The price which Oates or the corporation had to match in order to be substituted as purchasers was that which was contained in the written statement referred to in section 34. Oates failed to exercise his pre-emptive right to match the offer, and the sale to the third applicant became effective.

The order sought by the executor was granted.

SMM HOLDINGS (PVT) LIMITED v MAWERE

A JUDGMENT BY WILLIS J
SOUTH GAUTENG HIGH COURT
11 OCTOBER 2012

2012 SACLR 480 (SCA)

A person will be considered to be liable for the debts of a company as referred to in section 424 (1) of the Companies Act (no 61 of 1973) in circumstances where that person has purposely diverted funds due to that company for his personal gain.

THE FACTS

Southern Asbestos Sales (Pty) Limited (SAS) owed SMM Holdings (Pvt) Ltd R18 043 374, 21. Under a cession purportedly entered into by SMM, Petter Trading (Pty) Limited took cession of the debt. Petter was controlled by Mawere, the same person who controlled SAS. Mawere also exercised some control over SMM, the decisions taken by its board of directors having historically, been influenced by Mawere.

The cession was executed in writing, but was a fraudulent document because it contravened the Zimbabwean laws in regard to the remittal of foreign exchange. In terms of those laws, one could not cede the entitlement to foreign exchange without the prior approval of the Reserve Bank of Zimbabwe. Furthermore, the cession agreement had not been approved by the board of directors of SMM and the date upon which the agreement had been signed was not the date reflected on the agreement itself.

Petter obtained a court order based on the purported cession agreement which affirmed its rights in the cession, and ensured that money owing from the debt owing by SAS was not remitted to SMM in Zimbabwe but to Petter.

SMM obtained an order rescinding that court order, and then brought an action against Mawere claiming an order that he was personally liable to SMM in terms of section 424 (1) of the Companies Act (no 61 of 1973).

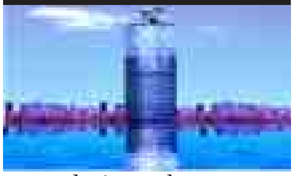
THE DECISION

Mawere’s failure to contest the evidence presented by SMM in regard to the cession and his failure to testify, the question arose: why was a cession agreement fraudulently created and thereafter relied upon to obtain a court order, if not for the purpose of diverting funds which were due to SMM by SAS to Petter? Further, if the funds were not, in fact paid from SAS to Petter, why was the money not found in the accounts of SAS?

The probabilities led to the conclusion, beyond reasonable doubt that (i) the cession agreement was devised for the purpose of diverting funds which were due to SMM by SAS, out of the accounts to SAS to Petter and that (ii) this diversion of funds took place consequent upon the court order. In the result, the diversion of funds caused SMM to suffer loss.

This meant that section 424(1) was directly applicable, and an order declaring Mawere personally liable to pay SMM’s claim against SAS.

FOURIE v FIRSTRAND BANK LIMITED



A JUDGMENT BY BRAND JA (LEWIS JA, BOSIELO JA, SHONGWE JA AND THERON JA concurring)
SUPREME COURT OF APPEAL
18 SEPTEMBER 2012

2012 SACLR 461 (SCA)

Documents which are intended to mislead a creditor into providing credit may constitute fraudulent misrepresentations upon which an action in terms of section 424 of the Companies Act (no 61 of 1973) may be brought

THE FACTS

In November 2001, a company trading under the name Supreme Car entered into a Used Car Floor Plan Agreement with FirstRand Ltd. Under the agreement, FirstRand advanced money to Supreme Car for the purchase of second-hand motor vehicles. The vehicles became the property of FirstRand and constituted security for the loan. In terms of the agreement, upon resale of the vehicle by Supreme Car, it was obliged to repay the sum advanced by FirstRand for the purchase of that vehicle, within the following week.

Fourie was appointed by the auditor of the company to manage the financial affairs of Supreme Car. In the course of his duties, he prepared documents which indicated the state of Supreme Car's financial affairs, in the format of financial statements. These financial statements were submitted to Firstrand from time to time, as and when Supreme Car wished to increase the credit facility given by Firstrand. On the strength of them, Firstrand increased the credit facility to R13m. According to the financial statements prepared by Fourie, Supreme Car's business was growing, it was making substantial profits and was financially sound. The financial statements did not correctly reflect the financial position of Supreme Car which was in fact trading under difficult conditions.

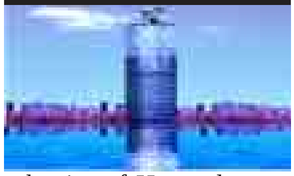
The sole director of the company and her son used Supreme Car's funds to speculate in seaside properties in Yzerfontein. They spent R2.9m of Supreme Car's money on completing a house which they expected to sell at a profit. However, this prospect did not materialise. At the same time, the son used some R2.7m of Supreme Car's funds to pay for personal expenses. At the time, Fourie was aware of these things.

In April 2004, FirstRand discovered that Supreme Cars had resold some vehicles without repaying the loan due to it. It cancelled the floor plan agreement. As at that date FirstRand had financed 136 vehicles. When FirstRand went to Supreme Car's premises to repossess the vehicles, it found only 84 of them. Supreme Car was placed under final liquidation. It was hopelessly insolvent.

Firstrand brought an action against Fourie for payment of R10m, basing its claim on section 424 of the Companies Act (no 61 of 1973).

THE DECISION

Fourie contended that because the financial statements were not true financial statements, in that they did not fully comply with the requirements of the Companies Act, they could not be said to constitute fraudulent misrepresentation made to Firstrand. However, the documents submitted to Firstrand were held out to be a true and fair reflection of the financial position of Supreme Car and vouched for by an independent financial expert. Fourie prepared them for that very purpose, and Supreme Car relied on them when making its applications to FirstRand for an increase in its credit facility. Fourie knew that they would be



used by Supreme Car for that purpose.

The financial statements were therefore fraudulent misrepresentations.

Fourie also contended that Firstrand failed to establish a causal link between the fraudulent or reckless conduct of the company's business and its inability to pay its debt, because Supreme Car's inability to pay its debt was a result of reckless spending on the Yzerfontein properties. Fourie contended that he was not a party to such spending. However, in accordance with the authority of *Howard v Herrigel* 1991 (2) SA 660 (A) and *Philotex (Pty) Ltd v Snyman* 1998 (2) SA 138 (A) it is not necessary to establish such a causal link. This conclusion did not detract from the fact that where the converse is positively established, ie that there was no causal connection between the relevant conduct and the debt, section 424 cannot be applied.

Firstrand was therefore entitled to reply on section 424 in its action against Fourie, and its action succeeded.

AGRI SA v MINISTER FOR MINERALS AND ENERGY

A JUDGMENT BY MOGENG CJ (MOSENEKE DCJ, JAFTA J, NKABINDE J, SKWEYIYA J, YACOOB J AND ZONDO J concurring, CAMERON J, FRONEMAN J and VAN DER WESTHUIZEN J dissenting)
CONSTITUTIONAL COURT
18 APRIL 2013

2013 (4) SA 1 (CC)

Property

A party which is deprived of its mineral rights by virtue of the coming into effect of the Mineral and Petroleum Resources Development Act (no 28 of 2002) does not necessarily suffer expropriation. It will only do so if the State acquires ownership of such rights.

THE FACTS

On 1 May 2004, Sebenza Mining (Pty) Ltd held the coal rights pertaining to a farm which it owned. These rights consisted in its common law mineral rights for which no prospecting permit or mining authorisation was issued in terms of the Minerals Act (no 50 of 1991). On that day, the Mineral and Petroleum Resources Development Act (no 28 of 2002) ('the Act') came into force, superseding the Minerals Act.

The effect of the Act was to change the position existing under the Minerals Act by conferring on the Minister custodianship of all mineral resources, and requiring individuals who wish to obtain prospecting and mining rights to apply to her for them. The Act provided for transitional arrangements in regard to rights already existing when it came into force. In respect of 'unused old order rights' - a category under which Sebenza's coal rights had fallen - these were to subsist for a period of one year, but the holder had the exclusive right to apply for a prospecting right or a mining right in terms of this Act, failing which the unused old order right would cease to exist.

Due to insufficient funds, as a result of which it had been placed in liquidation, Sebenza did not apply for the continuation of its coal rights within the year of the Act's enactment. It ceded its coal rights to Agri South Africa.

In March 2006, Agri claimed compensation for the loss of these rights from the Department of Minerals and Energy. The Minister rejected the claim. Agri claimed that the effect of the passing of the Act was to deprive Sebenza of its coal rights so as to amount to expropriation entitling it to compensation. It contended that in terms of section 25(2)(b) of the Constitution, it was entitled to compensation as a result of the expropriation.

THE DECISION

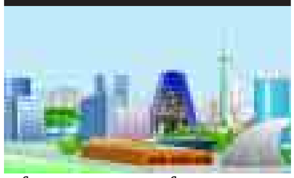
The essential question was whether or not Sebenza's mineral rights were expropriated when the Act came into force.

The effect of the Act was to deprive Sebenza of its mineral rights, but it did not necessarily follow from this that those rights became the State's. The Act does not confer such lost rights on the State, and there was nothing to show that the State acquired ownership of them. The State was custodian of the mineral resources of the country but was not the owner of them.

Since Sebenza's mineral rights were not transferred to the State, there was no expropriation of them, and in consequence, no entitlement under section 25 of the Constitution arose. In any event, for financial reasons, Sebenza had not taken action to preserve its rights. In these circumstances, the Act could not be said to have been the cause of its loss of them.

BERG RIVER MUNICIPALITY v ZELPY 2065 (PTY) LTD

Property



A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
8 APRIL 2013

2013 (4) SA 154 (WCC)

Section 4 of the National Building Regulations and Building Standards Act (no 103 of 1977) entitles a municipality to interdict a property owner from using or occupying structures unlawfully erected on the property. The municipality is not obliged to be satisfied with the criminal sanctions provided for in section 14(1A).

THE FACTS

Zelpy 2065 (Pty) Ltd owned fixed property situated within the area of municipal jurisdiction of Berg River Municipality. It built structures on the property without first obtaining approval of building plans for their construction.

The municipality sought a final interdict preventing Zelpy from occupying or using certain buildings on the property constructed in violation of section 4 of the National Building Regulations and Building Standards Act (no 103 of 1977) until an occupancy certificate had been issued by it in terms of section 14(1) of the Act.

