Current Commercial Cases

2014

ISBN 978-1-920569-39-6

A SURVEY OF THE CURRENT CASE LAW

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The Law Publisher CC
CK92/26137/23

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ANTARES INTERNATIONAL LTD v LOUW COETZEE & MALAN INC

A JUDGMENT BY ROGERS AJ
WESTERN CAPE HIGH COURT
2 SEPTEMBER 2011

2014 (1) SA 172 (WCC)

Corporations

A South African court will apply the law of a company's domicile to determine whether or not it is a registered company and has not been dissolved, and should apply that law to determine which entity owns the company's assets.

THE FACTS

Louw Coetzee & Malan Inc acted on behalf of Antares International Ltd in litigation to recover helicopters and spare parts. Following the litigation, the firm alleged that Antares owed it fees and disbursements amounting to some R2.7m. It attached the helicopters for the purpose of founding or confirming jurisdiction in an action it was to bring to recover the amount outstanding.

Antares was a company registered as such in Guernsey, but it was struck off the register of companies when it appeared that its registered office was no longer effective. This resulted in its dissolution.

In terms of the law of Guernsey, the two helicopters belonged to the Crown represented by Her Majesty's Receiver-General. If Antares were restored to the register, the company would be deemed to have continued in existence and its property would then be restored to it.

The firm threatened to sell the helicopters in order to secure its costs in the action. The sole director and director of Antares then brought an application for an interdict directing the firm to provide particulars of the sale, and interdicting the firm from removing the helicopters from its premises, pending the final determination of the action. It later added a claim that the firm be interdicted from selling, alienating or disposing of the helicopters without obtaining a court order authorising it to do so.

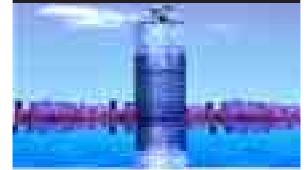
THE DECISION

Although the helicopters had been attached, they remained the property of Antares. Their attachment only had the effect of securing the firm's claim which was yet to be determined in the action it intended to bring. Until it obtained judgment, the helicopters could not be sold without Antares' permission. But for the fact that Antares had been struck off the register of companies, it had a clear right upon which it brought its interdict application.

Because Antares had been struck off the register of companies, it was unclear who owned the helicopters. The expert evidence indicated that they were owned by the Crown, but the prior question was which law applied, the law of Guernsey or the law of South Africa. A South African court applies the lex domicilii to determined whether or not a company has been incorporated or dissolved. In this case, this was the law of Guernsey. Applying this law, Antares was a dissolved company and the result of this was that its property vested in the Crown. On this basis, a South African court would therefore be entitled to make the order which Antares and its sole director requested.

It appeared however, that the applicants had not provided sufficient evidence that they were making a genuine and concerted effort to restore Antares to the register of companies in Guernsey. There was therefore some doubt about its case and an interdict could not be granted. This did not mean that the firm would be entitled to sell the helicopters: the law as stated indicated that it would not be entitled to do so.

AFRICAN BANKING CORPORATION OF BOTSWANA LTD v KARIBA FURNITURE MANUFACTURERS (PTY) LTD



A JUDGMENT BY KATHREE-SETILOANE J
NORTH GAUTENG HIGH COURT
29 AUGUST 2013

2013 (6) SA 471 (GNP)

A creditor is obliged to abide by a binding offer properly made in terms of section 153(1)(b)(ii) of the Companies Act (no 71 of 2008).

THE FACTS

African Banking Corporation of Botswana Ltd lent money to Kariba Furniture Manufacturers (Pty) Ltd, and in October 2006 brought an action for repayment. The matter was referred to arbitration. On appeal, an appeal tribunal ordered Kariba to pay the bank BWP (Botswana Pula) 5 610 125,38. In January 2012, Kariba's board resolved voluntarily to begin business rescue proceedings and place the company under supervision in terms of section 129(3) of the Companies Act (no 71 of 2008).

In March 2012, the business rescue practitioner, Jordaan, distributed a proposed plan to affected parties, the stated purpose of which was to revive the business. The proposed plan contemplated that the business would be revived by compromising certain creditors' claims, and that the bank would be paid 21 cents in the rand over a period of 100 months.

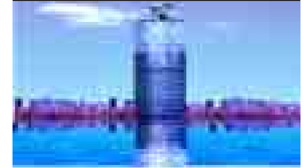
At the second meeting of creditors, the bank, which held 63% of the voting rights, voted against the plan. The shareholders then made a binding offer for the bank's voting interest in terms of section 153(1)(b)(ii) of the Act. Jordaan treated the offer as being immediately and ipso facto binding on the bank, and treated the offer as having been accepted by the bank. He then amended the voting interest to reflect the bank as holding 0% and the shareholders as holding 95% of the voting interests of the creditors. The remaining creditors — the shareholders — approved the adoption of the plan and it was approved on a preliminary basis in terms of section 152(2) of the Act. The shareholders also voted in favour of the adoption of the plan in terms of section 152(3) of the Act, the effect of which was that it was finally adopted. Jordaan had indicated that he would implement it.

The bank contended that the binding offer made on behalf of the shareholders to purchase the voting interest of the bank, was not binding on it since section 153(1)(b)(ii) contemplates an offer that is binding on the 'offeror' only (the shareholders in this case), and the offeree bank was free to accept or reject the offer, and the bank did not accept the offer. Alternatively, the bank sought an order that section 153(1)(b)(ii) of the Act was unconstitutional and invalid.

THE DECISION

In terms of section 153(1)(b)(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

The two aspects that arise for consideration from a reading of section 153(1)(b)(ii) were the meaning of the words 'binding offer', and the remuneration payable. The bank contended that section 153(1)(b)(ii) contemplates an offer that is unconditional and certain as to all the material elements thereof. It contended that no proper offer under the section was made by the shareholders since the offer was not unconditional, and it was uncertain as to all its material terms because at the second meeting of creditors Jordaan stated that he would circulate the binding offer to the



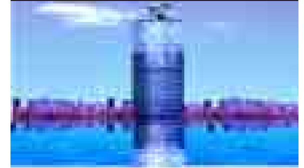
parties. The bank contended that at that stage it was not provided with a written offer and the terms of the offer were not recorded, with the consequence that it did not know what the terms of the offer were, the amount that it would be paid, and whether or not there were any conditions attaching to the offer.

The binding offer contemplated in section 153(1)(b)(ii) is not a contract or agreement in the nature of an 'option' but a set of statutory rights and obligations. Once the binding offer is made, it creates an obligation on the part of the offeror, from which it may not withdraw. The binding offer contemplated in section 153(1)(b)(ii) is to place any creditor voting against the adoption of a business rescue plan in the same or similar position that the creditor would be if the company concerned were to be liquidated. On a proper interpretation of the section, the 'binding offer' is binding on both the offeror and offeree once made. Accordingly, the binding offer made by the shareholders to purchase the voting interests of the bank was binding upon it. The bank's failure or refusal to accept the binding offer was irrelevant as the offer became binding upon it the moment it was made.

Whilst ordinarily an offer is made freely and voluntarily and may be withdrawn at any time before acceptance, s 153(1)(b)(ii) describes the offer contemplated in the section as 'binding' because once it is made it creates a vinculum juris or legal obligation on the part of the offeror and may not be withdrawn. The 'binding offer' envisaged in s 153(1)(b)(ii) of the Act is, therefore, not an 'option' or 'agreement' in the contractual sense of the term but is rather a set of statutory rights and obligations from which neither party may resile. Thus, the binding offer envisaged in s 153(1)(b)(ii) of the Act will be binding on both the offeror and the offeree once made, predominantly to ensure compliance with the procedure to revive a business rescue and enforce a revised business rescue plan within the framework of s 153(4) of the Act. As alluded to, s 153(4) prescribes a swift and efficient procedure to be accomplished within five days, the purpose of which is to revive the business-rescue procedure after rejection of the business rescue plan, by allowing the purchase of a voting interest of one of more persons who opposed the adoption of the business rescue plan. Manifestly, the core objective of the binding offer is to enable the adoption of the business rescue plan at the resumed meeting to be called by the practitioner in terms of s 153(4)(b) of the Act.

CA FOCUS CC v VILLAGE FREEZER

Corporations



A JUDGMENT BY CACHALIA JA (LEACH JA, MAJIEDT JA, PETSE JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
27 SEPTEMBER 2013

2013 (6) SA 549 (SCA)

The effect of section 26(7) of the Close Corporations Act (no 69 of 1984) before amendment by the Companies Act (no 71 of 2008) was to retrospectively validate a summons which was a nullity when issued.

THE FACTS

CA Focus CC rendered services to Village Freezer as a result of which, in September 2006 a debt of R60 000.00 became due by Village Freezer to CA. In November 2007, CA was deregistered as a close corporation. In March 2008, CA issued summons against Village Freezer for payment of the R60 000.00. In March 2011, CA was re-registered as a close corporation.

Village Freezer responded to the claim by pleading that because CA was not registered as a close corporation when the summons was issued, the summons was a nullity and had no legal effect. Since the debt was due in September 2006 and the issue of summons had had no legal effect, the summons did not interrupt prescription. The claim therefore became prescribed in September 2009.

CA contended that because of the effect of section 26(7) of the Close Corporations Act (no 69 of 1984) the issue of the summons did interrupt prescription. The section provides that as from the date of re-registration of a corporation, 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

Because CA had not been registered when it commenced litigation the summons was a nullity and had no legal effect. The question was whether the deeming provision of section 26(7) changed this. There was no limitation or qualification to the section, and so, on the face of it, it would appear to place all parties, including third parties, in the same position as if there were no deregistration.

The words of the statute are to be given a meaning by having regard to their language, the context in which they are used and the purpose to which they are directed. The subjective views of the parties, their state of mind, or the facts of a particular case have no bearing on this analysis. Applying this approach to the interpretation of the section, the effect of the deeming provision was to retrospectively validate the issue of the summons.

CA's contention was upheld.

Note: Section 82(4) of the Companies Act (no 71 of 2008) allows the registration of a deregistered company or close corporation to be reinstated, but there is no longer a provision permitting the restoration to operate retrospectively.

BARKO FINANCIAL SERVICES (PTY) LTD v NATIONAL CREDIT REGULATOR

A JUDGMENT BY PRETORIUS J (VORSTER AJ and HUGHES AJ concurring)
NORTH GAUTENG HIGH COURT
28 MARCH 2013

2013 (5) SA 370 (GNP)

Credit Transactions

A credit provider which presents its customers with documentation which includes an agreement to pay the charges of a third party attending to transaction services on behalf of the credit provider effectively contravenes the National Credit Act (no 34 of 2005) when such services require payment of a service fee by the consumer.

THE FACTS

Barko Financial Services (Pty) Ltd was a credit provider and it made short-term loans to consumers. The documentation signed by the consumer included an agreement that Altech NuPay could access the consumer's bank account from which it deducted each instalment payable to Barko, after which Nupay made payment to Barko.

Barko had entered into an agreement with Nupay in terms of which Nupay provided management services to Barko. The services included the processing and management of transactions. In terms of the agreement between Barko and its customers, the customer was obliged to pay for the service fees charged by Nupay in relation to the transactions made by the consumers to Barko.

The National Credit Regulator contended that Barko's actions contravened the provisions of section 100(1) of the National Credit Act (no 34 of 2005), and/or involved the charging of an impermissible fee as contemplated in section 100(1)(d) of the Act. It also alleged that Barko contravened s 90(1) of the Act.

Barko contended that the consumer exercised a choice whether or not to use the services of Nupay, and that since the consumer could pay it direct without incurring any charges payable to Nupay, it had not contravened the Act.

THE DECISION

The documentation presented to a consumer showed no indication of an agreement between the consumer and Nupay. It appeared to be a set of provisions regulating only the relationship between the consumer and Barko. While it was possible for the consumer to have excised the provision entitling Nupay to process the payments, this did not happen in 90% of the cases. Without Barko's conclusion of the credit agreement with the consumer, the consumer would not have known about Nupay and would not have utilised its services. The consumer would pay the amount into Barko's account without the intervention of Nupay and would not have to pay a service fee in addition to the amount reflected in the credit agreement.

This meant that when signing the documentation, the consumer accepted an additional liability and this was not permitted in terms of section 100(1)(d) of the Act. It constituted a contravention thereof in that it provided for the payment of a service fee additional to that permitted in the Act.

BESTER N.O. v CORAL LAGOON INVESTMENTS (PTY) LTD

A JUDGMENT BY HENNEY J
WESTERN CAPE HIGH COURT
20 FEBRUARY 2013

2013 (6) SA 295 (WCC)

A shareholder without controlling interest in a company which makes a loan to the company is subject to the National Credit Act (no 34 of 2005).

THE FACTS

Coral Lagoon Investments (Pty) Ltd was established in order to purchase and develop a beachfront property. The purchase price of R2 679 000 was paid by means of a loan from Absa Bank in the sum of R1 880 000 and four shareholders' loans of some R200 000 each. The four shareholders held shares in Coral in equal amounts. Coral was a company which was associated to other companies in which its shareholders or directors had an interest, but they were not companies related to Coral.

One of the four shareholders was Ekosto (Pty) Ltd. It was placed in liquidation. Its liquidator, Bester, claimed payment of R554 994,01 from Coral being the amount then owing by Coral to Ekosto. Bester applied for the winding up of Coral on the grounds that it was unable to pay its debts, alternatively that it was just and equitable that it be wound up.

The other shareholders intervened and opposed the application on the grounds that Ekosto's loan to Coral was unlawful and void because the loan exceeded the monetary threshold in terms of section 40(1)(b) of the National Credit Act (no 34 of 2005) under which Ekosto should have applied for registration as a credit provider but did not. They also opposed the application on the grounds that Coral was not unable to pay its debts because they had not become due and payable. Bester contended that the loan was, in terms of section 4(1), not subject to the Act because it was made to a consumer whose combined asset value or annual turnover of all related juristic persons exceeded R1m.

THE DECISION

The claim that the Act was not applicable to the loan agreement between Ekosto and Coral could only be correct if, for the purposes of section 4(2)(d), Coral was related to the shareholders, ie if the shareholders had direct control over whole or part of the business of Coral, or a person had direct or indirect control over both of them; or if, for the purposes of section 4(2)(b)(i), Ekosto, as credit provider, had a controlling interest in Coral. The key questions were the meanings to be attributed to the phrases 'direct or indirect control', for the purposes of section 4(2)(d), and 'controlling interest', for the purposes of section 4(2)(b)(i).

The companies with which Coral was associated did not have a controlling interest in Coral as defined in the Act and therefore could not be regarded as related persons. While the directors or shareholders of the respondent might have been shareholders or directors in those companies, they could not merely on that basis be regarded as related persons having a direct or indirect controlling interests in Coral, as they would not have been able to have an influence in the affairs of Coral.

The next question was whether Ekosto or any of the other juristic persons were related persons. Since Ekosto was a shareholder holding shares in an equal amount with the other three shareholders, it did not have a controlling interest in Coral as contemplated in section 4(2)(d) of the Act. It had not been shown that Ekosto had any interest, whether direct or indirect, over Coral. This was not only due to their limited shareholding, but also to the fact that Ekosto had no power either directly or indirectly to control or influence

Coral. This meant that, for the purposes of section 4(1), the loan agreement was at arm's length, and the Act would apply. As the Act was applicable, Ekosto as a credit provider had to be registered in terms of the Act.

Since it was not clear that the amount due to Ekosto was due and payable, there was no basis for its application for the liquidation of Coral. The application was dismissed.

If regard is to be had to the facts of this case for the purposes of s 4(1)(a)(i), the combined asset value of the respondent, together with the combined asset value of all the juristic persons associated with it at the time the agreement was made, may have equalled or exceeded the threshold value of R1 million, but as will be shown below, they are not related juristic persons for purposes of s 4(1)(a)(i).
[41] These other associated juristic persons the applicants refer to, which are Plasto Properties 7 (Pty) Ltd, Parch Properties 107 (Pty) Ltd, Regular Trading 81 CC, Stonevest 5 (Pty) Ltd, Akula Trading 148 (Pty) Ltd, are not companies related to the respondent, in which the shareholders or directors of the respondent have an interest. 5 These companies do not have a controlling interest as defined above for the purposes of the NCA in the respondent and cannot therefore be regarded as related persons.

FIRST NATIONAL BANK v CLEAR CREEK TRADING 12 (PTY) LTD

Credit Transactions

A JUDGMENT BY KOLLAPEN J
NORTH GAUTENG HIGH COURT
14 MARCH 2013

2014 (1) SA 23 (GNP)

Parties may mutually agree to render applicable to their agreement the provisions of the National Credit Act (no 34 of 2005) even if the agreement is in terms of the Act not subject to it.

THE FACTS

First National Bank lent R750 000 to Clear Creek Trading 12 (Pty) Ltd on the security of a mortgage bond, the value of the property mortgaged being R100 000. The home loan agreement provided that the National Credit Act (no 34 of 2005) applied to it.

When the bank sued for repayment, Clear Creek contended that the agreement was unlawful in terms of the Act. The bank contended that in fact, the Act did not apply because the home loan agreement was a 'large agreement', as referred to in section 9(4) of the Act, in terms of which the consumer is a juristic person whose asset value or annual turnover is at the time the agreement is made below the threshold value determined by the Minister. Clear Creek was a juristic person as defined in section 4(1)(b). Section 9(4) of the Act defines a large agreement as including a mortgage agreement. The effect of these sections was that the home loan agreement was excluded from the scope of the Act.

The question for determination was whether or not the agreement was subject to the Act.

THE DECISION

In accordance with the principle of pacta sunt servanda, the terms of the agreement could not be ignored on the vague ground that the inclusion of a term applying the Act was a mistake. The question was whether it was possible for parties to render applicable the provisions of an Act which itself expressly excluded its applicability.

The agreement between the parties sought to extend the Act's protection by mutual agreement. In doing so, the parties were by their agreement seeking to advance an objective of the Constitution. That in itself was not objectionable. Such conduct, to the extent that it is consistent with the values of the Constitution, should be welcomed and recognised, in particular when it is the voluntary conduct of contracting parties. If the stated intention of the Act is to protect consumers, then a consumer who falls outside of the Act is not necessarily precluded from mutually agreeing to adopt its protection.

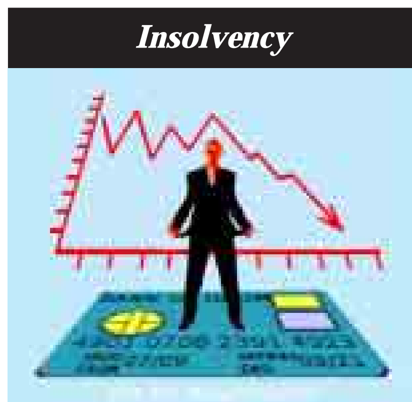
The agreement was therefore subject to the Act.

BLUE STAR HOLDINGS (PTY) LTD v WEST COAST OYSTER GROWERS CC

A JUDGMENT BY GAMBLE J
WESTERN CAPE HIGH COURT
23 AUGUST 2013

2013 (6) SA 540 (WCC)

Insolvency



An application for business rescue begins when the application is lodged with the Registrar and service on the respondents.

THE FACTS

Blue Star Holdings (Pty) Ltd applied for the winding up of West Coast Oyster Growers CC on the grounds that it was unable to pay its debts. West Coast sought to delay the proceedings by various means and secured postponements of the hearing of the matter on a number of occasions.

At the hearing of the application, the court was notified that an application for business rescue in terms of section 131 of the Companies Act (no 71 of 2008) had been lodged with the Registrar of the court that morning.

The court raised the question whether or not it could consider the application for winding up of West Coast in the light of the fact that the application for business rescue had been lodged. In terms of section 133(1) of the Act, during business rescue proceedings, no legal proceeding may be proceeded with except in certain circumstances.

THE DECISION

In terms of section 132 of the Act, business rescue proceedings begin when an affected person applies to the court for an order placing the company under supervision in terms of section 131. The question was what event indicated that an affected person had applied to the court for such an order: was the application for business rescue made on the day the winding up application came before court, or would it only be made when the matter eventually came before the court?

It was obvious that in this case the lodging of the application for business rescue with the Registrar for the issue thereof constituted the 'making' of the application and the commencement of proceedings to place the company under business rescue. It was fortuitously brought to the intention of Blue Star Holdings an hour or so later when a copy was handed to its representatives at court. Service therefore occurred almost instantaneously and the application then fell within the purview of the Rules of Court, read with the new Act and the regulations issued thereunder.

The provisions of s 131(6) of the Act applied, and the application for winding-up had therefore to be suspended.

FOURIE N.O. v EDKINS

Insolvency

A JUDGMENT BY SHONGWE JA (MTHIYANE AP, MAYA JA, TSHIQI JA and ZONDI AJA concurring)
SUPREME COURT OF APPEAL
19 SEPTEMBER 2013

2013 (6) SA 576 (SCA)

The effect of section 20(1) of the Insolvency Act (no 24 of 1936) is to stay execution proceedings upon the sequestration of a person's estate, so that a person who has purchased property of the insolvent cannot obtain transfer thereof.

THE FACTS

Absa Bank obtained judgment against the owner of Erf 64, The Hill Township. In August 2010 the property was sold in execution by the sheriff to Edkins for R530 000. After signing the conditions of sale Edkins complied with all his obligations in terms of the conditions of sale and guaranteed the full purchase price. Edkins instructed his attorneys, on the same day, to proceed with the necessary registration of the transfer of the property into his name. Three days after the sale, the judgment debtor's attorneys published a notice of the surrender of his estate in terms of section 4(1) of the Insolvency Act (no 24 of 1936) in the Government Gazette and the local newspaper. The notice stated that the insolvent intended applying to the North Gauteng High Court on 3 September 2010 for the acceptance of the voluntary surrender of his estate. On that date, the court accepted the voluntary surrender and placed his estate under sequestration.

In August 2011 Fourie and the other appellants were appointed as provisional trustees in the insolvent estate. At all material times Edkins and the sheriff were unaware of the notice by the insolvent to apply for the surrender of his estate, nor were they aware of the acceptance thereof.

The Registrar of Deeds refused to allow transfer of the property. Edkins then applied for a declaratory order validating the sale agreement of August 2010 between the sheriff and himself, and directing the registrar to register the transfer of the property into his name.

THE DECISION

In terms of section 20(1) of the Insolvency Act, the effect of the sequestration of the estate of an insolvent is to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed and, upon the appointment of a trustee, to vest the estate in him. As soon as any person whose duty it is to execute any judgment given against an insolvent, becomes aware of the sequestration of the insolvent's estate, he must stay that execution, unless the court otherwise directs.

The effect of this section is to bring about a stay of the execution. In the context of the present matter, this meant that the property could not be transferred to Edkins. Nothing had been placed before the court to indicated why it should 'otherwise direct' as provided for in the section.

The application was refused.

FIRSTRAND BANK LTD v BRERA INVESTMENTS CC

A JUDGMENT BY MALAN JA
(LEWIS JA, PONNAN JA,
THERON JA and PLASKET AJA
concurring)
SUPREME COURT OF APPEAL
25 MARCH 2013

2013 (5) SA 556 (SCA)

Banking

A guarantor under a payment guarantee is obliged to make payment strictly in terms of the provisions of a guarantee which requires payment upon the failure to issue a payment certificate. The issue of such a certificate after demand has been made in terms of the guarantee does not excuse the guarantor from making payment so demanded.

THE FACTS

Brera Investments CC entered into a sub-contract agreement with Spirit of Africa Developments (Pty) Ltd for the supply of materials and fittings, and the installation of the electrical reticulation for residential units forming part of the Windmill Park Extension 12 development in Boksburg. FirstRand issued a payment guarantee to Brera for R12 997 972,36. The guarantee was stated not to be construed as an accessory obligation or suretyship.

In terms of clause 2 of the guarantee, the bank undertook to pay Brera the sum certified upon receipt of the payment certificate entitling Brera to receive payment in terms of the sub-contract agreement the sum certified. In terms of clause 3, the bank undertook to pay Brera upon receipt of a copy of a first written demand issued Brera to Spirit of Africa stating that it demands the issue of a payment certificate within seven calendar days, and a first written demand issued by Brera to the bank stating that a period of seven calendar days had elapsed since the first written demand and that the payment certificate had still not been issued.

Brera issued a first written demand on the bank in terms of clause 3. It demanded payment of R1 065 864,29. The bank failed to pay and in consequence, Brera brought an application to enforce payment. A payment certificate for R60 909,79 was later issued.

The bank resisted the application on the grounds that the issue of the later certificate prevented Brera from enforcing its rights in clause 3.

THE DECISION

The bank contended that it was entitled to rely upon events that occurred after demand had been made. It contended that the word ‘still’ in clause 3.2 had the effect that, if at any stage after the expiry of the seven-day period a payment certificate was issued, the respondent’s entitlement to demand payment would fall away and it would only be entitled to the certified sum, if any.

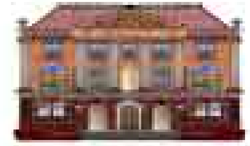
However, this was an artificial construction of the clause. The event on which liability depended was stated to be ‘upon receipt of the documents identified in 3.1 and 3.2’. The obligation to pay arose the moment the provisions of the clause were met, and not on the continued failure of the principal agent to issue the payment certificate. The words in clause 3.2 ‘and that the payment certificate has still not been issued’ did not detract from this conclusion. The use of the word ‘still’ in clause 3.2 simply meant that the payment certificate was not issued within the seven-day period referred to in clause 3.1.