Zelpy applied to the municipality in terms of s 14(1A) of the Act for permission to occupy the new structures prior to the issue of an occupancy certificate, such permission to endure pending a decision on the new rezoning application. The municipality advised Zelpy that its application could not be granted because section 14(1)(a) stated that an occupancy certificate could only be issued in respect of buildings constructed in accordance with approved plans.

Zelpy opposed the application on the grounds that (a) the municipality had not shown that the criminal sanctions provided for in the Act were an inadequate remedy, (b) any interdict granted by the court should be suspended pending a decision on Zelpy's section 14(1A) request, which Zelpy contended had not yet been validly determined, and pending the outcome of the new rezoning application.

THE DECISION

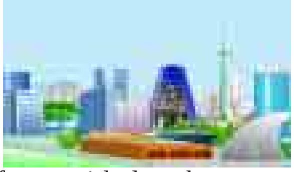
Section 14(1A) provides that a local authority may grant permission in writing for use of a building before the issue of a certificate of occupancy for a specified period and on such conditions as may be specified.

Section 4(1) of the Act provides that no person shall, without the prior approval in writing of the local authority, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act. Section 4(4) provides that a person who erects a building in contravention of section 4(1) is guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting the building.

One of the Act's main purposes, in providing for the laying-down of standards for plans and specifications and in requiring plans to be approved by the local authority, is to ensure that buildings will be safe and suitable for their intended use. It could not be said that that purpose would not be achieved unless one implied into it a prohibition against the use and occupation of a building erected in violation of section 4(1). However, a consideration of the terms of the Act as a whole left no doubt that in order to achieve that purpose, it is necessary to imply such a prohibition.

Zelpy's new structures were erected without municipal approval and in violation of section 4(1). It followed that Zelpy was not entitled to obtain permission for their use in terms of section 14(1A) and the municipality rightly refused permission. It also followed that Zelpy's use of the new structures violated the implied prohibition in section 4(1) against the use of structures erected without approval under the Act.

The remaining question was whether the municipality was entitled to an interdict to prevent



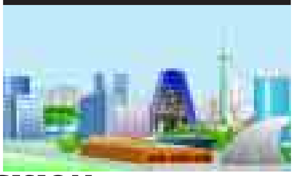
Zelpy's ongoing violation of the implied prohibition. Since section 14(1A) did not apply, the criminal sanction provided for in it could not apply. Criminal charges would not have constituted an alternative remedy available to the municipality. The municipality was therefore entitled to the interdict it sought.

Zelpy was prohibited from in any way using or occupying, or allowing to be used or occupied, the structures it unlawfully erected.

I cannot say that the Act would be unworkable as it stands unless one implied into it a prohibition against the use and occupation of a building erected in violation of s 4(1). However, a consideration of the terms of the Act as a whole leaves me in no doubt that in order to achieve the ostensible legislative intention, it is necessary to imply such a prohibition. It is inconceivable that the lawmaker could have intended that while lawfully erected buildings could be used and occupied only after obtaining the certificate or permission contemplated in s 14, an unlawfully erected building could lawfully be used and occupied unless and until it was demolished. Such a view would defeat the obvious intention of the lawmaker. The lawmaker intended that buildings should not come into existence without approved plans and that buildings erected in accordance with approved plans should not be used or occupied without further permission. If one were to commandeer the officious bystander whose more usual function is to put questions to contracting parties, and got him to ask the lawmaker, as the latter prepared to approve the Act, whether a person would be entitled to use and occupy a building erected without approved plans, the lawmaker's immediate response would have been, 'Of course not, he cannot even lawfully erect such a building.' By forbidding in s 4(1) the act of bringing into existence a building intended (upon completion) for use and occupation, the lawmaker can be taken to have also forbidden the intended use and occupation if for any reason the unlawful erecting was allowed to reach the stage of a completed building. Even though the local authority may apply for a demolition order, this might take some time.

CITY OF JOHANNESBURG v CANTINA TEQUILA

Property



A JUDGMENT BY CACHALIA JA (BRAND JA, LEWIS JA, BOSIELO JA AND THERON JA concurring)
SUPREME COURT OF APPEAL
20 SEPTEMBER 2012

2012 SACLR 386 (SCA)

Usage as hotel does not include restaurant within the meaning of permitted uses defined in a town plannning schemewhich only identifies primary use rights, and not any other uses. Excluded from the uses there identified is any use of the property as a 'place of refreshment'.

THE FACTS

Cantina Tequila conducted the business of a restaurant and bar at a hotel which was situated within the area of jurisdiction of the City of Johannesburg. The property was zoned under the Sandton Town Planning Scheme in terms of which certain primary use rights and consent rights were applicable to the property. These included use of the property as a hotel, as well as, with the consent of the local authority, 'use of the property for light industrial/ commercial purposes, places of amusement, places of instruction, recreational purposes as may be permitted with the written approval of the Council and which do not create any nuisance, noise, dust, smoke or smells'.

Cantina Tequila contended that because the business of a hotel may include that of a restaurant and bar, its conduct of that business as a stand alone business was also permitted under the zoning regulations.

The City of Johannesburg disputed this contention, and brought an application for an interdict to prevent Cantina Tequila from continuing the operations of the restaurant and bar.

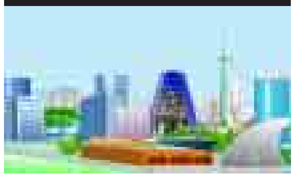
THE DECISION

Cantina Tequila's contention could not be upheld. The language of the zoning regulation was clear and unambiguous. It allowed only identified primary use rights, and not any other uses. Excluded from the uses there identified was any use of the property as a 'place of refreshment', which the scheme defined as including a restaurant, but not a bar. This had to mean that intention was to exclude any 'place of refreshment' – including a restaurant – from the permissible uses of the property.

Had the restaurant and bar business been part of a hotel, there would have been merit in the submission that the business was ancillary to the hotel, and did not detract from the primary right of a hotel. But it did not follow that because a restaurant and bar could be part of the ancillary uses of a hotel, they could also be read into the list of primary rights given under the town planning scheme.

The interdict was granted.

HYPROP INVESTMENTS LTD v NCS CARRIERS AND FORWARDING CC



A JUDGMENT BY SPILG J (BORUCHOWITZ J and COPPIN J concurring)
SOUTH GAUTENG HIGH COURT
14 MARCH 2013

2013 (4) SA 607 (GSJ)

A claim for loss of rental for holding over premises following cancellation of a lease must prove that the rental lost was the market rental which would have been obtained during the period of holding over. The rental payable under the cancelled lease is insufficient in itself to prove this when there are grounds for doubting whether that rental would have been obtainable from another tenant.

THE FACTS

Hyprop Investments Ltd leased business premises in a shopping centre to NCS Carriers and Fowarding CC. The parties concluded two lease agreements prior to completion of the construction of the shopping centre. Clause 31 of the leases provided that 'While for any reason . . . the tenant occupies the premises and the landlord disputes the right to do so, the tenant shall, pending the determination of such dispute . . . continue to pay an amount equivalent to the monthly rental'.

NCS failed to pay rent, as a result of which Hyprop brought an application for an order confirming cancellation of the leases. It obtained an order to that effect as well as an order for payment of arrear rental and ejectment.

NCS remained in occupation of the premises while it appealed the judgment given against it. NCS failed to obtain leave to appeal. Hyprop then claimed against NCS for loss of rental and ancillary charges for the period following cancellation of the lease. It alleged that the rental it was entitled to was the market related rental in respect of the premises, and this was equivalent to the rental it would have received in terms of the cancelled lease. In support, it depended, inter alia, on clause 31 of the lease agreements. NCS defended the claim on the same grounds it had opposed the first application Hyprop had brought, ie that Hyprop had fraudulently misrepresented the conditions of the shopping centre where NCS was to operate its business. NCS contended that the market related rental was not equivalent to the rental provided for in the lease because, given the quality of the shopping centre, Hyprop would not have been able to let the premises to another party at that rental. In support of this, they relied on a report given by a firm of architects which concluded that the premises as described in the lease did not accord with the premises as finally constructed.

Hyprop contended that it was entitled to lost rental for the period during which NCS was holding over the premises.

THE DECISION

A rental, predetermined before development of the centre was completed, could not be relied upon to determine the fair market value of rentals during the period of the actual holding over when there were so many uncertainties about the eventual character of the shopping centre. These uncertainties included the fact that there would be different tenants on the premises, the fact that anchor tenants did not materialise and, the effect of the quality of the shopping centre's management, its marketing, the tenant mix and actual pedestrian custom, as well as supervening external factors such as the economy.

As far as clause 31 was concerned, this allowed Hyprop to appropriate payments made to rental liability but did not equate payments made to a market rental.

The architects report did not state what the difference in rental would be between premises let in a shopping centre as described in the lease and one as actually constructed. However, the report showed that the defence that the rental provided for in the lease was not market related was bona fide.

In view of these uncertainties, it could not be accepted that the rental provided for in the leases was market related. Accordingly, Hyprop had failed to prove the amount of the damages it had suffered for NCS having held over the premises. Its claim for loss of rental failed.

CAPE EMPOWERMENT TRUST LTD v FISHER HOFFMAN SITHOLE

A JUDGMENT BY BRAND JA (MAYA JA, CACHALIA JA, SHONGWE JA and SWAIN AJA concurring)
SUPREME COURT OF APPEAL
20 MARCH 2013

2013 (5) SA 183 (SCA)

Contract

A negligent misstatement causing economic loss does not result in liability if it is not shown that the misstatement was wrongful. Wrongfulness is demonstrated by showing that the party to whom the statement was made seriously requested the statement in a business context and would be dependent on it.

THE FACTS

On 23 August 1999 Cape Empowerment Trust Ltd (CET) concluded a written sale of business agreement with Paradigm Interactive Media Ltd. In terms of the agreement, a subsidiary of CET, H Investments No 194 (Pty) Ltd purchased a business from Intella Ltd, a subsidiary of Paradigm. The purchase price was R147m, of which R137m was to be paid after fulfilment of certain suspensive conditions and the balance of R10m one year later. The agreement provided that upon non-fulfilment of a suspensive condition on due date (the approval of shareholders), 'this agreement will automatically fail and be of no further force and effect'.