The interpretation of the bank would mean that the subsequent provision of a payment certificate after the seven-day period set out in clause 3.1 would extinguish the guarantor’s liability or limit it to the amount certified. This was a strained interpretation and could not be accepted. The express words used in the clause excluded such a construction.

The application succeeded.

CAPRICORN BEACH HOME OWNERS ASSOCIATION v POTGIETER

Banking



A JUDGMENT BY MTHIYANE AP (MAYA JA, WALLIS JA, VAN DER MERWE JA and SWAIN AJA concurring)
SUPREME COURT OF APPEAL
19 SEPTEMBER 2013

2014 (1) SA 46 (SCA)

Set-off cannot be applied against a party who is not one of the two mutually indebted to each other.

THE FACTS

Potgieter was instructed by his client to attend to the transfer of certain fixed property after his client had sold the property. Upon transfer, Potgieter mistakenly paid the purchase price of R735 859.15 to the Capricorn Beach Home Owners Association.

Potgieter requested repayment. Capricorn stated that his client was indebted to it in the sum of R451 614.03 for arrear levies, water, rates and taxes. It repaid only the balance of R284 245.12, claiming that it was entitled to set off the amount erroneously paid to it against the amount due to it.

Potgieter claimed repayment of the money retained by Capricorn.

THE DECISION

Potgieter did not owe Capricorn any money and was therefore not indebted to it. The parties were not mutually indebted to each other, and so set-off could not apply.

Capricorn contended that when Potgieter made the payment to it, he acted as agent of his client so that the relevant parties were mutually indebted to each other. However, it was held in *Wypkema v Lubbe* 2007 (5) SA 138 (SCA) that when an attorney makes payment from his trust account, he does so as principal and not as agent. The fact that the attorney pays by electronic transfer, rather than by cheque, does not affect this rule.

In any event, there was no evidence to show that Potgieter had the authority to make the erroneous payment.

Potgieter was entitled to repayment of the balance of R284 245.12.

MINISTER OF AGRICULTURE AND LAND AFFAIRS v DE KLERK

A JUDGMENT BY MEYER AJA (CACHALIA JA and VAN DER MERWE AJA concurring, MAJIEDT JA and NAVSA ADP dissenting)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2013

2014 (1) SA 212 (SCA)

Property

When a conveyancer acts as the purchaser's agent, the purchaser does not discharge its obligation to pay the purchase price if the conveyancer fails to pay the purchase price to the seller.

THE FACTS

De Klerk sold her fixed properties to the National Department of Land Affairs for R3.7m. The sale agreement provided that the conveyancer was to be appointed by the purchaser and identified the conveyancer appointed for the purpose of transferring the properties. The purchase price was to be paid into the conveyancer's trust account and thereafter transferred to De Klerk.

The purchaser paid the purchase price into the conveyancer's trust account. The properties were duly transferred to the purchaser. The conveyancer paid De Klerk the agreed purchase price less R1 021 971,20.

De Klerk sued the Minister of Agriculture and Land Affairs for R1 021 971,20. The Minister took the view that he had fulfilled his obligations in terms of the sale agreement when the full purchase price was paid to the conveyancer. De Klerk contended that as the conveyancer acted as the purchaser's agent, the conveyancer's failure to pay amounted to default by the purchaser.

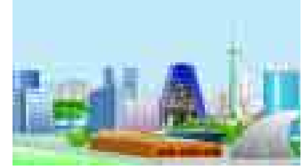
THE DECISION

The question was whether the purchaser's payment to the conveyancer operated as a discharge of its obligation to pay the purchase price. The central issue was therefore whether or not the conveyancer acted as the seller's agent when receiving payment: if he did, the purchaser's payment operated as a discharge of its obligations.

The provisions of the sale agreement made it clear that the conveyancer acted as the purchaser's agent and not the seller's agent. Furthermore, its provisions did not establish an express or tacit authorisation of the conveyancer to receive payment of the purchase consideration, or any portion thereof, on behalf of the seller. Payment to the conveyancer was therefore not equivalent to payment to the seller, and did not operate to discharge the purchaser's obligation to pay the purchase price to the seller.

The Minister was obliged to pay the shortfall of R1 021 971,20.

HAVISIDE v HEYDRICKS



A JUDGMENT BY CHILI AJ
(STRETCH AJ concurring)
KWAZULU-NATAL HIGH
COURT, PIETERMARITZBURG
17 OCTOBER 2013

2014 (1) SA 235 (KZP)

A defect in a thing sold may be a failure to comply with a statutory requirement in respect of that thing. A seller may claim the protection of a voetstoots clause if the seller was unaware of the defect in the thing sold

THE FACTS

Haviside sold a residential property in Port Shepstone to Heydricks for R896 400. The sale agreement contained a voetstoots clause which provided that the property was sold as it stood, with all defects whether latent or patent, subject to all the conditions, burdens and servitudes referred to in, and/or registered against the title deeds of the property and to all such conditions, burdens and servitudes which might exist in regard thereto.

After taking transfer, Heydricks discovered that fourteen years earlier, the municipality had sent a letter to the owner of the property stating that it had come to its attention that an illegal structure was in the process of being built on the property in the absence of plans having been submitted to the local engineer's department for approval. Heydricks determined that this was in respect of a double garage then constructed on the property.

Heydricks claimed R91 512 being the diminished value of the property with the improperly constructed garage. Haviside defended the claim on the grounds that the voetstoots clause applied. Haviside had not been aware of the fact that the garage was improperly built when she purchased the property herself in 1991, and was not aware of this when she sold the property to Heydricks.

THE DECISION

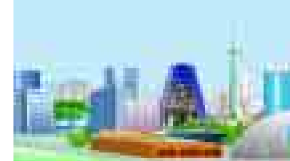
The absence of statutory approval for the construction of the garage constituted a latent defect. In accordance with Odendaal v Ferraris 2009 (4) SA 313 (SCA), this could be something to which a voetstoots clause applied and in respect of which a seller could claim protection.

There was nothing to suggest that Haviside knew of this defect either when she purchased the property herself or when she sold it to Heydricks. There was also nothing to suggest that she was aware that building regulations had not been complied with. Even if she had been aware of this, there was nothing to suggest that she ought to have considered this significant enough to mention to the buyer. She was therefore entitled to rely on the voetstoots clause in defending the claim.

The claim failed.

METCASH SEVEN ELEVEN (PTY) LTD v POLLEV PROPERTY HOLDING AND INVESTMENT CC

Property



A JUDGMENT BY BASHALL AJ (KATHREE-SETILOANE J concurring)
SOUTH GAUTENG HIGH COURT
19 OCTOBER 2012

2013 (4) SA 506 (GSJ)

A seller of property which retains its rights in terms of leases concluded in respect of that property can assert no rights against a tenant to which the seller cannot honour its obligation to provide beneficial occupation.

THE FACTS

Pollev Property Holding and Investment CC leased two shop premises to Metcash Seven Eleven (Pty) Ltd from November 1998 to October 2008. By May 2003, Metcash had vacated the premises and it maintained that it validly cancelled the leases due to breach by Pollev.

In 2006, Pollev sold the property to Winners Chapel International and the property was transferred to it in April 2007. By agreement with Winners, Pollev retained its rights in terms of the leases concluded with Metcash. Pollev relinquished all rights of possession and control of the premises to Winners from 19 June 2007.

Metcash contended that as from April 2007, Pollev held no rights in terms of the leases and could not claim rental from it for this period. It also contended that Pollev had been unable to comply with its obligation to provide beneficial occupation of the premises to it.

THE DECISION

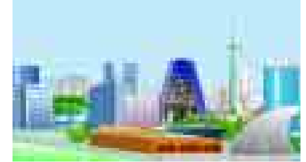
What Pollev retained by agreement with Winners was the right to claim rental. This did not carry with it the obligation to provide beneficial occupation of the premises. However, the right to claim rental was dependent on the continuation of the leases, but these had been abandoned. Winners was therefore unable to confer on Pollev any rights in terms thereof.

From April 2007, Pollev had been unable to perform its obligations under the leases by virtue of it having sold and transferred the property to Winners.

Metcash's contentions were therefore upheld.

CITY OF TSHWANE METROPOLITAN MUNICIPALITY v MATHABATHE

Property



A JUDGMENT BY PONNAN JA (MAJIEDT JA, ERASMUS AJA, SWAIN AJA and ZONDI AJA concurring)
SUPREME COURT OF APPEAL
22 MAY 2013

2013 (4) SA 319 (SCA)

Section 118(3) of the Local Government: Municipal Systems Act (no 32 of 2000) does not entitled a municipality to claim debts arising prior to the two-year period referred to in that section.

THE FACTS

Mathabathe sold his fixed property to Mr L.T. Lawrence for R1.3m. When the conveyancer attending to transfer of the property requested the City of Tshwane Metropolitan Municipality to provide the amount required for the rates clearance certificate, the municipality stated that the total amount outstanding in respect of municipal rates and services was R162 722,26. This included a 'the historical debt' of R151 324,22 in respect of charges levied by the municipality for the provision of municipal services to the property prior to the two years envisaged in section 118(1)(b) of the Local Government: Municipal Systems Act (no 32 of 2000).

Section 118(1)(b) provides for the payment of amounts that became due in connection with a property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the rates clearance certificate.

The municipality claimed an arrear amount of R87 743,64 contending that it was entitled to this in terms of section 118(3) of the Act.

THE DECISION

In terms of section 118, municipalities are given firstly security for repayment of a debt in that it is a charge upon the property concerned (subsection 3) and secondly, the capacity to block the transfer of ownership of the property until debts have been paid in certain circumstances (subsection 1). The principal elements of s 118 are accordingly a security provision without a time limit and a veto or embargo provision with a time limit. The purpose of both is to ensure payment of the municipal claims that fall within the stipulated categories, but the mechanisms employed to achieve that purpose are different.

Subsection 3 is not an embargo provision but a security provision. The Municipality had failed to draw this distinction and thus confused the two distinct remedies available to it. This led it to the erroneous claim that the security it enjoyed for the historical debt had no limit in duration. The municipality was not entitled to this. Its claim was dismissed.

UNITING REFORMED CHURCH, DE DOORNS v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Property

A JUDGMENT BY ZONDI J
WESTERN CAPE HIGH COURT
14 DECEMBER 2012

2013 (5) SA 205 (WCC)

A provision in a lease by which the lessor is obliged to transfer its property to the state free of charge may be considered invalid on the grounds that it is contrary to section 25 of the Constitution if it is clear that the lessor had no choice but to agree to the provision and this constitutes arbitrary deprivation of its property.

THE FACTS

The Uniting Reformed Church, De Doorns, owned three properties on which schools operated. In April 1987, the church concluded a notarial lease with the state in terms of which it leased the properties to the state for a 20-year period. In terms of clause 16 of the lease, the church was obliged to transfer the properties to the state free of charge.

Before the date on which the lease was concluded, the there was a lack of adequate educational facilities in the communities served by the church and it had been compelled to assume the responsibility of providing decent educational facilities to these communities. To this end, the church developed new and improved existing very basic and largely neglected school buildings on its properties. To finance these educational projects the church used its financial resources and obtained loans. In 1987, the House of Representatives, one of the arms of the tri-cameral parliament, assumed these responsibilities, arranged a loan of R1.6m to the church and concluded the leases. The rental was used mainly to repay the loan.

After 2007, the church contended that when the lease was concluded it had no option but to agree to clause 16 and that the clause was therefore contrary to public policy and unconstitutional, and for that reason invalid. It applied for an order that it was not obliged to transfer the properties to the state.

THE DECISION

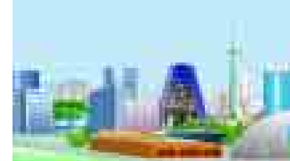
The state had not provided any convincing response to the allegation that the church had been compelled to agree to clause 16 of the lease. Furthermore, on a proper analysis of the terms of the leas agreement, the provisions of clause 16 were inimical to the values enshrined in the Constitution, in particular section 25.

Were the State to enforce the provisions of clause 16, the church would have no alternative but to transfer its properties to it without receiving any compensation. This constituted deprivation of property as envisaged by section 25(1). There would be a failure to comply with the requirements of subsections 2 (a) and (b) of the Constitution.

The application was granted.

SALDANHA BAY MUNICIPALITY v BRITANNIA BEACH ESTATE (PTY) LTD

Property



A JUDGMENT BY ERASMUS AJA (CLOETE JA, TSHIQI JA, SWAIN AJA AND MBHA AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2012

2013 SACLR 31 (SCA)

A municipality which wishes to amend a tariff applicable to rezoning of property must effect such an amendment in terms of section 42(3) of the Land Use Planning Ordinance 15 of 1985 (Cape).

THE FACTS

Britannia Beach Estate (Pty) Ltd lodged six applications for rezoning of property to the Saldanha Bay Municipality. The tariff payable by Britannia and applicable at the time it lodged the six applications had been determined in resolution R55 of the council of the municipality. The approvals for the first three applications were granted prior to 1 July 2007, when the tariff in resolution R55 was still applicable. Payment of capital contributions calculated in terms of this tariff was made a condition of all the approvals, and this condition was accepted by Britannia.

On 26 June 2007, the council passed resolution R35 which amended the tariff applicable, and it resolved that this was to come into force on 7 July 2007. It purported to do so in terms of section 42(3) of the Land Use Planning Ordinance 15 of 1985 (Cape). Approval of the next three applications was given after this date. The municipality took the view that the applicable tariff in respect of these applications was that provided for in resolution R35. A later resolution of the council confirmed its position, but this resolution was later withdrawn.

Britannia applied for an order declaring the tariff for the calculation of bulk infrastructure development contribution levies, set out in resolution R35 to be of no force and effect.

THE DECISION

The payment of contributions was an enforceable condition of each approval. It was accepted by the parties that these conditions were validly imposed in terms of Land Use Planning Ordinance 15 of 1985 (Cape). The amount payable was determined with reference to the tariff as provided for in the resolutions passed by the council. Changes in the council's policy were irrelevant to the validity of these resolutions.

The procedure prescribed in section 42(3) of LUPO for the amendment of tariffs was however, not followed. This meant that the tariff which was applied to the applications was not authorised in terms of the Act and was therefore unenforceable.

Britannia's application succeeded.

BASSON v NIEMANN

A JUDGMENT BY LEACH JA
(MPATI P, NUGENT JA, MALAN JA AND THERON JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2012

2013 SACLR 1 (SCA)

Prescription

A party which knows of the material facts upon which it may claim payment of a debt cannot rely on section 12(3) of the Prescription Act (no 68 of 1969) to allege that such a debt has not prescribed.

THE FACTS

In 1999, Basson was a member of a law firm which operated in partnership. Niemann and the other respondents were partners in the same firm.

In that year, Basson had acted for a company named Anglo-Euro Company (Pty) Ltd. The company took deposits from individuals. Some of them were paid into the trust account of the law firm, and then paid to Anglo-Euro. Basson assured the other partners of the law firm that he was authorised to make these payment to Anglo-Euro.

Shortly after payment, public allegations were made that the payments were improper. Summonses were threatened against the law firm. Two investors claimed R1.5m against the firm in an application to the High Court. The claim became the subject of arbitration. An appeal against the arbitrator's decision concluded with it being determined that written instructions had not been obtained from the investors.

The firm accepted liability to various investors whose deposits had improperly been paid out of trust by Basson. Niemann had conceded that if he had exercised care he would have learned everything necessary to institute action against Basson by 2006. In the same year, at a directors' meeting of the firm it was decided that Basson would contact an attorney who was acting on behalf of the majority of the investors who had instituted action, to discuss the Anglo-Euro matter with a view to settling it.

In May 2007, Niemann and the other partners in the firm were advised that Basson had not had the authority of the depositors to pay their money to Anglo-Euro. They contended that it was at that point that they knew or could reasonably have ascertained that Basson had lacked the necessary authority to make the disputed payments. They contended that Basson was their partner in whom they were entitled to have the utmost faith, and he had reassured them that he had not acted improperly and had been duly authorised to make the payments to Anglo-Euro.

In December 2009, Niemann and the other partners brought an action against Basson for damages arising from the claims brought by investors against the firm. Basson raised a special plea of prescription. Niemann and the other partners contended that section 12(3) of the Prescription Act (no 68 of 1969) applied and that whether they did not know or could reasonably have ascertained that Basson had lacked the necessary authority to make the payments.

THE DECISION

It was clear that earlier than December 2009, Niemann knew of the payments made to Anglo-Euro. The only question was whether they knew or could reasonably have ascertained that Basson lacked the necessary authority to make them.

The argument that prescription only commenced to run from December 2009 could not be accepted. In view of Niemann's concession that if he had exercised care he would have learned everything necessary to institute action against Basson by 2006, he could not assert that he could not reasonably have ascertained that Basson lacked the necessary authority.

In any event, it was clear from Niemann's own evidence that he had knowledge of the material facts by then. Crucial to this was the directors' meeting of the firm at which it was decided that the

appellant would contact the attorney acting on behalf of the majority of the investors who had instituted action, to discuss the Anglo-Euro matter.

Niemann could have investigated the merits of the matter at a far earlier stage than he said he did. However his indifference to the various investor's claims, appeared to have been due to the partners having left the litigation in the hands of Basson and their insurers.

Prescription therefore commenced to run against the partners by early 2006 at the very latest. Their claims had therefore prescribed before they instituted their action against Basson more than three years later

The special plea was upheld.

Of the respondents, only the first respondent testified in the court below. According to him, despite their having made these payments, the appellant continued to assure them that he had been authorised to make the payments. The first respondent averred that it was only in May 2007 that they came to realise that the appellant had not been so authorised. This occurred when the respondents met with Mr Leinberger who explained that the appellant had not had the necessary written authority to make the payments he had made to Anglo-Euro and explained the extent of their potential liability due to their insurers refusing to make further payments on their behalf.

[21] However, the respondents' argument that prescription only commenced to run at this point in time cannot be accepted. Indeed the first respondent conceded that if he had exercised care he would have learned everything necessary to institute action against the appellant by 2006. This in itself is fatal to the respondents' case.

OCKIE STRYDOM v ENGEN PETROLEUM LTD

A JUDGMENT BY WALLIS JA (TSHIQI JA, SWAIN AJA AND SALDULKER AJA concurring, HEHER JA dissenting)
SUPREME COURT OF APPEAL
30 NOVEMBER 2012

2013 SACLR 42 (SCA)

Suretyship

Section 15(6) of the Matrimonial Property Act (no 88 of 1984) should be interpreted as a proviso to section 15(2)(h) and other sub-sections to which it relates. A party whom it is alleged falls within the proviso provided for in section 15(6) must give evidence to show that he did not sign the deed of suretyship in the ordinary course of his profession, trade or business.

THE FACTS

Ockie Strydom signed a deed of suretyship in favour of Engen Petroleum Ltd. Engen required the agreement because it undertook to advance loans to Soutpansberg Petroleum (Pty) Ltd, a company in which Strydom had an interest.

Soutpansberg's business was the distribution and sale of Engen's products in Limpopo through its depots in Mesina and Louis Trichardt. The main business of the company consisted in marketing operations. It also delivered product to customers and administration. Strydom's involvement entailed that he worked at the core of the business. He admitted that he signed the agreement but did not indicate that he had done so for reasons other than his financial commitment to Soutpansberg. Immediately beneath his signature was a line, under which were the words 'CONSENT BY SPOUSE (TO THE EXTENT APPLICABLE)'. Entered on that line was the acronym 'N/A' meaning 'not applicable'.

When Strydom signed the deed of suretyship, he was married in community of property.

Engen brought an action against Strydom for payment of R25 311 432.21. Its action was based on the suretyship agreement. Strydom defended the action on the grounds that section 15(2)(h) of the Matrimonial Property Act (no 88 of 1984) applied. The sub-section provides that a spouse married in community of property may not without the written consent of the other spouse bind himself as surety.

Engen contended that section 15(6) applied. The sub-section provides that the limitation of sub-section (2)(h) does not apply where the act of becoming bound as surety is performed by a spouse in the ordinary course of his profession, trade or business.

THE DECISION

In substance, sub-section 15(6) is a proviso to those parts of sub-sections 15(2) and 15(3) to which it relates. The onus was therefore on Strydom to show that he did not fall within the proviso, ie that his signing the deed of suretyship was not an act performed in the ordinary course of his profession, trade or business.

The evidence given by Strydom in relation to his business was limited. He put forward no facts which would show that his involvement with Soutpansberg as unrelated to any act performed in the ordinary course of his profession, trade or business. What evidence there was pointed in the opposite direction. However, Strydom did not explain such evidence, nor did he give any indication that from such evidence the conclusion that he did perform the act of signing the suretyship agreement in the ordinary course of his business was wrong.

Strydom gave no explanation of the insertion of the words 'not applicable' underneath his signature. The central issue was whether 'not applicable' was indeed so, yet Strydom did not explain it. Futhermore, Strydom failed to explain how he came to be involved in Soutpansberg; why he was appointed a director and why his activities in relation to its operations did not constitute his business. He failed to do so even after Engen had alleged that he bound himself as surety in the ordinary course of his business.

Section 15(6) therefore did apply. Engen was entitled to payment in terms of the deed of suretyship.

ALLPAY CONSOLIDATED INVESTMENT HOLDINGS (PTY) LTD v SOUTH AFRICAN SOCIAL SECURITY AGENCY

A JUDGMENT BY FRONEMAN J (MOGOENG CJ, MOSENEKE DCJ, CAMERON J, JAFTA J, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J, ZONDO J, MADLANGA J and MHLANTLA AJ concurring)
CONSTITUTIONAL COURT
29 NOVEMBER 2013

2014 (1) SA 604 (CC)

Contract

A tender process must be free of material irregularities, such as the failure to properly assess claims made by one of the tenderers and the creation of confusion by the issuing of unclear requirements for tenderers.

THE FACTS

The South African Social Security Agency called for tenders for the management of payment of social grants. The bid process required bidders to exceed a minimum requirement for technical solutions. Two bidders did so at an initial stage: Allpay Consolidated Investment Holdings (Pty) Ltd and Cash Paymaster. After a second stage, AllPay's score fell to 58,68% and Cash Paymaster's score rose to 82,44%. The effect of this was that AllPay did not qualify for the next round—the assessment on finances and preference points—and Cash Paymaster was awarded the tender.

During the tender process, the Agency's bid committee issued a notice that biometric verification would be mandatory. It stated 'In order to ensure that the right Beneficiary receives the right amount at the right time, biometric verification must be performed when a beneficiary receives his grant regardless of the payment methodology.'

AllPay challenged the decision on a number of grounds one of which was that in awarding the tender to Cash Paymaster, the bid committee failed to properly assess Cash Paymaster's black empowerment claims in that it failed to assess the ability of Cash Paymaster's black economic empowerment partners to perform the tender. Cash Paymaster claimed that its equity partners would manage and execute over 74% of the tender. It substantiated this by providing particulars of the management capabilities of its workforce, which included previously disadvantaged people. When stating its requirements for the tender process, the bid committee had indicated that responsive tenders would be evaluated using a system which awarded points on the basis of the tendered price and equity ownership. The points system and equity ownership operated on the explicit premise of active management and control of the enterprise.

AllPay also challenged the decision on the ground that the requirement of biometric verification had been stated in a bidders notice in a vague and confusing manner. It had understood the initial preference for biometric verification at the payment stage to relate to actual payment in the hands of a beneficiary, and did not consider biometric verification by way of fingerprints to be possible at payments from ATMs.

THE DECISION

It was necessary that the tender process be free of material irregularities as envisaged in the Promotion of Administrative Justice Act (no 3 of 2000). The materiality of irregularities is determined primarily by assessing whether the purposes the tender requirements serve have been substantively achieved. The tenderers had a right to a fair tender process, irrespective of whether they were ultimately awarded the tender.

Cash Paymaster's bid had not properly substantiated its black economic empowerment claims. On the face of the information provided by Cash Paymaster in its tender, it was not possible to determine whether its claimed empowerment credentials were up to scratch or not. In terms of the Procurement Act, the bid committee had been under an obligation to properly substantiate this claim. The Act provides that an organ of state must determine its preferential procurement policy within a preference-point system for

specific goals, which may include 'contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability'. The handling of the tender process by the bid committee made this a nullity, in that the black economic empowerment preference points — which were to be assessed in the second stage — played no actual role in the decision because by that stage there was no competitor. There was an obligation on the committee to ensure that the empowerment credentials of the prospective tenderers were investigated and confirmed before the award was finally made. That obligation became even more crucial when there were no other competitors left in the second stage.

On this ground, the decision made was therefore fatally defective.

As far as the requirement of biometric verification was concerned, doubt and uncertainty surrounded the effect of the change from preferential biometric payment verification, as stated in the request for proposals, to mandatory biometric verification in terms of the bidders notice. The bid evaluation and adjudication committees were unsure about the proper effect of the bidders notice. The effect of this was to knock AllPay out of contention altogether at the functionality stage. Without any competitor in the financial and preference-point stage, the process became entirely uncompetitive. Given the confusion over the requirements of the tender on the part of both bidders and members of the bid evaluation committee, the notice given by the tender documents was inadequate. It did not specify with sufficient clarity what was required of bidders. The requirements of section 3(2)(b) of Promotion of Administrative Justice Act were not met.