During negotiations, the chief executive officer of CET, Mr S Rai, was informed by directors of Paradigm and Intella that the business had made a substantial loss in the 1999 financial year, but that as a result of a lucrative contract it had concluded with another company, the business had experienced a turnaround in its financial fortune. The assurance resulted in a warranty in the sale agreement, to the effect that 'the [gross] profits from the business for the period 1 March 1999 up to and including 30 June 1999 will not be less than R10 million (ten million rand) …' Another warranty given by the seller was that all accounts receivable were good and collectable to the full amount thereof.

Rai decided that a due diligence requirement of the agreement could be substituted with an assurance from Intella's auditors, Fisher Hoffman Sithole (FHS) and so he requested an audit certificate from them confirming the warranty that the gross profits of the business for the period March 1999 to 30 June 1999 were not less than R10 million. In response, one of the firm's partners affirmed in an email message:

'I . . . advise that the after tax earnings for the Intella group for the year ended 30 June 1999 as reported in the published results of Paradigm amounted to R9,141 million.
The Intella group had incurred a substantial loss for the period 1 July to 28 February 1999. Unfortunately I do not have the breakdown between the two periods but I am satisfied that the after tax profit of Intella group for the period 1 March 1999 to 30 June 1999 amounted to in excess of R10 million.'

The approval of shareholders was not obtained before the date provided for in the agreement, but was obtained at a later date.

This statement made by FHS was untrue. The business in fact made a substantial loss during this period. Rai became aware of this in March 2000. Because of obligations arising from the financing arrangements concluded with other parties, Rai considered that CET was unable to cancel the agreement, but concluded settlement agreements involving those parties, H Investments 194, Intella and Paradigm.

CET then brought an action in delict against FHS, alleging that its affirmation in its email message constituted a negligent misstatement which had induced it to enter into a disadvantageous business deal that caused it to incur wasted expenses. It claimed R17m in damages.

THE DECISION

CET had to prove the three elements of delictual liability: wrongfulness, fault and factual

causation. The evidence clearly established fault and factual causation. Given the true facts concerning the profitability of the business, the statement made by FHS displayed gross negligence on its part. Factual causation had also been proved – had the affirmation correctly recorded the profitability of the business, the shareholders would not have approved the agreement.

However, as far as wrongfulness was concerned, this was to be determined by considerations of legal and public policy as applied to the facts of the particular case. In this regard, whether or not a request for a statement upon which a person will rely is made as a serious request is relevant. In the present case, Rai had made a serious request and this pointed to possible wrongfulness on the part of FHS. However, what was also relevant was whether or not CET was dependent on the statement. CET was not so dependent because it had had the option of proceeding with the due diligence investigation.

Most importantly for the question of wrongfulness was the issue of ‘vulnerability to risk’. In the present case, CET had reduced its vulnerability to risk by insisting on the warranty regarding the gross profits of the business. However, upon it being apparent that there had been a breach of warranty, CET had deprived itself of the remedy available to it flowing from such breach by allowing the agreement to lapse and entering into a settlement agreement. CET therefore appeared to be the author of its own misfortune. Its allegation that it could not extricate itself from the complex financing arrangements and was therefore compelled to continue with the agreement in modified form was unconvincing.

It also appeared that CET had not proved that the statement made by FHS was a legal cause of its loss. FHS could not have foreseen that its statement would result in loss. It was aware of the safeguards CET had ensured for itself in the form of the warranties in the agreement and the requirement of a due diligence investigation, and had no reason to think that CET could not have depended on these to avoid any loss.

BANDA v VAN DER SPUY

A JUDGMENT BY SWAIN AJA (LEWIS JA, MAYA JA, CACHALIA JA and ERASMUS AJA concurring)
SUPREME COURT OF APPEAL
22 MARCH 2013

2013 (4) SA 77 (SCA)

A seller is liable to a buyer for the reasonable costs of repairing a latent defect if the seller was aware of the defect and failed to disclose it to the buyer at the time of conclusion of the sale.

THE FACTS

Van der Spuy sold a house with a thatch roof to Banda. The sale agreement recorded that Van der Spuy transferred to Banda his rights under a guarantee given by a contractor who had repaired the roof. By that time, the period of the guarantee had expired. The sale agreement also contained a voetstoots clause.

The repairs had been effected because the roof had leaked when it rained. It continued to do so after Banda had taken occupation of the house. Banda sought a reduction of the purchase price on the grounds that Van der Spuy had known of the latent defect.

Van der Spuy contended that as he had been confident of the repair work done to the roof, and the house continued to be insured. He denied that he had known that the roof would continued to leak.

THE DECISION

If Van der Spuy had believed that the repairs were adequate, the question arose why he did not inform Banda that the guarantee was no longer effective and refer him to the contractor who had issued it. Van der Spuy had provided no explanation for this.

Van der Spuy's failure to probe the assurances given by the contractor indicated a wilful disregard of the defect in the roof. He did not possess an honest belief in the adequacy of the repairs that were effected to the roof, such that the problem of leaks in the roof had been permanently addressed. Considered together with his fraudulent conduct in not disclosing the absence of a valid guarantee and his dishonesty in relation to the duration of the guarantee, it was clear that he possessed knowledge of the structural defects in the roof which were a cause of the roof leaking, and which had not been permanently repaired. At the very least, he was conscious of the inadequate nature of the repairs to the defects in the roof, which gave him reasonable grounds to suspect that the leaks in the roof had not been fixed. He was therefore obliged to disclose this knowledge to Banda.

Banda was therefore entitled to the reasonable costs of repairing the roof.

COMWEZI SECURITY SERVICES (PTY) LTD v CAPE EMPOWERMENT TRUST LIMITED

Contract

A JUDGMENT BY WALLIS JA (CLOETE JA, CACHALIA JA, LEACH JA AND THERON JA concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2012

2012 SACLR 435 (SCA)

A provision entitling a party in whose favour there is a resolutive condition to relax that condition, entitles that party to extend the period of the condition.

THE FACTS

Comwezi Security Services (Pty) Ltd agreed to repay a loan owed to Cape Empowerment Trust Ltd by issuing 25 shares in itself to that company. The agreement was subject to the resolutive condition that Cape Empowerment Trust complete a due diligence investigation into Comwezi, and be satisfied with the outcome thereof by no later than 3 months after the date of the agreement. In the event of Cape Empowerment Trust not notifying Comwezi that it was satisfied with the outcome of the due diligence investigation, the agreement would 'automatically fail and be of no further force and effect'. It was provided that this condition was imposed for the benefit of Cape Empowerment Trust and could be waived or relaxed by it prior to the lapsing of the 3-month period.

Cape Empowerment Trust extended the date for fulfilment thirteen times, on the grounds that Comwezi was in breach of its obligations to co-operate with the due diligence investigation and provide documents to enable the investigation to be undertaken.

Comwezi argued that the power to relax the resolutive condition did not allow Cape Empowerment Trust to extend the period within which it was to conduct the due diligence investigation. Since that investigation was not completed within the 3-month period the agreement was automatically failed and was of no further force and effect.

Cape Empowerment Trust contended that the effect of the extensions was to extend the period applicable to the resolutive to condition, and so ensure that the agreement remained in force.

THE DECISION

Cape Empowerment Trust had the right to insist on proper compliance with the due diligence obligations imposed on Comwezi and equally, the right to relax full compliance with that obligation. That right existed independent of the resolutive condition. The right to waive or relax the resolutive condition therefore did not relate to that obligation and could only relate to the 3-month period referred to in the resolutive condition.

Were that right not to apply to the period of the resolutive condition, the provision of the agreement establishing the right would be redundant as it would not apply to anything. Such a result would not be acceptable since it would mean that the provision would be interpreted as having no application.

The only meaningful application of the provision was to consider it as relating to the 3-month period. On a proper interpretation of it, Cape Empowerment Trust was given the power to relax that period, and thereby extend the period of the resolutive condition.

SENTINEL MINING INDUSTRY RETIREMENT FUND v WAZ PROPS (PTY) LTD

Contract

A JUDGMENT BY CLOETE J (MALAN, SHONGWE AND TSHIQI JJA AND SOUTHWOOD concurring)
SUPREME COURT OF APPEAL
21 SEPTEMBER 2012

2012 SACLR 425 (SCA)

An agreement which provides for the lapsing of an obligation to make a payment upon the happening of some future event, absolves the party obliged to make such payment of the obligation to make payment immediately upon the occurrence of that event.

THE FACTS

Waz Props (Pty) Ltd concluded an agreement with Sentinel Mining Industry Retirement Fund in terms of which Waz undertook to pay Sentinel R115 531.87 being its pro-rata share of a road upgrading project. The project related to a road serving both the properties of Waz and those of Sentinel.

Clause 4 of the agreement provided that Waz would secure its obligation either by transfer of the money into an attorney's trust account, or by furnishing a bank guarantee, or by agreeing to the imposition of a particular restrictive conditions in its title deeds. Clause 5 of the agreement provided that in the event that the road upgrading project was not completed by 1 April 2009, any money transferred was to be repaid and Sentinel was to procure cancellation of the restriction condition.

Waz furnished the bank guarantee.

The project was not completed by 1 April 2009 but was completed on 15 February 2010. Sentinel's attorneys presented the guarantee for payment on 26 March 2010. On 6 April 2010, the bank made payment in terms thereof.

Waz contended that because the project was not completed on the due date, its obligation to make payment had lapsed and Sentinel had not been entitled to present the guarantee. It contended that clause 5 of the agreement contained a resolutive condition which terminated the obligation to pay the amount of R115 531.87 and any further obligations.

Waz brought an application for repayment of the amount paid to Sentinel.

THE DECISION

The obligation to make payment was not independent of the other terms and conditions of the agreement. It had to be read with the obligations imposed on Waz under the options for payment because these would determine the amount to be paid, and these would vary depending upon the option chosen.

The effect of clause 4 was to list the methods by which Waz had to make payment. It contained no express residual obligation to pay the amount due at some future and undefined date. It was therefore exhaustive of the methods by which payment can be made, and it allowed for no payment other than in its terms.

The effect of clause 5 was to terminate the obligation to make payment. If the project was not completed by 1 April 2009, the obligation to pay lapsed. It followed that if the resolutive condition was fulfilled, the amount payable by Waz, and the accrued interest, had to be refunded to Waz.

CASEY v FIRST NATIONAL BANK LTD

A JUDGMENT BY SPILG J
SOUTH GAUTENG HIGH COURT
8 AUGUST 2011

2013 (4) SA 370 (GSJ)

Banking

There are circumstances in which a bank may call up a letter of credit given to it as security for a debt on the basis that the debtor has not met its obligations to the bank, irrespective of whether or not the debt has prescribed.

THE FACTS

In 1998, Kimberley Roller Mills (Pty) Ltd, the second applicant, obtained a finance facility of R850 000 from First National Bank Ltd. As security, the bank obtained a standby letter of credit for $200 000 from the Bank of America which Casey, that bank's customer, arranged.

The facility was increased from time to time, and the security of the letter of credit was also increased. In 2005, the facility was extended, the expiry date being March 2007. The period of the letter of credit was also extended.

In July 2010, the parties entered into without prejudice negotiations. Kimberley took the view that the bank's claim had prescribed three years after the last expiry date of the continuation of the facility. The bank asserted its right to claim payment under the letter of credit and presented it for payment to the Bank of America. The Bank of America paid $420 000 to the bank.

Kimberley applied for an order reversing the payment. It contended that the bank had falsely stated to the Bank of America that the debt was due to it when it had in fact prescribed.

THE DECISION

If the Bank of America had extended the period of the letter of credit without proper authority, then it would be open to Casey to address a claim against that bank for breach of the banker-customer mandate.

On a plain reading of the letter of credit, it would be called up if Kimberley did not meet its obligations to the bank. On an ordinary interpretation of the document the catalyst for payment was not that the amount was due and payable, since under the letter of credit that was simply the consequence flowing from Kimberley not having met its obligations. If the term had required the bank to authenticate that an amount was 'currently due, owing and payable', then there might have been scope to argue that prescription would not allow for authentication. However, in the present case it was common cause that Kimberley had not met its obligations.

In terms of the law relating to letters of credit, the Bank of America had been obliged to pay the bank and the bank had been entitled to call up the amount due under it.

CHILIZA v GOVENDER

A JUDGMENT BY VAHED J
KWAZULU NATAL HIGH COURT
29 APRIL 2013

2013 (4) SA 600 (KZD)

Insolvency

It is not necessary to serve a provisional order of sequestration on the South African Revenue Service prior to applying for a final order, although a court may exercise its discretion to require such service prior to granting such an order.

THE FACTS

Govender applied for the provisional sequestration of Chiliza's estate. The application papers were served on the South African Revenue Service.

In due course, Govender obtained a final order. Prior to the grant of the final order, the provisional order was not served on the South African Revenue Service.

Chiliza applied for a rescission of the final order on the grounds that there had been a failure to comply with section 11(2A)(c) of the Insolvency Act (no 24 of 1936). The section provides that a petition for the sequestration of a person's estate must be served on the South African Revenue Service.

THE DECISION

The question was whether or not the provisions of the section were peremptory. If they were, failure to comply with them would render the granting of the final order invalid.

The purpose of bringing the provisional sequestration of a debtor's estate to the attention of the South African Revenue Service was reasonably clear. Its purpose is to provide it with an opportunity to intervene, so as to bring certain relevant facts to the court's attention or to ensure that a final order does in fact eventuate. That object is substantially achieved by service of the petition.

While service of the petition on the South African Revenue Service is peremptory, the requirement of further service of the provisional order is not. This conclusion was consistent with section 12 of the Act which does not oblige a court to take the non-service of the provisional order into account when exercising its discretion whether to grant a final order.

The application for rescission was dismissed.

PRO-MED CONSTRUCTION CC v BOTHA

Insolvency

A JUDGMENT BY WILLIS J (HORN J AND BAVA J concurring)
SOUTH GAUTENG HIGH COURT
24 AUGUST 2012

2012 SACLR 375 (GSP)

There is no disposition without value within the meaning of section 26(1)(b) the Insolvency Act (no 24 of 1936) if the disposition is matched by an equivalent reduction in the indebtedness of the insolvent party.

THE FACTS

AD Master Parts (Pty) Limited sold a farm, together with certain movable items to Superfecta Trading CC for R2 950 000 and transfer of the property later took place by registration thereof with the Registrar of Deeds. The agreement was later varied to provide that payment of part of the purchase price - R576 000 - would be effected by transfer to Botha of two properties in a development known as the Pinehaven Country Estate. These properties were then owned by Pro-Med Construction CC.

Botha took transfer of one of the Pinehaven properties. The sale agreement in terms of which Botha obtained this property recorded that the sale price was R100. A certain Mr Lubbe, the sole member of Pro-Med Construction CC, had a loan account in Superfecta which he accepted would be reduced proportionately in accordance with the value of the property as reflected in the variation agreement. Mr Lubbe was also owed money by Pro-Med, the amount of that indebtedness exceeding the price payable for the Pinehaven properties.

The joint liquidators of Pro-Med claimed payment of R349 900,00 from Botha. The claim was based on the allegation that the transfer of the Pinehaven property to him amounted to a disposition without value in terms of the provisions of section 26(1)(b) the Insolvency Act (no 24 of 1936) and should be set aside.

THE DECISION

The evidence was that the Pinehaven property was used, together with other assets of Pro-Med, to discharge a debt of Superfecta Trading to AD Master Parts that arose from Superfecta Trading's purchase of the farm from AD Master Parts. This would have given rise to a corresponding claim by Pro-Med against Superfecta Trading, and the disposition would have been matched by a corresponding legal obligation, ie the indebtedness of Superfecta Trading to Pro-Med.

The disposition was however not without value, because Lubbe's claim against Pro-Med was reduced proportionately against it, via the reduced loan account of Superfecta. The fact that the amount of Pro-Med's indebtedness to Lubbe had not been specified did not detract from this conclusion as the exact amount was peculiarly within the knowledge of Pro-Med itself.

There was no disposition without value. Accordingly, section 26(1)(b) did not apply. The claim was dismissed.

ARNTZEN v NEDBANK LTD

Insolvency

A JUDGMENT BY GORVEN J
KWAZULU NATAL HIGH COURT, PIETERMARITZBURG,
28 SEPTEMBER 2012

2012 SACLR 447 (KZP)

An ex parte application for the voluntary surrender of an estate requires full and frank disclosure by the applicant and well-founded evidence indicating sufficiently that the applicant owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

THE FACTS

Arntzen brought an ex parte application for the voluntary surrender of his estate. In support of the application, he affirmed that he had two assets, an immovable property and a motor cycle, and that their values were R650 000 and R33 500 respectively. The value of the property was substantiated by means of a letter issued by an estate agent, and the value of the motorcycle was substantiated by means of a similar letter issued by another person.

Arntzen affirmed that his total indebtedness was R828 888.85. He owed Nedbank Ltd R746 584.88. Of this, R524 535.32 was secured by a mortgage bond. The rest of his creditors were together owed R82 303.97. He affirmed that the costs of sequestration would be R45 495. These figures resulted in a sum of R113 469.68 remaining to meet concurrent creditors' claims of R304 353.53, and a dividend of some 37 cents in the rand.

Nedbank intervened in the application. It affirmed that, on a forced sale basis, Arntzen's property would fetch a maximum of R600 000. This was based on the evidence of a professional valuer registered as such under the Valuers' Act (no 23 of 1982). Nedbank also affirmed that the costs of realising the immovable property and the motor cycle on insolvency would be R92 505 and R8 021.45 respectively. It affirmed that the costs of Arntzen's attorneys of R22 500 and costs of advertisements and two postponements should be added, with the result that an amount of R640.78 would be available for distribution to the concurrent creditors. This would give a dividend of less than 1 cent in the rand. There was also a danger of a contribution if it as intervening creditor proved a claim.

In his replying affidavit, the estate agent deposed to the value of the property affirming that it was the expected value from a sale through insolvency. Arntzen also affirmed that he had applied for debt review in terms of the National Credit Act (no 34 of 2005).

THE DECISION

The test for voluntary surrender applications as set out in section 6(1) of the Insolvency Act (no 24 of 1936) requires that it be shown that the debtor in question is insolvent, that he owns realisable property of a sufficient value to defray all costs of the sequestration which will in terms of this Act be payable out of the free residue of his estate and that it will be to the advantage of creditors of the debtor if his estate is sequestrated.

In the present case, there was no dispute that Arntzen's estate was insolvent. The question was whether the remaining two requirements were satisfied.

Since the application was brought ex parte, and was one for the voluntary surrender of an estate, the need for full and frank disclosure and well founded evidence concerning Arntzen's estate was more pronounced. Such evidence had not been given. Not only were there disputes on the papers, but the evidence put forward in Arntzen's founding affidavit was insufficient. Even disregarding the debt review process, it was unclear whether or not there would be an advantage to creditors. A factor relevant to this was whether, despite Arntzen being insolvent, the indebtedness would be likely to be liquidated over time if his income exceeded his expenses. This would operate to the benefit of creditors since they would receive the full amount due to them. However,

the disclosure concerning income and expenditure was insufficient to give a proper indication in this regard.

In consequence, the court could not be satisfied that Arntzen owned realisable property of sufficient value to defray all costs of the sequestration.

The application was dismissed.

I take the view that there is an even greater risk of abuse and a risk that the interests of creditors will be undermined in voluntary surrender applications than in 'friendly' sequestration applications. Therefore the need for full and frank disclosure and well founded evidence concerning the debtor's estate is even more pronounced. There are a number of reasons for this, some of which have been foreshadowed in the discussion above. I shall mention only some. First, the applicant tends to focus on the formal requirements of s 4 of the Act and does not seem to appreciate the need to satisfy a more rigorous test than for sequestration applications at both provisional and final stages as regards advantage to creditors. Secondly the court must perforce, in most instances, rely on the founding papers. This brings into play the peculiar characteristics mentioned above of voluntary surrenders being brought as ex parte applications. Thirdly, no collusion between friendly creditor and debtor is necessary since it is the debtor who is the applicant and has a more direct interest in the application succeeding and understanding of the genuine position than the friendliest of creditors. Voluntary surrender applications therefore require an even higher level of disclosure than do 'friendly' sequestrations if the court is to be placed in a position where it can arrive at the findings and exercise the discretion set out in s 6(1) of the Act.

LORCOM THIRTEEN (PTY) LTD v ZURICH INSURANCE COMPANY SOUTH AFRICA LTD

A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
29 APRIL 2013

2013 (5) SA 42 (WCC)

Insurance

A party will be considered to have an insurable interest in an insured asset if it has a well-founded expectation that it will become the owner of the asset in due course.

THE FACTS

Zurich Insurance Company South Africa Ltd insured Lorcom Thirteen (Pty) Ltd against loss of a fishing vessel, the Buccaneer. During the period of the insurance, the Buccaneer sank.