Given the central and fundamental importance of substantive empowerment under the Constitution and the Procurement and Empowerment Acts, SASSA's failure to ensure that the claimed empowerment credentials were objectively confirmed was fatally defective. It is difficult to think of a more fundamentally mandatory and material condition prescribed by the constitutional and legislative procurement framework than objectively determined empowerment credentials. 84 The failure to make that objective determination fell afoul of s 6(2)(b) of PAJA (non-compliance with a mandatory and material condition) and s 6(2)(e)(iii) (failure to consider a relevant consideration).

COUNTRY CLOUD TRADING CC v MEC, DEPARTMENT OF INFRASTRUCTURE DEVELOPMENT

Contract

A JUDGMENT BY BRAND JA (LEACH JA, TSHIQI JA, THERON JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2013

2014 (2) SA 214 (SCA)

In proving that a party has caused economic loss which can be claimed as damages it is necessary to show that policy considerations dictate that that party acted wrongfully. If to do so would establish indeterminate liability in the circumstances, a court will be reluctant to characterise such action as wrongful.

THE FACTS

The Department of Infrastructure awarded a R480m contract to Ilima Projects (Pty) Ltd for the construction of the Zola Clinic in Soweto. The Department awarded the contract to Ilima after a joint venture in which Ilima had been a partner had defaulted in performing the construction work. Because of the urgent need to address the default, the Department had not followed the tender process followed when the original contract was awarded. Because of Ilima's need for loan finance, the Department undertook to pay Ilima a 'site re-establishment and mobilisation fee' equal to 5 % of the contract price of R480 million within 30 days of concluding the contract. The Department also allowed its managing agent, Tau Pride (Pty) Ltd (Tau Pride), to give a formal undertaking to Country Cloud Trading CC that a loan of R12m it had agreed to advance to Ilima be paid directly to it out of the site rehabilitation and mobilisation fee of R21,5m when Ilima became entitled to this fee.

Later in the year, the Department alleged that Ilima had made two misrepresentations prior to the conclusion of the completion contract. Both were alleged to be intentional and material. The first was a representation conveyed through a tax clearance certificate from the South African Revenue Service (SARS), to the effect that Ilima had complied with all its tax obligations and was in good standing with SARS. The Department alleged that this was untrue in that, at the time, Ilima's tax affairs were in serious disarray. The second was a representation that it had received a level 8 accreditation from the Construction Industry Development Board. As a result, the Department cancelled the contract. It had paid no money in terms of the cancelled contract.

Country Cloud then brought an action for damages against the Department. It alleged that the Department owed it a duty of care not to cancel the completion contract without any lawful ground prior to payment of the site rehabilitation and mobilisation fee to Ilima. It alleged that the Department intentionally, and, in breach of its duty of care, unilaterally cancelled the completion contract without any lawful grounds, and that but for the conduct of the Department, Ilima would have received payment of an amount of R21,5m and would have been able to pay the R12m and R8,5 million which it owed to Country Cloud.

The Department defended the action on the grounds that the first misrepresentation it alleged had been made was a sufficient reason for the cancellation of the contract. It also defended the action on the grounds that the contract had been awarded contrary to the procurement regulations and policies of the Department in that it was not advertised and did not invite other companies to bid for the tender, and it was not evaluated and adjudicated by the appropriate internal structures of the Department. Its third defence was that it could not be held delictually liable for damages because it had not acted wrongfully.

THE DECISION

The first two defences relied on by the Department could not be sustained. However, its third defence relied on the proposition that Country Cloud had failed to establish all the requirements of delictual liability.

As one of these requirements was that the Department acted wrongfully, it was necessary to examine what the Department did. Given the finding on the failure of the first two defences, it followed that it cancelled the completion contract without any legal justification and did so with the intent — at least in the form of dolus eventualis — to repudiate the contract. This indicated fault on the part of the Department, but other factors needed to be considered such as the desirability of the extension of liability in these circumstances. For Country Cloud to succeed, it would be necessary to extend delictual liability to a contracting party for damages suffered by a stranger to the contract resulting from the intentional repudiation of the contract by that contracting party. This had never been done before.

To ascribe wrongfulness to the Department's actions would be to open the door to indeterminate liability. There would be no reason why other lenders could have successfully sued the Department. Furthermore, at least two alternative remedies were available to Country Cloud to recover its loss. It could either have claimed repayment from Ilima in terms of the contract of loan or it could have taken cession of Ilima's claim against the department. The reason why it did neither was not explained.

Country Cloud's claim could therefore not succeed.

A further consideration which, in my view, weighs heavily against the imposition of delictual liability on the department, in the circumstances of this case, is the one that has become known in the context of wrongfulness as the plaintiff's 'vulnerability to risk'. As developed in our law under the influence of Australian jurisprudence, vulnerability to risk signifies that the plaintiff could not reasonably have avoided the harm suffered by other means. What has by now become well established in our law is that the finding of non-vulnerability on the part of the plaintiff is an important indicator against the imposition of delictual liability on the defendant

OSBORNE v WEST DUNES PROPERTIES 176 (PTY) LTD

Contract

A JUDGMENT BY BLIGNAULT J
WESTERN CAPE HIGH COURT
18 APRIL 2013

2013 (6) SA 105 (WCC)

In seeking rectification of a sale agreement so as to change the identity of one of the parties, it is necessary to describe the new party sufficiently to identify that party.

THE FACTS

In July 2012, a sale agreement was concluded between West Dunes Properties 176 (Pty) Ltd as seller and PJ Osborne (Pty) Ltd as buyer. The property sold was a farm on which the second defendant conducted a restaurant business and third defendant a separate wedding and conference facility. The purchase price of the property was R17 500 000.

Shortly after the conclusion of the sale, Osborne who represented PJ Osborne (Pty) Ltd, alleged that certain fraudulent misrepresentations had been made by the representative of West Dunes and that as a result, the sale was cancelled.

Osborne sued for return of a deposit of R2.5m which he had paid as a desposit required in terms of the sale agreement, and for rectification of the agreement of sale by deleting the description of the purchaser and replacing it with a description of the purchaser as a registered shelf company represented by Osborne. The claim was based in delict.

West Dunes excepted to the claim on a number of grounds. The court also considered certain difficulties in the manner in which the claim had been stated.

THE DECISION

Payment of the R2.5m by Osborne did not mean that he was entitled to repayment because when he paid this sum of money he did so on behalf of PJ Osborne (Pty) Ltd and not in his personal capacity.

The agreement of sale identified the purchaser adequately as PJ Osborne (Pty) Ltd. However, the formal purchaser was, on the basis of Osborne's own case, not the true purchaser of the land. The true purchaser on his case, was the shelf company. Its description was however, so vague that it could not be identified: the concept of a shelf company was not defined or described. The description did not identify the shelf company by name or by registration number or in any other way. It provided that the shelf company would be purchased at some stage in the future but it did not identify the proposed purchaser or the proposed seller thereof. In terms of common-law principles the alleged agreement of sale was therefore void for vagueness.

In any event, on Osborne's case, the agreement of sale was not valid because it was not signed by the parties alleged to be the parties to the agreement. In terms of section 2(1) of the Alienation of Land Act (no 68 of 1981), signature by the parties was essential for its validity.

The particulars of claim were therefore set aside.

RADON PROJECTS (PTY) LTD v NV PROPERTIES (PTY) LTD

Contract

A JUDGMENT BY NUGENT JA (LEACH JA, PILLAY JA, ERASMUS AJA and SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2013

2013 (6) SA 345 (SCA)

A contractor is entitled to arbitration proceedings in respect of its claims arising from a construction contract if the claims have not already been adjudicated upon in the course of construction. If the employer disputes the claims, this does not deny the arbitrator jurisdiction to determine the matter.

THE FACTS

Radon Projects (Pty) Ltd as contractor, and NV Properties (Pty) Ltd as employer, concluded a contract for the construction of the East London Convention Centre. The contract was concluded on the Principal Building Agreement of the Joint Building Contracts Committee (JBCC) form.

Clause 40 of the agreement provided that the resolution of disputes was to follow procedures provided for therein, there being provision for the resolution of disputes arising during the course of construction by summary decision within 10 days or by adjudication. Where practical completion had taken place, disputes would be determined by arbitration. During the course of construction, Radon submitted various claims in terms of clause 40.1. They were determined by adjudication against it. Later claims made in terms of this clause were not responded to.

Clause 29 provided for the consequences of delays experienced in the course of construction, and provided for the submission of claims resulting from such delays.

The construction of the Centre was delayed. As a result, after completion, Radon submitted a consolidated claim, being claims made in the course of construction and revised in the light of information which later became available.

An arbitrator was appointed to resolve the disputes. NV contended that the arbitrator had no jurisdiction to consider and rule upon the bulk of the claims. It contended that they should be rejected because most of the claims being advanced were claims that were submitted in the course of construction and were refused, after which Radon called upon the principal agent to resolve the disagreement under clause 40.1. It alleged that the principal agent did so, and Radon failed to dispute his decision within 20 days, and as a result his decisions became final and binding, and no dispute came into existence.

THE DECISION

Radon had contended it was entitled to revise and update its claims, as it had when submitting the consolidated claim. Whether or not it was so entitled, was not a matter for present consideration. The matter for consideration was whether or not the arbitrator had jurisdiction to consider the claims.

It could be accepted that decisions made by the principal agent under clause 40.1 in relation to the initial claims that were refused in the course of construction became final and binding and no dispute concerning them that could be submitted to arbitration came into existence in relation to them. But those were not the claims presently in issue. Radon alleged it was entitled to submit revised claims to the principal agent, and it did so when submitting its consolidated claim. Those were the claims that became disputed once the principal agent failed to respond to Radon''s later request for a decision under clause 40.1. A dispute thereupon arose as to the validity of those claims, which was one arising out of or concerning the agreement. It was only because the agreement existed that the dispute had arisen. This was subject to resolution by arbitration.

NV's contention was rejected. The appeal was upheld.

RMB PRIVATE BANK v KAYDEEZ THERAPIES CC

Contract

A JUDGMENT BY SATCHWELL J
SOUTH GAUTENG HIGH COURT
30 MAY 2012

2013 (6) SA 308 (GSJ)

Parties which by mistake apply a statute to their agreement do not thereby render the statute applicable to it.

THE FACTS

RMB Private Bank lent money to Kaydeez Therapies CC. As security it took suretyships from the second and third respondents. Kaydeez was unable to repay the loan and went into liquidation.

When the parties signed the agreements, they thought that the National Credit Act (no 34 of 2005) applied to them, referred to that Act in the agreements and cited it as being applicable. The agreements incorporated addenda which stated the consumer's rights as provided for in the Act. The Act was not in fact applicable to the agreements as the loan agreement was a large agreement as defined in the regulations.

When RMB sought to enforce the suretyship agreements, the second and third respondents contended that the Act was applicable to the suretyship agreements and that RMB failed to comply with its provisions. They contended that RMB should have conducted an assessment as provided for in sections 81 and 82 of the Act and had advanced credit recklessly, and they should have been notified of RMB's intention to enforce repayment in terms of sections 129 and 130 of the Act.

THE DECISION

The parties were operating under the mistaken belief that the Act was applicable to their agreement. Both made the same erroneous supposition about the legislative environment. There was no lack of consensus about the content or import of the agreement, but a mistaken common assumption about the applicability of the Act. However, there was nothing in the suretyship agreements themselves to suggest that the agreements were made dependent upon the assumption that the Act would apply to any of the agreements.

The Act cannot be rendered applicable by agreement. The parties had not expressly agreed to include in their agreement certain terms which reflected certain provisions of the Act. They had not tacitly agreed to include in their agreement any term that the creditor must conduct an assessment prior to entering into the agreement, failing which the granting of any credit would be reckless. They had not tacitly agreed to include in their agreement any term that the creditor must give the sureties notice of default, which also refers them to an entity to resolve any dispute, or result in agreement on a payment plan. Therefore, the sureties could not depend on the Act in defending the action brought against them.

RMB was therefore entield to payment in terms of the suretyship agreements.

TUBULAR HOLDINGS (PTY) LTD v DBT TECHNOLOGIES (PTY) LTD

Contract

A JUDGMENT BY DU PLESSIS AJ
SOUTH GAUTENG HIGH COURT
3 MAY 2013

2014 (1) SA 244 (GSJ)

A provision which requires a party to a dispute which has been referred for decision and obliges the party to abide by that decision even if the matter is referred to arbitration, requires that a party dissatisfied with the decision abide by it until the matter is determined by arbitration.

THE FACTS

DBT Technologies (Pty) Ltd subcontracted part of a construction project to Tubular Holdings (Pty) Ltd. In terms of their agreement, in the event of dispute, the dispute was to be referred in the first instance, to a Dispute Adjudication Board (DAB) which was to give a decision on that dispute. A party dissatisfied with that decision could give a notice of dissatisfaction after which it was to be referred to arbitration. The decision of the DAB was in the interim, binding on both parties.

The wording of the relevant clause, clause 20.4, was that the DAB's decision was to be 'binding on both parties who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the contract has already been abandoned, repudiated or terminated, the contractor shall continue to proceed with the works in accordance with the contract'.