Zurich took the view that Lorcom did not have an insurable interest in the vessel as it was owned by Gansbaai Fishing Wholesalers (Pty) Ltd, GFW. GFW owned all the shares in Lorcom, 62.5% of whose shares were owned by a close corporation which a certain Mr Theart had become the 100% owner of under a sale agreement with the close corporation's owner. Under that sale agreement, the risk of loss to the vessel passed to Theart upon payment of a deposit. Theart was the party who completed the proposal form resulting in the insurance of the Buccaneer.

Lorcom claimed indemnity in terms of the insurance policy.

THE DECISION

The policy's reference to the loss did not specify that it was to be loss suffered by Lorcom. The loss referred to was the loss of the vessel. The word 'loss' did not mean 'lost by the insured party', but meant the event of the vessel's loss due to sinking or destruction.

The parties understood their contract as meaning that Zurich promised to pay Lorcom R3 million if the vessel were lost. It followed that the policy did not require Lorcom to prove that the loss of the vessel caused it to suffer actual loss. The enquiry was whether Lorcom had an interest sufficient to render enforceable a policy providing cover measured with reference to the value of the vessel.

That Lorcom had an insurable interest was evident from the combination of its right of use, its well-founded expectation that such use would continue until it became the owner of the vessel, and its well-founded expectation that the sale agreement would result in Lorcom becoming the owner of the vessel by the effective date. The cover thus provided would enable Lorcom, if the vessel were lost or damaged prior to the effective date, to be placed in the same position as if Lorcom's right of use had continued as expected and as if the sale agreement had followed its expected course. If there were any doubt about it however, the matter was placed beyond question by the added consideration that Lorcom was the 100% shareholder of GFW.

Lorcom's claim was confirmed.

ABSA BANK LTD v MORRISON

A JUDGMENT BY SPILG J
SOUTH GAUTENG HIGH COURT
28 MARCH 2013

2013 (5) SA 199 (GSJ)

Property

An execution creditor may stop a sale in execution right up to the time when the sale takes place. If by mistake, it fails to do so, its debtor may obtain re-transfer of the property to it.

THE FACTS

Absa Bank Ltd obtained a judgment against the third respondent which included an order that his property be declared executable. The property was sold in execution by public auction in terms of Rule of Court 46 by the sheriff. Morrison was the purchaser.

Prior to the date of the sale, the third respondent contacted Absa which informed him that the sale could be prevented if the total arrears were paid before the date of sale. The third respondent settled the arrears in full prior to the public auction. Absa failed to inform its attorneys, as a result of which, the sale had proceeded.

Absa applied for an order that the sale be set aside. Morrison contended that he had purchased the sale from the sheriff acting in his capacity as such under Rule 46, and not from Absa, and that as such, the sale had been free of any impediment and could not be impugned by Absa.

THE DECISION

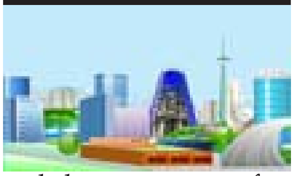
Rule 46 contains a sharp distinction between the attachment of property and its sale. After attachment, it is not the sheriff who takes the steps necessary for the sale in execution but the execution creditor, in this case Absa. The execution creditor's interests are what motivates the sale in execution. Accordingly, it is entitled to stop the sale right up until the point that the sale is about to take place.

Absa's failure to withdraw the sale amounted to an actionable breach of contract entitling its debtor to specific performance. However, Morrison as the purchaser at the sale had an enforceable right to insist on transfer. Both parties held personal rights against Absa. In such situations, two considerations come to the fore. The first was the principle of "qui prior est" which accords the enforceable right to the first holder of the right in question. The second was that the law would seek to assist an existing owner of property even against those who were bona fide when they acquired it from a third party claiming title.

An overarching principle was that the law sought to avoid the loss of property. This also finds expression in sections 129 and 130 of the National Credit Act. In accordance therewith, property which is by agreement of the execution creditor with the debtor to be withdrawn from a sale in execution upon payment of arrears before that date cannot by reason of the principle of 'the fall of the hammer' at public auctions result in the debtor losing his house because of a mistake. The innocent purchaser is limited to a damages claim for breach of contract against the execution creditor.

The application was granted.

RADEMAN v MOQHAKA LOCAL MUNICIPALITY



A JUDGMENT BY ZONDO J (MOGOENG CJ, MOSENEKE DCJ, FRONEMAN J, JAFTA J, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J and MHLANTLA AJ concurring)
CONSTITUTIONAL COURT
26 APRIL 2013

2013 (4) SA 225 (CC)

If a municipality's bylaws so provide, a municipality is entitled to cut off a ratepayer's electricity supply if the ratepayer withholds payment of rates, even if the amounts due for electricity have been paid in full.

THE FACTS

Rademan received an electricity supply at her house from the Moqhaka Local Municipality in terms of a supply agreement concluded between her and the municipality. She was also a ratepayer within that municipality's area of jurisdiction.

Rademan refused to pay her rates because she alleged that the municipality had failed to maintain proper standards of service delivery. However, she continued to pay for the electricity supplied at her house.

The municipality asserted the right to cut off the supply of electricity because of Rademan's failure to pay her rates. Rademan contended that the municipality was not entitled to do so because she had paid for the electricity supplied to her house and was not in arrears with any payments due from her. She also contended that the municipality was not entitled to do so because any one of the three conditions provided for in section 21(5) of the Electricity Supply Regulation Act (no 4 of 2006) had not been met. The section provides that a municipality cannot terminate an electricity supply unless the customer is insolvent, the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity or the customer has contravened payment conditions.

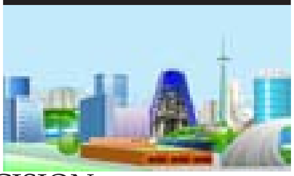
THE DECISION

Section 18(1) of the municipality's bylaws provided that if one account was rendered for more than one municipal service, the amount due and payable by a customer constituted a consolidated debt, and any payment made by a customer of an amount less than the total amount due, would be allocated in reduction of the consolidated debt toward payment of (a) the current account, (b) arrears and (c) interest. Section 18(3) provided that a customer could not elect how an account was to be settled if it is not settled in full or if there were arrears.

Section 1(g) of the bylaws made it clear that the application for the municipal services that a resident or ratepayer made to the council constituted the agreement between the municipality and the customer concerned. It was also clear from a reading of the Local Government: Municipal Systems Act (no 32 of 2000) and the bylaws that residents and ratepayers were bound by the bylaws. In the application for municipal services made by a resident or ratepayer to the municipality, the applicant agreed to be bound by the bylaws, regulations and policies of the municipality relating to the control and distribution of supplies and for the collection or enforcement of payment thereof.

In paying the components of her account without paying the rates, Rademan elected how she was settling her account. This is disallowed by section 18(3). By so doing, she placed herself in default and in breach of her obligations towards the municipality. This constituted a contravention of the municipality's conditions of payment of an account. It followed that the contention that, since Ms Rademan did not owe anything on electricity, the municipality was not entitled to cut her electricity off, was to be rejected.

ROYAL HOTEL RIVERSDAL (PTY) LTD v SIMON N.O.



A JUDGMENT BY HEHER JA (CACHALIA JA, MALAN JA, TSHIQI JA AND PILLAY JA concurring)
SUPREME COURT OF APPEAL
18 SEPTEMBER 2012

2012 SACLR 532 (SCA)

The terms of a servitude may be interpreted according to the background circumstances of its creation, and from the language of the terms themselves.

THE FACTS

The Simon Family Trust sold a portion of its property to Royal Hotel Riversdal (Pty) Ltd. The sale agreement also provided for the creation of a servitude in favour of the trust. The servitude related to an area of the portion sold and obliged Royal Hotel not to allow any obstruction which might stand in the way of vehicles in that area, to allow the existing parking area there to be used by clients of businesses operating in a building on the property, and to ensure that lorries and buses only use a specific gravel portion.

After transfer of the portion to Royal Hotel, it wished to construct a building on part of the area subject to the servitude. This would affect only the third restriction referred to in the servitude, and would occupy some 20% of the gravel area.

The Royal Hotel applied for an order declaring that it was entitled to construct the proposed building.

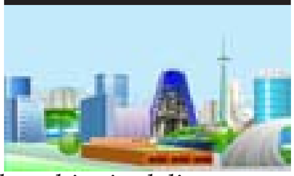
THE DECISION

Upon a proper interpretation of the third restriction, it was clear that Royal Hotel was not entitled to construct a building on the gravel area. In contrast to the first and second restrictions, the language of the third was broad terms. Were the restriction not be applied in broad manner, this would render it ineffective in respect of the area to which it referred.

The servitude entitled the trust to insist on a right to have buses and lorries visiting its premises park anywhere on the gravel area. This did not confer an exclusive right to park on the gravel area in favour of such vehicles but it did entitle the trust to defend the right conferred on its portion against a proposed development on the servitude area that would detract from its reasonable use. The effect of the erection of a building covering a substantial proportion of the gravel area, as proposed by Royal Hotel, would so detract from its reasonable use.

The application failed.

Property



MARGALIT v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY LEACH JA (NUGENT JA, PILLAY JA, SOUTHWOOD AJA AND ERASMUS AJA concurring)
SUPREME COURT OF APPEAL
3 DECEMBER 2012

2012 SACLR 564 (SCA)

A conveyancer should fastidiously examine all relevant documents when preparing them for a transfer of property. Failure to do so will constituted negligence.

THE FACTS

Margalit sold his property for R3m. At the time of the sale Standard Bank of South Africa Ltd held two mortgage bonds over the property. These had to be cancelled before the could be transferred to the purchaser. The bank appointed the second respondent, a firm of attorneys, to act on its behalf to cancel the bonds.

As a result of a series of delays and mistakes, it took more than a year before the bonds were cancelled, the property was transferred to the purchaser, and Margalit was paid. There was a delay in securing the rates clearance certificate, and a delay arose because the bank had lost the property title deeds and its mortgage bonds. When the documentation for lodgement of the transfer was examined in the Deeds Office, it was discovered that an application for certified copies of the title deeds had not yet been made, and no cancellation of the second mortgage bond over the property had been lodged. A second attempt at transfer failed because of defective linking. A third attempt also failed because of a failure to conform to agreed practices in the signing of the affidavit necessary to obtain certified copies.

Marglit alleged that the second respondent's negligent and unprofessional conduct had resulted in a delay in transfer from 29 May 2008, a date agreed to have been the date on which transfer would have been effected if the papers as they were initially lodged had been in order, until it was eventually registered on 16 July 2008. Margalit contended that the second respondent's conduct resulted in Standard Bank having breached its contract with him, and led to the second respondent being liable to him in delict.

Margalit claimed R42 713,42 in damages.

THE DECISION

The crucial question was whether or not the second respondent had been negligent in the performance of its duty in cancelling the bonds. In this connection, it was important to remember that any mistakes which may lead to a transaction in the deeds office being delayed will almost inevitably cause adverse financial consequences for one or other of the parties to the transaction.

The inference that the second respondent overlooked the need to cancel the second bond was irresistible. In the absence of an explanation, the inevitable conclusion to be drawn was that whoever acted for the second respondent to obtain cancellation of Standard Bank's bonds over the property, did so negligently. The potential of harm caused by a delay in the event of the application for cancellation being defective was obvious. A cursory examination of the copy of the deed of transfer in the second respondent's possession would have shown that it was necessary to cancel two mortgage bonds registered over the property. A conveyancer should fastidiously examine all relevant documents, and this was clearly not done by the second respondent. The standard of care it exercised fell well short of what is expected of a reasonable conveyancer.

The failure to conform to agreed practices in the singing of the affidavit neceesary to obtain certified copies was also evidence of negligence. The rejection of the transfer in the Deeds Office as a result of this emanated from negligence on the part of the second respondent.

The claim succeeded.

NEDBANK LTD v COOPER N.O.

A JUDGMENT BY VAN ZYL J
FREE STATE HIGH COURT
13 MARCH 2013

2013 (4) SA 353 (FB)

Insolvency

Security ceded in securitatem debiti is an asset in an insolvent estate even if the security has been realised prior to the date on which the insolvent was provisionally liquidated.

THE FACTS

Nedbank Ltd advanced loans to Marlim Group (Pty) Ltd, and took security in the form of two deeds of pledge and cession of two life policies.

On 9 January 2009 Nedbank called up Marlim's banking facilities and informed it that the security it held would be realised and applied in reducing its indebtedness. On 27 January 2009 Marlim owed Nedbank R2 129 592,04.

On 30 January 2009 Nedbank surrendered the first and second Momentum policies and requested payment of the policy proceeds from the insurer. On 4 February 2009 AIM Group (Pty) Ltd applied for the winding-up of Marlim.

Prior to Marlim being placed under provisional winding-up, Nedbank received payment of R1 387 512,00 and R525 006,00 from the insurer. On 26 February 2009 Marlim was placed under provisional winding-up. On 11 March 2009 Nedbank received payment of the further amounts of R3 519,34 and R1 331,65 from the insurer.

Nedbank submitted claims in the insolvent estate of Marlim for R5 023 743,17 plus interest, being the balance outstanding on a term loan granted to Marlim, and R3 599 132,61 plus interest, being the balance outstanding on Marlim's Nedbond loan.

When Cooper and the other liquidator drew the liquidation and distribution account, they levied a fee of 1% on the amounts received from the insurer prior to 26 February 2009 and a fee of 3% on the amounts received after that date. The account stated the effective date of liquidation was 4 February 2009.

Nedbank contended that the liquidators were not entitled to levy a fee on either amount because the policies were surrendered on 30 January 2009, before the deemed winding up of Marlim on 4 February 2009, and therefore did not vest in the insolvent estate. The liquidators contended that as section 348 of the Companies Act (no 61 of 1973) provides that the winding-up of a company by the court is deemed to commence at the time the application for the winding-up, this being 4 February 2009, and the payments were made after that date, the liquidation and distribution account was to be drawn up as at that date, with the result that the fee was applicable.

THE DECISION

The surrender of a policy always creates a potential asset in an insolvent estate because more money may be realised than what is owed to the creditor. If not, there would be no basis for a liquidator or a trustee of an insolvent estate to claim the balance back from the said creditor. Where the proceeds of the policies have not yet been paid out on the deemed date, their surrender values still form an asset in the insolvent estate. When the insurer paid the proceeds to Nedbank, the effect of this was that it operated in favour of Marlim in that it reduced Marlim's liability towards Nedbank.

When a cession in securitatem debiti is made, a personal right is pledged, and the pledgor retains the dominium of the right. The pledgor transfers only the power to realise the right to the pledge. Accordingly, the right falls into his estate upon his insolvency. It followed that even if the surrender took place prior to Marlim having been placed in provisional liquidation, Marlim

retained its ownership of the policies and these therefore fell into the insolvent estate.

The liquidators were therefore entitled to levy the fee on the amounts paid by the insurer.

The liquidation and distribution account was properly drawn up as at the date of application for the winding-up of Marlim, ie 4 February 2009.

Mr Steyn, on the other hand, pointed out that given the established legal position that the reversionary interest (the dominium) remains with the cedent, it is common cause that, if the money that the policies were worth were in excess of the debt owed to the applicant, the excess would have had to be paid back to the cedent, based on his reversionary interest. Using this established principle as a basis, Mr Steyn submitted that the surrendering of a policy always creates a potential asset in an insolvent estate, in that more money may be realised than what is owed to the creditor. If not, there would be no basis for a liquidator or a trustee of an insolvent estate to claim the balance back from the said creditor. He submitted that, should Mr Rood's argument be accepted, it would have the result that the policies, which policies were given as a cession in securitatem debiti, become an out-and-out cession because of the surrendering thereof, which cannot be correct. Mr Steyn therefore submitted that, where the proceeds of the policies had not yet been paid out on the deemed date, their surrender values still formed an asset in the insolvent estate. He also pointed out that it should be remembered that, when Momentum was to pay the proceeds to the applicant, it would still have been utilised in favour of Marlim to reduce Marlim's liability towards the applicant.

I have to agree with the submissions by Mr Steyn. It is evident that by means of a cession in securitatem debiti a personal right is pledged, that the pledgor retains the dominium of the right, that he transfers only the power to realise the right to the pledge, and accordingly that the right falls into his estate upon his insolvency.

TOTAL AUCTIONEERING SERVICES AND SALES CC v NORFOLK FREIGHTWAYS CC

Insolvency

JUDGMENT BY WILLIS J (HORN J AND BASHALL AJ concurring)
SOUTH GAUTENG HIGH COURT
30 OCTOBER 2012

2012 SACLR 521 (GSP)

In an application for provisional liquidation, if the applicant has made out a prima facie case against the respondent and the respondent fails to show any reason why the debt alleged to be due from it should not be paid, the application should succeed.

THE FACTS

Total Auctioneering Services and Sales CC conducted an auction sale which was attended by a Mr N Lallbehadu representing Norfolk Freightways CC. Norfolk purchased certain equipment at the auction.

In terms of the agreement between the parties, Norfolk became obliged to pay commissions on the sales. The total of commissions following the sales was R842 311.80.

The sales were subsequently cancelled. Total claimed payment of R842 311.80 and brought an application for the liquidation of Norfolk based on this debt in terms of section 68(c), read with section 69(1)(c), alternatively section 68(d) of the Close Corporations Act (no 69 of 1984).

In opposing the application, Lallbehadu gave no reason why the debt should not be paid but denied that the money was due to Total.

The application failed. Total appealed.

THE DECISION

In liquidation proceedings, if the applicant has prima facie established its case that the respondent is unable to pay its debt to the applicant, the onus is on the respondent to show that this debt is disputed on bona fide, reasonable grounds. In *Kalil v Decotex* 1988 (1) SA 943 (AD) it was also stated that where there is a prima facie case (ie a balance of probabilities) in favour of the applicant, a provisional order of winding-up should normally be granted.

These principles were applied in the case of *Hannover Group Reinsurance (Pty) Ltd v Gungudoo* [2011] 1 All SA 549 (GSJ). An appeal against that judgment having been dismissed by the Supreme Court of Appeal, its principles could be appropriately applied to the present case. Applying them, it could be accepted that a proper case was clearly established for a provisional order of liquidation of Norfolk.

The appeal was upheld.

NORTH EAST FINANCE (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY LEWIS JA (PONNAN JA, SHONGWE JA, SALDULKER JA and ZONDI AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2013

2013 (5) SA 1 (SCA)

Contract

An agreement which contains a provision that any disputes between the parties are to be subject to arbitration must be interpreted within its context. Such an interpretation may result in it being found that the parties did not intend that a dispute based on the allegation that one of the parties was fraudulent must be submitted to arbitration.

THE FACTS

North East Finance (Pty) Ltd financed the acquisition of goods by concluding rental agreements with end users. It discounted the debts owed to it with the Standard Bank of South Africa Ltd in terms of an agreement of cession. The business between them began in 1999. In terms of the cession North East ceded its rights under various rental agreements to the bank, and agreed to offer contracts to the bank from time to time. The bank was entitled to accept such offers in its absolute discretion.

In September 2008, following negotiations and meetings to resolve disputes which had arisen, the parties entered into a settlement agreement. Clause 19.1 provided: 'In the event of any dispute of whatsoever nature arising between the parties (including any question as to the enforceability of this contract but excluding the failure to pay any amount due unless the defaulting party has, prior to the due date for such payment, by notice in writing to the other party disputed liability for such payment), such dispute will be referred to arbitration.'

In the two years following the settlement agreement, the bank reached the conclusion that the settlement agreement had been induced by fraudulent misrepresentations and non-disclosures. Its officials asserted that they had discovered that procedures had been flouted by North East, transactions had been disguised, funds embezzled and other serious breaches of the fiduciary duty owed by North East to the bank had occurred. They concluded that these irregularities must have been known to North East at the time when the settlement agreement was concluded, and that by deliberately failing to make disclosure of all the irregularities, North East induced the bank to conclude the contract.

The bank decided to resile from the agreement and to regard it as void ab initio. It refused to submit the question as to whether there had been fraud inducing the contract to arbitration. North East contended that the dispute had to be submitted to arbitration as provided for in clause 19.1.

THE DECISION

In interpreting the settlement agreement, it was necessary for the court to look at it as a whole, and its purpose. That was to be done by looking at the context in which it was concluded.

The parties had had a protracted dispute about the collection of debts and the amounts owed to each other respectively. The sums ran into millions of rand. The purpose of the settlement agreement was to resolve accounting issues: at the time the bank was oblivious to the malpractices it claimed were perpetrated by North East.

In the light of the purpose of the settlement agreement, and having regard to what the parties envisaged at the time of concluding the agreement, it was not intended that the validity or enforceability of the contract induced by fraudulent misrepresentations and non-disclosures would be subject to arbitration.