Clause 20.6 provided that 'Unless settled amicably or otherwise agreed by the parties in writing, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by arbitration'.

The parties referred a dispute to the DAB. The DAB made a decision, and DBT referred the matter to arbitration. DBT contended that in the interim, it was not bound by the decision of the DAB.

THE DECISION

The notice of dissatisfaction did not detract from the obligation of the parties to give prompt effect to the decision until such time it was revised in arbitration. The notice of dissatisfaction did not suspend the obligation to give effect to the decision. The party must give prompt effect to the decision once it is given.

The scheme of the provisions was that the parties had to give prompt effect to a decision. If a party was dissatisfied he had to live with it and had to deliver his notice of dissatisfaction within 28 days, failing which it would become final and binding. If he had given his notice of dissatisfaction he could have the decision reviewed in arbitration. If he was successful the decision would be set aside. But until that happened, the decision stood and he had to comply with it.

Therefore, DBT was obliged to comply with the decision.

IMPERIAL BANK LIMITED v BARNARD N.O.

A JUDGMENT BY MPATI P
(CACHALIA JA, PILLAY JA,
SCHOEMAN AJA and
SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2013

2013 (5) SA 612 (SCA)

Liquidators which sue for payment of a debt due to the company in liquidation, stating that they sue in their capacities as liquidators of the company, do not introduce a new cause of action by amending particulars of claim to cite the plaintiff as the company in liquidation represented by the liquidators.

THE FACTS

Barnard and four others were joint liquidators of Pro Med Construction CC. They brought an action against Imperial Bank Ltd in which they were cited as suing in their representative capacities as the joint liquidators of Pro Med.

The claim alleged that Pro Med had purchased property from Imperial Bank for R10m and that Pro Med was entitled to transfer of the property into its name. In lieu of transfer of the property, Pro Med sought payment of R25m.

The action began in August 2007. In February 2011, the liquidators applied to amend the particulars of claim by citing the plaintiff as Pro Med Construction CC (in liquidation) represented by the five joint liquidators.

Imperial opposed the amendment on the grounds that the debt upon which the claim was brought had become prescribed and it would be prejudiced, in that it would be deprived of the opportunity to raise the defence of prescription, were Pro Med to be substituted as plaintiff.

THE DECISION

The issue in the present case was not whether or not a liquidator has standing where a debt owed to a company in liquidation is sought to be recovered. The question of the correct citation of a plaintiff in a claim brought for payment of a debt due to a company in liquidation was therefore not relevant to the present matter.

The essential question was, as stated in *Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978 (1) SA 463 (A), whether or not the service of the summons interrupted the running of prescription. In considering whether or not prescription was interrupted by service of the summons, the right sought to be enforced by means of the amendment must be the same or substantially the same right as originally sought to be enforced.

The citation of the plaintiffs, read together with the reference that they were acting in their official capacities clearly indicated that they were not acting in their personal capacities, but representing Pro Med. The allegations made in the particulars of claim relating to the agreement of sale, the conclusions that Pro Med is entitled to transfer of the property and the tender made by Pro Med to pay the purchase price clearly showed that the claim was that of Pro Med and not the liquidators. Furthermore, because the plaintiffs litigated in their representative capacities, judgment in their favour would not enure for their personal benefit, but for the benefit of creditors.

It followed that the amendment sought would not have the effect of substituting a different plaintiff, but merely corrected a misnomer in the first paragraph of the particulars of claim. No new cause of action would be introduced by the amendment.

The amendment was granted.

NAIDOO v KALIANJEE N.O.

A JUDGMENT BY VORSTER AJ
NORTH GAUTENG HIGH COURT
11 JUNE 2013

2013 (5) SA 591 (GNP)

A warrant to search for and take possession of property given in terms of section 69 of the Insolvency Act (no 24 of 1936) may provide and authorise members of the police force to execute the search warrant.

THE FACTS

M & M Hiring SA CC was finally liquidated during October 2010. Naidoo was a member of M & M and the sole member of the second and third applicants, all of whom did business at the same premises. The fourth applicant was a company in which Naidoo was interested.

After the provisional liquidation order had been made final, an enquiry was held in terms of the Insolvency Act (no 24 of 1936) during which it transpired that Naidoo fraudulently used the second and third applicants to lay claim to assets belonging to M & M. This was easily achieved by Naidoo because those entities and M & M shared the same premises for business purposes.

This evidence led Kalianjee, the liquidator, to make application in terms of section 67(3) of the Act for the issuing of a warrant to search for and take possession of the property which was alleged to be concealed by M & M. The warrant was then issued.

Naidoo brought an application to set aside the issuing of the warrant. The warrant authorised members of the police force to execute the search warrant.

THE DECISION

Section 69(4) of the Insolvency Act provides that the warrant in question shall be executed in like manner as a warrant to search for stolen property. It also charges the person executing the warrant to deliver such property seized under the warrant to the trustee.

There is a fundamental distinction between the power to issue a search warrant in terms of the Criminal Procedure Act and the power to authorise or issue a warrant in terms of section 69 of the Insolvency Act. This distinction underlies the correct interpretation of section 69(3). Where an insolvent or somebody acting on behalf of the insolvent appears to be guilty of dishonest conduct in the sense of concealing or alienating property belonging to the insolvent, the provisions of s 69(2) and (3) come into play. Those provisions are directed at enabling the trustee to fulfil his statutory duty.

The facts of the present case were an illustration of the necessity for a trustee to do his duty with the assistance of the police force. This was the reason for the provision in section 69(4) that the warrant was to be executed in like manner as a warrant to search for stolen property and the provision that the article so seized must be delivered to the trustee. The trustee knows which articles are to be searched for and will typically accompany the member of the police in the execution of the search warrant. It is a means to attach and take into custody the assets of the insolvent, and no more.

Authorising members of the police force to execute the search warrant does not mean that the search warrant was unlawfully authorised by the court. It merely enables the trustee to conduct the search with the assistance of any police officer.

The application to set aside the warrant was dismissed.

ABSA BANK LTD v SUMMER LODGE (PTY) LTD

Insolvency

A JUDGMENT BY MAKGOBA J
NORTH GAUTENG HIGH COURT
22 MAY 2013

2013 (5) SA 444 (GNP)

The existence of a business rescue application does not prevent a court from granting an order of liquidation against a company, but will suspend the liquidation process in terms of section 131(6) of the Companies Act (no 71 of 2008).

THE FACTS

Absa Bank Ltd brought an application for the liquidation of Summer Lodge (Pty) Ltd in order to secure recovery of a debt due to it by Summer Lodge. Summer Lodge applied for business rescue in order to place it under supervision and to commence business rescue proceedings.

When Absa requested a provisional order against Summer Lodge, Summer Lodge contended that the business rescue proceedings suspended the legal proceedings for its liquidation in terms of section 131(6) of the Companies Act (no 71 of 2008). It contended that the application for liquidation constituted 'liquidation proceedings' as envisaged in section 131(6) of the Act. In consequence, the liquidation application was automatically suspended and the court had no jurisdiction is oused to grant final winding-up order.

Section 131(6) of the Act provides that if liquidation proceedings have already been commenced by or against a company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until (a) the court has adjudicated upon the application, or (b) the business rescue proceedings end, if the court makes the order applied for.

THE DECISION

Summer Lodge's contention was that the words 'liquidation proceedings' refer to the substantive application to obtain a winding-up order and also to the collective processes followed by the master and the liquidator in the actual winding-up. Absa's interpretation of the words is that they refer only to the collective proceedings in the actual winding-up of Summer Lodge, followed by the master and the liquidator, thus excluding the legal proceedings in order to obtain a winding-up order.

Absa's interpretation was to be preferred. The words 'liquidation proceedings' refer to a process that consists of the collection of the assets, realising and reducing them to money, dealing with proof of creditors by admitting or rejecting them, and distributing the net proceeds after providing for costs and expenses by the liquidator to the persons entitled thereto. The words 'liquidation proceedings' have to do with the process that is overseen by the liquidator and the master in winding-up and not the legal proceedings before a court of law in order to obtain such order.

Applying section 131(6) in the present case, once the liquidation proceedings had begun by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application in terms of section 131(1) of the Act would suspend the liquidation process. The provisional order was therefore properly granted since as at that time there were no liquidation proceedings to be 'suspended' by the business rescue application.

VAN REENEN v SANTAM LTD

A JUDGMENT BY MAYA JA
(LEACH JA, THERON JA, WILLIS JA and MEYER AJA concurring)
SUPREME COURT OF APPEAL
29 MAY 2013

2013 (5) SA 595 (SCA)

A claim in terms of section 156 of the Insolvency Act (no 24 of 1936) arises on the sequestration of the insured and not on any later date such as when the insurer repudiates liability for the claim.

THE FACTS

Santam Ltd insured Abakor Ltd against claims for damages arising from its supply of products. One of its customers was Van Reenen to whom it supplied tallow, which was to be used as an ingredient in cattle feed.

Van Reenen alleged that the tallow was defective. He brought an action against Abakor for breach of warranty and damages resulting from the latent defects in the sum of R1 970 926,60. On 10 October 2000 Abakor was placed under provisional liquidation and was finally wound up on 31 October 2000. Van Reenen became aware of this on 27 November 2000. The final appointment of Abakor's liquidators was made on 16 March 2001.

In January 2004, Van Reenen brought an action against Santam based on the same cause of action, and relying on section 156 of the Insolvency Act (no 24 of 1936). The section provides that whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.

Santam defended the action on the grounds that the claim had become prescribed three years after 31 October 2000, when the liquidation of Abakor had been made final. Van Reenen contended that his claim arose no earlier than 10 April 2001 when Santam repudiated Abakor's claim for indemnification arising out of the liquidators' failure to comply with certain obligations under the insurance contract. Van Reenen also contended that Santam had tacitly admitted liability to indemnify Abakor by instructing attorneys to defend the action he brought against it.

THE DECISION

Section 156 refers to 'on the sequestration of the estate of the insured'. This means when the insured is wound up by an order of court. In the present matter, this took place on 31 October 2000. That is the date on which Van Reenen's claim arose. All that he had to do to bring himself within the section was to show (a) that Abakor had incurred a liability to him; (b) that Santam was contractually obliged to indemnify Abakor in respect of that liability; and (c) the amount which Santam would have been obliged to pay Abakor. The subsequent repudiation of Abakor's claim by Santam was wholly irrelevant for the purposes of his claim.

By 27 November 2000, Van Reenen knew (a) the identity of Abakor, its debtor, and the facts from which the debt Abakor owed him arose in January 2000, (b) that Santam was obliged to indemnify Abakor in respect of that liability in terms of the insurance policy, (c) the amount of the indemnity by August 1998 and (d) that Abakor had been finally wound up. Accordingly, in terms of the Prescription Act (no 68 of 1969) the claim prescribed by 27 November 2003.

As far as the allegation of the tacit admission of liability was concerned, section 156 does not transfer to or vest the existing rights of an insolvent estate in the third party. For that reason, too, an acknowledgement of liability by the insurer to its insured does not avail the third party. There was therefore no interruption of prescription.

VAN STADEN v ANGEL OZONE PRODUCTS CC

Insolvency

A JUDGMENT BY LEGODI J
NORTH GAUTENG HIGH COURT
12 OCTOBER 2012

2013 (4) SA 630 (GNP)

Business rescue proceedings may be brought in respect of a company or close corporation that was finally wound up before the commencement of the Companies Act (no 71 of 2008).

THE FACTS

Van Staden, the sole member of Angel Ozone Products CC, brought an application for its liquidation. He brought the application before the commencement of the Companies Act (no 71 of 2008). Angel was placed under final liquidation before the commencement of the Act.

Van Staden then brought an application to place Angel under business rescue. He did so under section 131 of the Act. Section 131(1) 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.

THE DECISION

It was argued that liquidation proceedings had come to an end when a final liquidation order was granted, and that such proceedings should not be confused with the winding-up proceedings, which come to an end when the Master approves the liquidation and distribution account.

It is more likely that the provisions of s 131(7) read with s 135(4) contemplate the conversion of a liquidation into rescue proceedings no matter how far the liquidation and winding-up proceedings might have progressed. If the rescue proceedings are a better option than the liquidation proceedings, there is no reason why such liquidation proceedings could not be converted into supervision and rescue proceedings irrespective of how far advanced the liquidation or the winding-up proceedings might have progressed.

The application succeeded.

WATERKLOOF MARINA ESTATES (PTY) LTD v CHARTER DEVELOPMENT (PTY) LTD

Insolvency

A JUDGMENT BY PRETORIUS J
NORTH GAUTENG HIGH COURT
10 MAY 2013

2013 (6) SA 185 (GNP)

Section 82 of the Insolvency Act (no 24 of 1936) obliges a liquidator to abide by the terms of sale agreement validly entered into on behalf of the company in liquidation.