PAGE AUTOMATION (PTY) LTD v PROFUSA PROPERTIES CC

A JUDGMENT BY HEATON NICHOLLS J
SOUTH GAUTENG HIGH COURT
26 OCTOBER 2012

2013 (4) SA 37 (GSJ)

It is possible to infer that transfer of ownership of a corporeal takes place upon conclusion of a cession agreement in circumstances where the thing transferred remained in the possession of a third party both before and after the cession.

THE FACTS

On 15 October 2008 Profusa Properties CC entered into a five-year rental agreement with OEP Financial Services (Pty) Ltd for the hire of three PABX systems supplied by Page Automation (Pty) Ltd. On 10 January 2010, as a result of Profusa defaulting on its rental obligations, OEP ceded its right, title and interest to the rental agreement to Page Automation.

Page Automation then brought an action against Profusa for (i) payment of arrear rentals, (ii) escalated future rentals until 15 October 2013, as provided for in the rental agreement, (iii) delivery of the equipment.

Profusa defended the action on the grounds that (i) Page had no right to claim for any rentals after the date of the cession as the agreement of cession did not provide for the cession of future rentals, and (ii) because ownership cannot be ceded, ownership still vested in OEP rather than Page Automation which therefore had no locus standi to claim delivery of the equipment.

THE DECISION

As far as the second defence was concerned, the situation was that the owner (OEP) and the possessor (Profusa) had entered into an agreement which permitted the owner to cede ownership. The question that arose was whether once the owner entered into the agreement of cession with a Page Automation to cede ownership of the goods, constructive delivery took place by way of attornment (the existing possessor then possessing for another party). There was no tripartite agreement, Profusa not having agreed to hold on behalf of Page Automation. However, Profusa had agreed that the owner, OEP, could cede the agreement to whomsoever it wished. The question then arose whether the requirements of attornment had been met, or whether an adaptation of the legal principles relating to cession had to be made in order to give effect to the intention of the cedent and the cessionary.

It was necessary that the law of cession should be developed to accommodate cession of ownership or cession of the right of vindication. In this matter OEP ceded all its rights in terms of the rental agreement, including ownership, to Page Automation. Accordingly, delivery and transfer of ownership of the equipment took place when OEP ceded its rights to and in the agreement to Page Automation on 10 January 2010. The claim for delivery of the equipment therefore had to succeed.

As far as the first defence was concerned, the cession expressly stated that the right, title and interest in and to OEP's claim against Profusa in terms of the agreement were ceded. The latter phrase could not be ignored: 'the claim' could not be divorced from the rental agreement, as the claim was specifically stated to be in terms of the agreement. The rental agreement made provision for a claim for future rentals. To interpret the cession otherwise would be unnecessarily restrictive and would attribute a meaning that neither the cedent nor the cessionary intended. The claim for future rentals therefore had to succeed.

BEAUX LANE SA PROPERTIES (PTY) LIMITED v TRESSO TRADING 193 (PTY) LTD

Contract

A JUDGMENT BY WILLIS J
SOUTH GAUTENG HIGH COURT
25 OCTOBER 2012

2012 SACLR 554 (GSP)

Contemporaneous notes taken at negotiations conducted between parties constitutes evidence of any agreement alleged to have resulted from such negotiations. The subsequent actions of parties to such negotiations also constitutes evidence of the conclusion of an agreement between them.

THE FACTS

Beaux Lane SA Properties (Pty) Limited and Tresso Trading 193 (Pty) Ltd entered into negotiations for the conclusion of a lease in respect of certain business premises at a shopping mall. Tresso wished to conclude the lease as tenant because the previous tenant had been placed under provisional liquidation and owed it some R1m. Tresso wished to recoup its impending losses by buying up all stock from the liquidators and trading out of the difficulty. Tresso wished to trade from the premises.

The parties agreed that Tresso would rent the premises until the end of March 2008 at a rate of R2000 a day. After the meeting at which the terms were agreed, Beaux Lane sent a fax to Tresso summarising the terms of lease as recorded in contemporaneous notes taken by a representative of Beaux Lane at the parties' negotiations. These included a term that from 1 April 2008, Tresso would pay a rent of R2000-00 per day exclusive of VAT. Tresso did not counter-sign the fax.

Tresso paid Beaux Lane R82 080 on 27 March 2008 and made no further payments. On 5 May 2008, Beaux Lane discovered that Tresso had vacated the premises. It had vacated the premises in early April 2008.

Beaux Lane brought an action for unpaid rental.

THE DECISION

Given the fact that there was no reason to doubt that the notes taken at the negotiations were contemporaneous and reflected what must have been understood by Beaux Land, terms of agreement were those set out in the fax later sent to Tresso. It was significant that Tresso did not respond to this fax querying it, or some of its detail.

It was also significant that the parties needed reasonable flexibility as to the arrangement because it was dependent on a number of contingencies, which could not be determined at the time. The very uncertainties inherent in the situation favoured Beaux Lane's version more than Tresso's. If the agreement had been from 1 to 31 March only, the question arose why Tresso paid Beaux Lane an amount in excess of the amount that would be payable for 31 days only at the rate of R2000 per day. Furthermore, Tresso's plea and affidavit resisting summary judgment set the date of commencement of the lease at 25 February and not 1 March. On Tresso's own version, it did not vacate the premises on 31 March but did so some time after that. The discrepancy as between the evidence of the witnesses for each party did not undermine the credibility of Beaux Lane's witnesses nor the probability that a fixed term agreement ending on 31 March 2008 had not been agreed between the parties. Whether or not notice could be given during the month of March did not affect the outcome.

The action succeeded.

OMM DESIGN WORKSHOP CC v SEGAL

A JUDGMENT BY GORVEN J
KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
29 NOVEMBER 2012

2012 SACLR 540 (KZP)

An arbitrator does not exceed his powers as envisaged in section 33(1)(b) of the Arbitration Act (no 42 of 1965) merely because he allows the addition of other claims to a claim brought by one of the parties to the arbitration. The addition of other claims is possible by amendment in terms of Rule 17 of the Rules for Arbitrations.

THE FACTS

OMM Design Workshop CC concluded an agreement to supply architectural services to Diamond Igoda View (Pty) Ltd. In terms of clause 11 of the agreement, any dispute between the parties was to be submitted to mediation and then arbitration.

Diamond disputed an account rendered by OMM alleging that there had been no contractual basis for an item stipulated in one of its fee accounts and stated in the sum of R54,493.92. The parties then agreed to proceed with the resolution of the dispute by arbitration and agreed on the appointment of Segal as arbitrator. The parties agreed on the exchange of the statement of claim, statement of defence and further pleadings.

Before the date set for the arbitration, Diamond gave notice that other alleged breaches of the agreement had come to its notice, and that further claims would therefore be added to the statement of claim. OMM objected to this on the ground that it did not fall within the dispute declared by Diamond. The matter was argued, and the arbitrator published his interim award in which he gave Diamond leave to amend its statement of claim.

OMM brought an application for an order reviewing and setting aside the arbitrator's interim award. It alleged that Segal had exceeded his powers and based its application on section 33(1)(b) of the Arbitration Act (no 42 of 1965) which provides that a court may review and set aside an arbitration award if an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers.

OMM contended that the additional claims were not mentioned in the dispute declared by Diamond and it had not consented to the expanding of the declared dispute by the inclusion of this claim.

THE DECISION

A the time the dispute was declared, the ambit of the dispute had not been defined. This meant that its precise ambit would be determined at a later date. No time limit was set and neither was it said that, after the statement of claim was delivered, no further definition could take place.

Segal had then defined the ambit of the dispute to include the new claims. The amendment of the statement of claim was the means by which Diamond proposed to more clearly define what is in dispute. The Rules for Arbitrations apply, and the proposed amendment was allowed by Rule 17. There was see no reason why the new claim did not fall within the declared dispute since the ambit had been defined by Diamond. This meant that the arbitrator had the power to consider and grant an amendment which would result in the inclusion of the new claim. The arbitrator did not act beyond his powers in allowing the amendment.

In any event, OMM's interpretation of clause 11 was incorrect. It envisaged that 'any disagreement' which arose between the parties provided the basis for a party to declare a dispute. Even though the clause referred in the singular to a disagreement, there was no reason to limit its application so as to exclude more than one dispute between the parties. In the light of the grammar and syntax used, it was not sensible or businesslike to interpret the clause 11 to require a clear and precise formulation of what is in dispute at the time a dispute is declared to the exclusion of all other disputes not mentioned at the time.

NULANDIS (PTY) LTD v MINISTER OF FINANCE

A JUDGMENT BY PILLAY J
KWAZULU NATAL HIGH COURT
24 MAY 2013

2013 (5) SA 294 (KZP)

Companies

A court may declare void the dissolution of a company which has taken place because it failed to file its annual returns if such an order would be just and equitable in the circumstances.

THE FACTS

On 1 November 2007, Nulandis (Pty) Ltd obtained judgment against Greenacres Management Services (Pty) Ltd for R369 328,25. Greenacres applied for rescission of judgment but was unsuccessful. On 28 September 2010 its appeal was dismissed. On 16 July 2010, Greenacres was de-registered for failing to file its annual returns.

Nulandis then applied for an order that Greenacres be restored to the companies register in terms of section 83(4)(a) of the Companies Act (no 71 of 2008).

Section 83(4) provides that at any time after a company has been dissolved (a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances, and (b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

THE DECISION

Section 83(1) of the Act equates de-registration with dissolution. Section 82(4) provides that if de-registration has taken place, any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company. It followed that it would be incorrect to hold that section 83(4)(a) is reserved for voiding dissolution following a winding-up in terms of sections 82(1) and (2) and not deregistration as contemplated in s 82(3) when a company has failed to file its annual returns. Such an interpretation would leave creditors without a remedy following dissolution after an administrative deregistration. Leaving creditors without a remedy would have the B effect of denying them a right they had under the old Act.

Section 83(4) empowers a court to declare the dissolution of a company to be void. However, the discretion to make any order that is 'just and equitable' did not go far enough to confer power on the court to order the reinstatement of Greenacres on the register of companies. That power remained exclusively within the realm of the Commission.