THE FACTS

Charter Development (Pty) Ltd was placed in final liquidation in July 2002. Two years later, Waterkloof Marina Estates (Pty) Ltd concluded a written agreement with Charter, represented by the company's liquidator, in terms of which Charter, acting under authority granted to him at a meeting of creditors held in January 2003, sold and Waterkloof bought 40% of the issued shares in the second defendant for R6m.

Charter refused to comply with the sale agreement and refused to transfer the shares against a tender of payment of the purchase price. It alleged that the sale of shares agreement was invalid and unenforceable. Waterkloof issued summons praying for an order directing the delivery and transfer of the 40% shareholding in the second defendant, against payment of R6m. After the company's liquidator resigned, Charter issued a third-party notice against the liquidator, claiming that in the event that it is found that effect should be given to the sale-of-shares agreement in terms of section 82(8) of the Insolvency Act, the liquidator should be held liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of him contravening section 82 when dealing with the property. Charter contended that the third party was not authorised by the members of the first defendant to sell any movable property of the first defendant by private contract as provided for in section 386(3)(a) read with section 386(4)(h) of the Companies Act.

Waterkloof contended that the liquidator acted pursuant to the resolutions passed by the creditors ofCharter at the second meeting of creditors, which authorised the liquidator to sell Charter's shares in the second defendant by private contract without the members' authority, and this did not invalidate the administration action. Waterkloof also contended that the sale-of-shares agreement was valid and enforceable as provided for in section 82(8) of the Insolvency Act read with the provisions of section 339 of the Companies Act.

THE DECISION

In terms of section 386(3)(a) and 4(h) of the Companies Act (no 61 of 1973) the liquidator of a company in a winding-up by the court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387 shall have the power to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof.

This section requires the authority of both creditors and members or contributories or on the direction of the Master of the High Court. Neither the contributories nor the Master authorised the sale of the shares in the company and no court application was launched to rectify the situation. Therefore, unless section 82 of the Insolvency Act (no 24 of 1936) was applicable the court has to find against Waterkloof.

Section 82(1) provides that the trustee of an insolvent estate shall, as soon as he is authorised to do so at the second meeting of the creditors of that estate, sell all the property in that estate in such manner and upon such conditions as the creditors may direct. Section 82(8) provides that if any person other than a person mentioned in subsection (7) has purchased in good faith from an

insolvent estate any property which was sold to him in contravention of the section, the purchase shall nevertheless be valid, but the person who sold or otherwise disposed of the property shall be liable to make good to the estate twice the amount of the loss which the estate may have sustained as a result of the dealing with the property in contravention of the section.

This section was directly applicable. The liquidator and Waterkloof entered into an agreement in terms of which the liquidator sold to Waterkloof the shares in the second defendant. The share-sale agreement was valid and enforceable.

The liquidator had to act in the interest of the creditors and the members, not in the public interest, as this was a private agreement. The liquidator made no decision on which he had acted, he only acted on the authority of the creditors who authorised him to sell 40% of the shares. It cannot be held to have been a decision which can be characterised as administrative action as he had made no decision.

The court finds that the agreement was not an administrative action as the liquidator did not take a decision, but was granted authority by the creditors to sell the shares and PAJA is thus not applicable.

KNIPE v KAMEELHOEK (PTY) LTD

A JUDGMENT BY DAFFUE J
FREE STATE HIGH COURT,
BLOEMFONTEIN
27 JUNE 2013

2014 (1) SA 52 (FB)

Corporations

If it appears that there are such serious disputes between shareholders that the companies of which they are shareholders cannot continue to function, then a case is made for the winding up of the companies.

THE FACTS

Kameelhoek (Pty) Ltd and an associated company owned properties worth R60m. The shareholders of the companies were trusts, the trustees of which were a Mr HBLJ Knipe and his wife and the beneficiaries of which were their children. After Mr Knipe died, disputes arose between the beneficiaries. The disputes were serious, and resulted in discord and lack of trust between some of the shareholders of the companies, and they were unable to work together.

At a shareholders' meeting of the companies, the surviving spouse, Mrs Knipe, was removed as director of the companies and three of the children were appointed as directors. They subsequently took control of the companies. The other children challenged the legality of the shareholders' meeting.

Mrs Knipe and her daughter applied for the liquidation of the two companies. A provisional order was granted. They then applied for a final order.

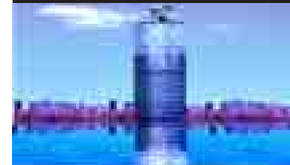
THE DECISION

The issues to be determined were whether the daughter was the cause, if not the sole cause, of the lack of trust and confidence among the shareholders of the companies, whether the companies were domestic companies akin to partnerships, in order to qualify for winding-up on the basis of justice and equity, and whether winding-up was the solution, bearing in mind alternative remedies such as that provided for in section 163 of the Companies Act (no 71 of 2008).

Given the state of discord between the shareholders, and the impossibility of resolving the disputes between them, there appeared to be no prospect that the companies could continue as functioning entities. The provisional order for the liquidation of the companies should therefore be confirmed and made final.

PINFOLD v EDGE TO EDGE GLOBAL INVESTMENTS LTD

Corporations



A JUDGMENT BY STEYN J
KWAZULU NATAL HIGH COURT, DURBAN
27 SEPTEMBER 2013

2014 (1) SA 206 (KZD)

Shareholders may obtain an order winding up a solvent company if they show that the directors, or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal or the company's assets are being misapplied or wasted.

THE FACTS

Pinfold and the other applicants were shareholders in Edge to Edge Global Investments Ltd. They invested R60 to R70 million in the company on the strength of representations that were made to them. Their subsequent investigations led them to believe that the directors had either misapplied the moneys belonging to the company or wasted the moneys. The company failed to issue financial statements in respect of the years ending February 2012 and February 2013.

When Pinfold brought an application for the winding up of Edge to Edge, the directors blamed the delay of issuing the financial statements on an employee, although the company had sufficient time to obtain the services of an independent auditor. In considering the management of the assets owned by the company, the directors blamed this on another employee. They did not aver that any attempt was made to track down the company assets and to protect and maintain them.

The directors also claimed that Blue Gold Water and Chemicals (Pty) Ltd was owned by the company, although it did not own 50% in Blue Gold, a company which held the patent in respect of a water- purifying component, the registration of which was still pending.

Pinfold also alleged that two directors of the company failed to disclose to that one had a previous conviction for fraud and that the other had a civil judgment against him.

THE DECISION

Section 81(1)(e) of the Companies Act (no 71 of 2008) provides that a court may order a solvent company to be wound up if a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that (i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; or (ii) the company's assets are being misapplied or wasted.

The directors had not directly responded to the allegations, nor had they proffered reasonable explanations in response to the allegations made against them. They made a misrepresentation to their investors when they claimed that Blue Gold Water and Chemicals (Pty) Ltd was owned by Edge to Edge. Furthermore, there is a vast difference between lodging a registration and owning a patent, and holding out that you are the patent holder in instances where you are not. Such conduct is misleading and potentially prejudicial to investors who rely on such a representation.

Misrepresentations were made and that there was a real likelihood that the investors relied on these misrepresentations when they invested. In the circumstances, it was likely that these misrepresentations could have caused prejudice to those acting upon them. Accordingly, an order winding up the company was properly given.

MACLEOD v KWEYIYA

A JUDGMENT BY TSHIQIJA (MTHIYANE DP, MAJIEDT JA, PLASKET AJA and SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2013

2013 (6) SA 1 (SCA)

Prescription

A person who has no reason to question a settlement made on her behalf which is alleged to have been negligently made retains a claim against the person who made such a settlement as prescription of her claim does not run in terms of section 12(3) of the Prescription Act (no 68 of 1969).

THE FACTS

MacLeod was instructed by Kweyiya's mother to claim damages arising from a motor vehicle accident. In May 1997, she accepted a settlement of R124 000 for the claim.

In 2006, a year after Kweyiya had reached the age of majority, she notified MacLeod that she had been ejected by her mother from a house which had been obtained in the settlement. MacLeod advised her to obtain funding for legal assistance.

In 2009, Kweyiya claimed that the claim should have been settled at an amount of about R2,1 million. She claimed payment of the present value of that amount from MacLeod, alleging that the settlement of the claim in the sum of R124 000 had amounted to negligence on her part.

MacLeod defended the claim on the grounds that by the time Kweyiya had reached the age of majority in 2005, the claim had prescribed. She contended that by that time, Kweyiya knew or could have reasonably known the identity of the debtor and the facts on which her debt against MacLeod arose. In the trial of the matter, MacLeod did not give evidence. Kweyiya contended that in the absence of a rebuttal of her evidence, the defence of prescription could not be sustained.

THE DECISION

In terms of section 11(d) read with section 12(1) of the Prescription Act (no 68 of 1969), civil debts prescribe three years from the date the debt is due. Section 12(3) of the Prescription Act provides that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. In the present case, it was not unreasonable of Kweyiya to trust her mother and MacLeod's judgment. The probability was that she thought that they had acted in her best interests. There was no conceivable reason why that belief would change merely because she had attained majority. The question was not whether she could or could not have obtained the documents from her mother or MacLeod, but rather whether she was negligent or innocent in failing to do so. There was no basis to arrive at the conclusion that she was negligent. There was also no basis to conclude that once she turned 21, without any intervening factor, she ought to have become suspicious or eager to know the details of the claim settled by her mother on her behalf nor to have questioned the settlement. Only some new knowledge or event would displace that belief.

Given this, Kweyiya had shown that she fell within the provisions of section 12(3).

MCKERSIE v SDD DEVELOPMENTS (WESTERN CAPE) (PTY) LTD

A JUDGMENT BY ROGERS AJ
WESTERN CAPE HIGH COURT
6 MARCH 2013

2013 (5) SA 471 (WCC)

Property

Section 33 of the Deeds Registries Act (no 47 of 1937) does not provide a basis upon which a person may compel transfer of property which has been properly acquired by the owner and against which that person has no claim.

THE FACTS

In January 2005 McKersie purchased from a certain Mr Humphrey for R490 000 section 1 in the sectional title scheme known as Harbour Terrace in Sea Point, together with an exclusive use area being an open parking bay. The following month, transfer of the section was passed to McKersie. The parking bay was not simultaneously registered in his name by notarial deed of cession in accordance with section 27(4) of the Sectional Titles Act (no 95 of 1986). The developer was SD Developments (Western Cape) (Pty) Ltd.

McKersie discovered early in 2012 that he was not the registered owner of the parking bay. The conveyancer who attended to the transfer in 2005 was aware of the need to transfer the exclusive use area to the applicant and prepared a draft notarial deed of cession, but this was not executed and registered because the conveyancer ascertained that Humphrey himself was not the registered owner of the parking bay. Humphrey could not be located.

SDD was finally deregistered as a company on 20 April 2007.

McKersie brought an application for an order declaring him to be the owner of exclusive use area in the sectional title scheme known as Harbour Terrace in Sea Point, and directing the Registrar of Deeds to register the property in his name within three months of the order.

THE DECISION

In terms of section 27(1)(c) of the Act, if a developer ceases to be a member of the body corporate as contemplated in section 36(2), any right to an exclusive use area still registered in his or her name vests in the body corporate free from any mortgage bond. The effect of this section was to vest the parking bay in the body corporate when SDD ceased to be a member of the body corporate. It followed that McKersie was seeking to have registered in his name an exclusive use area which was then vested in the body corporate.

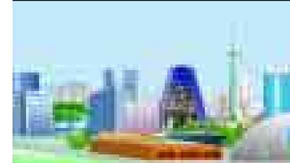
The source of a court's jurisdiction to give the kind of relief sought by McKersie was section 33 of the Deeds Registries Act (no 47 of 1937). Section 33(1) provides that any person who has acquired in any manner, other than by expropriation, the right to the ownership of immovable property registered in the name of any other person and who is unable to procure registration thereof in his name in the usual manner and according to the sequence of the successive transactions in pursuance of which the right to the ownership of such property has devolved upon him, may apply to the court for an order authorising the registration in his name of such property.

The scope of this section was wide enough to include the case of a person with a personal right to claim ownership, even though he is not yet owner: although McKersie could not allege that he was the owner of the parking bay, this did not in itself preclude him from relying on section 33(1).

The difficulty for McKersie however, was that ownership of the parking bay vested in the body corporate. Neither he nor Humphrey contracted with the body corporate. The result was that even if Humphrey could be found, he could not obtain transfer of the parking bay from SDD (assuming it to be still in existence) in order to give transfer to McKersie.

Since section 33 provided no basis for the transfer of the property from the body corporate to McKersie, the order sought could not be granted.

NEDBANK LTD v MENDELOW



A JUDGMENT BY LEWIS JA (MAYA JA, MALAN JA, SHONGWE JA and ZONDI AJA concurring)
SUPREME COURT OF APPEAL
5 SEPTEMBER 2013

2013 (6) SA 130 (SCA)

Property transferred as a result of fraud does not become owned by the transferee on registration of transfer as the transferee had no intention that ownership should pass. Property thus transferred may be re-registered in the name of the transferor.