Once the Commission is served with an order voiding dissolution it is for the Commission to determine whether the registration should be reinstated. Any other interested person who considers reinstatement of registration to be necessary may apply under s 82(4) to the Commission to reinstate the registration of Greenacres. In the present case, Nulandis held no interest as to whether Greenacres was reinstated. Its real interest was in Greenacres' assets. If the Commission required Greenacres to be reinstated then it could exercise its discretion on how that could be accomplished and whether the reinstatement would be conditional or unconditional. If the Commission did nothing, Nulandis should not be frustrated in pressing ahead with locating, attaching and executing against Greenacres' assets, subject to public notices to other creditors and persons interested in the assets attached.

The question remaining was whether it was just and equitable that Greenacres should be reinstated as a company. The effect of the dissolution and consequent vesting of any of Greenacres' assets in the national Treasury was an injustice to Nulandis as a creditor. Nulandis obtained a valid judgment by

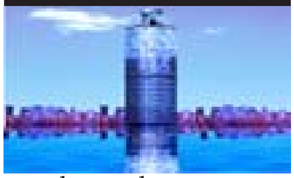
default but could not enforce it. Furthermore, Greenacres persisted with the appeal even after it was de-registered and lost its legal status. Those proceedings denied Nulandis the remedies available to it under the old Act and propelled it into the regime of the new Act.

Nulandis' application was granted.

My interpretation is that s 83(4) empowers a court to declare the dissolution of a company to be void. However, the discretion to make any order that is 'just and equitable' does not go far enough to confer power on the court to order the reinstatement of Greenacres on the register of companies. That power remains exclusively within the realm of the Commission. Relying on s 158 to promote the purpose of the new Act, as MrVan Rooyen proffers, does not assist creditors because the clarity of the text of s 82(4) bars any interpretation suggesting that the court has the power to reinstate registration.

Once the Commission is served with an order voiding dissolution it falls upon the Commission to determine whether the registration should be reinstated. Any other interested person who considers reinstatement of registration to be necessary may apply under s 82(4) to the Commission to reinstate the registration of Greenacres. As I said above, Nulandis is disinterested as to whether Greenacres is reinstated; its real interest is in Greenacres' assets. If the Commission requires Greenacres to be reinstated then it could exercise its discretion on how that could be accomplished and whether the reinstatement would be conditional or unconditional. If the Commission does nothing, Nulandis should not be frustrated in pressing ahead with locating, attaching and executing against Greenacres' assets, subject to public notices to other creditors and persons interested in the assets attached.

RABINOWITZ *v* VAN GRAAN



JUDGMENT BY DU PLESSIS AJ
SOUTH GAUTENG HIGH COURT
26 APRIL 2013

2013 (5) SA 315 (GSJ)

It is possible for a third party to hold directors of a company liable in terms of section 77(3)(b) of the Companies Act (no 71 of 2008) for acquiescing in or knowing about conduct that falls within the ambit of section 22(1).

THE FACTS

Van Graan and the other defendants were directors of Cool Ideas (Pty) Ltd. Rabinowitz brought an action against them in which she alleged that she had concluded a written land sale and building contract with, Cool Ideas, that a dispute arose between her and Cool Ideas about certain defects and workmanship to a house built on her property. The dispute was referred to arbitration resulting in an award for specific performance and costs in favour of Rabinowitz. Cool Ideas and two other companies commenced review proceedings in respect of the arbitration award, and after this was dismissed, commenced appeal proceedings. Rabinowitz commenced further arbitration proceedings. The companies responded with a tender to pay her R1,35m and costs. Rabinowitz accepted the tender. The arbitrator made an award against the companies for the payment of certain sums, including the R1,35m, interest and costs. The award was made an order of court.

Rabinowitz alleged that the companies traded in insolvent circumstances, took no steps to remedy the defective workmanship, continued to trade and incur debts and actively opposed the arbitration proceedings despite the absence of a bona fide dispute. She alleged that Cool Ideas and another entity caused a mortgage bond to be registered over the property at a time when their respective liabilities exceeded their assets and tendered to pay the R1,35 million plus costs in circumstances where they did not have the ability to pay the amounts and a determination had already been made to place them in winding-up. She alleged that the companies caused the erection of a gazebo and a pool on a portion of the property that was subject to a servitude, of which fact they were aware, that in order to overcome certain problems with the construction, the companies caused certain fraudulent documents to be submitted to various entities, and that two of the defendants, representing Cool Ideas and another entity, made certain false representations to her which induced her to accept transfer of the property into her name Rabinowitz alleged that the representations were made for the purpose of securing payment of the purchase price from her when the defendants had no true intention of causing the companies to remedy the defects.

Rabinowitz alleged that the conduct described constituted the carrying on of the business of each entity within the ambit of section 22 of the Companies Act (no 71 of 2008), that the defendants, as directors of the various companies, were knowingly parties to the conduct in respect of the entity of which such a defendant was a director. In consequence thereof, the defendants, alternatively each defendant individually, was liable to her in terms of section 22 read with section 218(2) of the Act.

The defendants excepted to the claim on the grounds that a director can only be liable in terms of the Act for the losses or damages sustained by the company of which he was a director. The proper plaintiff should therefore be the company itself or, when it is in liquidation, the liquidator thereof.

THE DECISION

A court has no discretion but to declare a director acting in the manner contemplated in section 77(3)(b) to be a delinquent

director.

Section 77(3)(b) provides that director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1). Section 22(1) provides that a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. Section 218(2) provides that any person who contravenes any provision of the Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

The consequence of an order of delinquency is that such a person is disqualified from being a director of the company. In these circumstances the Act prohibits directors from engaging in conduct as provided for in section 22 thereof. These provisions show that the legislature intended to include within its ambit a director who knowingly was a party to conduct specified in section 22 of the Act. Bearing in mind that the Act specifically contemplates that the business and affairs of a company are to be managed by or under the direction of its board, there was no conceivable basis upon which the legislature intended to prevent a company from acting in the manner provided for in section 22, but did not intend to prevent the directors responsible for the management of the company from acting in that manner.

It followed from this that a third party can hold a director personally liable in terms of the Act for acquiescing in or knowing about conduct that falls within the ambit of section 22(1).

It was clear from the particulars of claim that the directors were being held liable by Rabinowitz on the basis that they were knowingly parties to the conduct of the company in respect of which they were directors. The causation between the conduct of Cool Ideas and the damages claimed by the plaintiff in respect thereof was also clear: Cool Ideas was a party to all the acts complained of and any damages resulting therefrom could be claimed from it and, by implication, its directors personally.

The exception was dismissed.

OAKDENE SQUARE PROPERTIES (PTY) LTD *v* FARM BOTHASFONTEIN (KYALAMI) (PTY) LTD

Companies

A JUDGMENT BY BRAND JA (CACHALIA JA, VAN DER MERWE AJA, ZONDI AJA and MEYER AJA concurring)
SUPREME COURT OF APPEAL
27 MAY 2013

2013 (4) SA 539 (SCA)

A court may exercise its discretion in a broad sense when determining whether or not an application for business rescue should be accepted in preference to the liquidation of a company.

THE FACTS

Farm Bothasfontein (Kyalami) (Pty) Ltd owned fixed properties on which was built the Kyalami racetrack complex. The shareholders of the company were Nedbank Ltd (30%), Imperial Bank Ltd (30%) and the MJF Trust (40%).

At a board meeting of the company held on 13 December 2010, a resolution was passed in terms of which all revenue streams enjoyed by the MJF Trust or Motortainment (Kyalami) (Pty) Ltd, in terms of whatsoever agreement, resolution, head lease, lease and/or leases are pledged and ceded to Oakdene Square Properties (Pty) Ltd.

Motortainment was a company controlled by a certain Mr Theodosiou and his brother who had also been appointed as trustees of the M JF Trust in terms of a transaction which was disputed by the other shareholders of Farm Bothasfontein. This dispute had resulted in a number of applications and actions which were still pending. Theodosiou refused to produce the financial statements of the company.

Nedbank acquired the assets and liabilities of Imperial Bank, with effect from 1 October 2010. It then became entitled to repayment of an amount of R31 247 099, together with interest, which Imperial had lent to Farm Bothasfontein. Nedbank had lent the company R28m in its own right. Farm Bothasfontein was unable to repay either loan as its only revenue stream was rental from a lease over the property which was not being paid.

Nedbank brought foreclosure proceedings against the company and took steps to have the properties sold in execution.

Oakdene brought an application for the business rescue of the company. It contended that a business rescue practitioner would be able to realise a higher price for the properties, whereas a liquidator at a sale in execution would realise a lesser price.

THE DECISION

Section 131(4)(a)(iii) of the Companies Act (no 71 of 2008) provides that a court may place a company under supervision and commence business rescue proceedings if it is just and equitable to do so for financial reasons, and there is a reasonable prospect of rescuing the company.

It was common cause that, although the company appeared to be factually solvent in that the value of its assets, on the face of it, exceeded its debts, it was unable to satisfy the judgment debt in favour of Nedbank. This meant that it was both commercially insolvent and 'financially distressed' within the meaning of section 131(4)(a)(i). The question however was whether or not there was 'a reasonable prospect of rescuing the company'.

In determining this question, a court must exercise its discretion. Its discretion need not be exercised in the strict sense of the word but may exercise a broad discretion, taking into account whether or not there is a reasonable prospect of rescuing the company. The answer to this question is either Yes or No: there is no middle option.

The court's discretion cannot depend on vague speculation regarding the prospects of the company. Its discretion must be based on concrete and objectively ascertainable details of the likely costs of rendering the company able to commence or resume its business, and the likely availability of the necessary cash resource in order to enable the company to meet its day-to-day

expenditure, or concrete factual details of the source, nature and extent of the resources that are likely to be available to the company, as well as the basis and terms on which such resources will be available.

Given the facts of the case, the position taken by Nedbank and Imperial could not be considered unreasonable. This, together with the uncertainty associated with the proposals put up by Oakdene, pointed to the court exercising its discretion against Oakdene's application in this case.

My problem with the proposal that the business rescue practitioner, rather than the liquidator, should sell the property as a whole, is that it offers no more than an alternative, informal kind of winding-up of the company, outside the liquidation provisions of the 1973 Companies Act which had, incidentally, been preserved, for the time being, by item 9 of sch 5 of the 2008 Act. I do not believe, however, that this could have been the intention of creating business rescue as an institution. For instance, the mere savings on the costs of the winding-up process in accordance with the existing liquidation provisions could hardly justify the separate institution of business rescue. A fortiori, I do not believe that business rescue was intended to achieve a winding-up of a company to avoid the consequences of liquidation proceedings, which is what the appellants apparently seek to achieve.