THE FACTS

In January 2001, certain property owned by Mrs E Valente was sold to U Valente Africa (Pty) Ltd. Mrs Valente's signature on the deed of sale was forged by her son Riccardo. A week later Mrs Valente died. Riccardo also forged the signature of the other beneficiary under the will, his brother Evan in order to obtain transfer of the property. The property was transferred to the company at a time when liquidation proceedings against it had been instituted. In December 2008 the company was placed under provisional winding-up at the instance of Evan. The winding-up order was made final in April 2009.

The joint executors of Mrs Valente's deceased estate applied to the North Gauteng High Court, Pretoria, for an order setting aside the transfer of the property to the company, and the registration of a bond over the property in favour of Nedbank Ltd. The High Court set aside the Master's certificate, and the Registrar was ordered to transfer the property to the estate and to cancel the bond.

Nedbank appealed against the order that its bond be cancelled.

THE DECISION

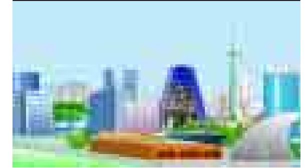
It was clear that when Riccardo forged his mother's signature on the deed of sale of the property and the signature of his brother on the consent to the sale, Evan did not intend to transfer ownership of the property. It was also clear that the power of attorney signed by the Master to permit the registration of transfer was vitiated by the fraud and the forgery. As a result, ownership did not pass to the company. Accordingly the bonds registered over the property were not valid as the company was not the owner of the property mortgaged.

It followed that Nedbank could not resist the claim of the executors for cancellation of the registration of the bond. The executors were entitled to re-registration of the property in the name of the deceased estate.

The appeal was dismissed.

VAN RHYN N.O. v FLEURBAIX FARM (PTY) LTD

Property



A JUDGMENT BY BINNS-WARD J (YEKISO J and SAVAGE AJ concurring)
WESTERN CAPE HIGH COURT
8 AUGUST 2013

2013 (5) SA 521 (WCC)

The owner of a servient tenement is entitled to vary it and to allot for that purpose a different part of its land, provided that no prejudice is occasioned thereby to the dominant tenement holder.

THE FACTS

The Waterfall Trust and Fleurbaix Farm (Pty) Ltd owned adjoining properties, both of which were formed by a subdivision of a single property. Fleurbaix's property had access to a public road by way of a gravel road running across the trust's property.

Early in 2012 the trust advised one of Fleurbaix's directors that it would be closing the gravel road across its property so as to enable certain landscaping to be done. The director was advised that an alternative access road along the northern boundary of the trust's property would be made available. The trust then constructed the alternative access road at a cost of nearly R3m. It became available for use upon the closure of the gravel road.

Fleurbaix claimed that it had been dispossessed of its right of way over the trust's property and claimed an order restoring its right of access over the original route.

THE DECISION

It was important to determine the right upon which Fleurbaix relied in seeking restoration of possession because the alleged dispossession did not amount to a frustration or taking away of existing access. It merely entailed substituting the existing route of the alleged right of way over the trust's property with another, also over the trust's property. Fleurbaix thus enjoyed uninterrupted access across the trust's property. If Fleurbaix depended on rights arising from a simple servitude, a change of route by the trust as servient tenement holder might not derogate from the right of way involved.

Fleurbaix's case could be interpreted as depending on a right of was which was tacitly given by the subdividing owner in favour of the sequestered subdivision over the other land units interposed by the act of subdivision between it and a public road. In such circumstances, a right of way inures in favour of the isolated property over the adjoining subdivisions to afford access to a public road.

It is well established that in the case of a right of access by means of a via simpliciter the owner of the dominant tenement (Fleurbaix's property) has the right to choose the route.It was also implicit in Fleurbaix's case that the gravel road constituted the chosen route. However, the question remained whether the closure of the gravel road by the trust and the provision of an alternative route for the exercise of the right of way amounted to dispossessing Fleurbaix of its purported right of way. The answer to this was in the negative because the owner of the servient tenement (the trust) was at liberty to vary it and to allot for that purpose a different part of its land, provided that no prejudice was occasioned thereby to Fleurbaix as the dominant tenement holder.

The alternative route made available by the trust was adequate and did not prejudice Fleurbaix. The trust was merely exercising its prerogative as servient tenement holders under a servitude of via simpliciter when it closed the gravel road and contemporaneously made an adequate alternative route of access available. It followed that Fleurbaix failed to prove that there was an infringement of the right upon which it apparently relied.

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA v RYTON ESTATES (PTY) LTD

A JUDGMENT BY VAN DER MERWE AJA
(BRAND JA, THERON JA, MAJIEDT JA and MBHA AJA concurring)
SUPREME COURT OF APPEAL
13 SEPTEMBER 2013

2013 (6) SA 319 (SCA)

Credit Transactions

In the absence of agreement to the contrary, mora interest at the prescribed rate is payable on unpaid interest which is due and payable.

THE FACTS

The Land and Agricultural Development Bank of SA advanced loans to Ryton Estates (Pty) Ltd. It did so in terms of the provisions of the Land Bank Act (no 13 of 1944) which regulated the relationship between the parties. In terms of the Act the main object of the Land Bank was the development of agriculture in South Africa by providing financial assistance to commercial farmers, inter alia, from public funds.

In terms of each loan agreement the loan and interest were repayable in equal instalments annually in arrears. The first instalment was payable one year after the registration of the mortgage bond. Each instalment consisted of capital and interest and the date on which each instalment was due and payable was fixed by agreement. In many instances, instalments were not paid on the due date.

Ryton and the other borrowers took the view that the bank was entitled to charge simple interest on capital only and that no interest on interest should have been charged. The bank took the view that apart from simple interest on capital, it was also entitled to levy mora interest on the unpaid interest, calculated on a simple-interest basis only, at the rate then applicable on the balance of the capital outstanding.

THE DECISION

The question was whether the bank was entitled to levy mora interest on unpaid but due and payable interest.

As a matter of law, in the event that any instalment was not paid in full on the due date, mora operated ex re. Mora interest is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora debitoris. There is no legal principle which prevents, in the absence of agreement, a creditor being compensated by an award of mora interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. It must similarly be assumed that the interest would have been productively employed had it been paid on the due date. No consideration of public policy points the other way. Taking into account that interest is the 'life-blood of finance' it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date.

In the absence of agreement to the contrary, mora interest at the prescribed rate is payable on unpaid interest which is due and payable.

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INTERNET SITE
The Web Site address of The Law Publisher CC is: http://www.lawpublisher.co.za

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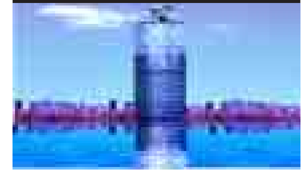
PUBLISHER
Current Commercial Cases is published by **The Law Publisher CC**, CK 92/26137/23.

ISSN 1019-2530

PENINSULA EYE CLINIC (PTY) LTD v NEWLANDS SURGICAL CLINIC (PTY) LTD



A JUDGMENT BY BINNS-WARD J
WESTERN CAPE HIGH COURT
22 OCTOBER 2013

2014 (1) SA 381 (WCC)

Section 82(4) and 83(4) of the Companies Act (no 71 of 2008) may be interpreted to the effect that administrative reinstatement of a company's registration retrospectively re-establishes its corporate personality and title to its property, but does not validate its corporate activity during the period that it was deregistered.

THE FACTS

Peninsula Eye Clinic (Pty) Ltd and the Newlands Surgical Clinic (Pty) Ltd concluded an arbitration agreement and, in performance of the agreement, arbitration proceedings took place between them. The conclusion was an award in favour of Peninsular. The award determined the extent of Peninsular's shareholding in Newlands, and directed Newlands to pay a stated amount to Peninsular for dividends, and arrear interest.

After an appeal, Peninsular applied for an order in terms of section 31(1) of the Arbitration Act (no 42 of 1965) for enforcement of the award. Newlands opposed the application on the grounds that such an order would support a contravention of section 38 of the Companies Act (no 61 of 1973).

Prior to the giving of the arbitration award, Newlands was deregistered as a company because it had not filed annual returns as required by section 173 of the Companies Act. When Peninsular discovered this, it applied for the restoration of Newlands to the register of companies. On 3 April 2012, the Companies and Intellectual Property Commission effected the reinstatement in terms of section 82(4) of the Companies Act (no 71 of 2008).

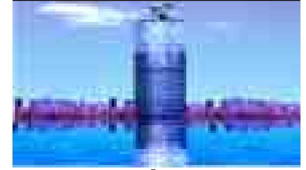
Newlands contended that the reinstatement did not operate with retrospective effect, so that the award was a nullity.

THE DECISION

Section 83(4) of the Act 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. This section provides two more bases, over and above that provided for in section 82(4), for the reinstatement of a deregistered company. Upon any basis, the purpose of reinstatement would appear to be achieved only it were to have retrospective effect.

Construing these provisions to the effect that administrative reinstatement of a company's registration retrospectively re-establishes its corporate personality and title to its property, but does not validate its corporate activity during the period that it was deregistered, is the best interpretation of them. Because they omit the express wording of those provisions of the old Companies Act which concerned the same subject matter, this is a construction that acknowledges the omission, but still allows the inevitable practical needs bound up in the reinstatement exercise to be addressed, while minimising possible prejudicial 'anomalies'. When the subsections are construed contextually in that manner with s 83(4) they are seen to afford a basis for the role of judicial guidance or control.

The interpretation contended for by Newlands, that an interested person who obtains the reinstatement of a company's registration in terms of section 82(4) is thereby disqualified from subsequently obtaining additional relief, if such is required, under the just-and-equitable relief provision in s 83(4), in any event finds no



support in the wording of the provision. Section 83(4) permits any interested person to apply for relief connected with or arising from the dissolution of a company and the court is empowered upon such application to make any order that is just and equitable in the circumstances.

In the present case, there was no doubt that it would be just and equitable to make an order declaring that the conduct of the arbitration purportedly on behalf of the respondent company during the period that it was removed from the register be deemed to have been valid and effective.

Construing the provisions of s 82(3) and s 82(4) to the effect that administrative reinstatement of a company's registration retrospectively re-establishes its corporate personality and title to its property, but does not validate its corporate activity during the period that it was deregistered, seems to me to give the preferred result given the choice of meanings available. It is a construction that acknowledges the probably intended significance of the omission from the currently applicable provisions of the phrase 'the company shall be deemed to have continued in existence as if it had not been deregistered' in the statutory predecessors of the provisions, but still allows the inevitable practical needs bound up in the reinstatement exercise to be addressed, while minimising the incidence of prejudicial 'anomalies' of the sort postulated in the Supreme Court of Appeal's judgment in CA Focus CC supra. When the subsections are construed contextually in that manner with s 83(4) they are seen to afford a basis for the role of judicial guidance or control that the judgment in Kadoma Trading supra (at para 15) regarded as generally desirable, but which the express retrospectivity provisions in s 26(7) of the Close Corporations Act and s 73(6A) of the 1973 Companies Act had excluded.

BOTHMA-BATHO TRANSPORT (EDMS) BPK v S BOTHMA & SEUN TRANSPORT (EDMS) BPK

A JUDGMENT BY WALLIS JA (MTHIYANE AP, LEWIS JA, SHONGWE JA and PILLAY JA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2013

2014 (2) SA 494 (SCA)

Contract

An agreement may be interpreted in the light of those agreements which preceded it. A proviso in an agreement operates to qualify the provision it relates to and does not stand as an independent assertion of rights or obligations.

THE FACTS

Bothma-Batho Transport (Edms) Bpk and S Bothma & Seun Transport (Edms) Bpk were two companies which rented a tank farm from Omnia Kunsmis Bpk entitling them to the use of specified tanks situated on a farm. Because Omnia wished to deal only with Botha-Batho, it invoiced that company for the entire rental and gave it exclusive management and control over the farm. The allocation and recovery of expenses incurred in the operation of the tank farm was left to determination by agreement between the two companies. Two such agreements were concluded.

Clause 7 of the first agreement provided that each company would separately invoice the party to which it let those tanks allocated to them. Bothma & Seun undertook to pay to Bothma-Batho the pro rata expenses plus a ten percent management fee in respect of the management of the storage tanks, such expenses being the tank capacity percentage which Bothma & Seun's clients used from time to time. In performance of this agreement, Bothma & Seun paid a higher proportion of the expenses because the tank capacity allocated to it exceeded that allocated to Bothma-Batho.

Bothma-Batho invoiced Bothma & Seun's client directly. That client deducted from the rental due to Bothma & Seun the amount of that invoice which it paid to Bothma-Batho. Bothma & Seun disputed Bothma-Batho's right to do so. The dispute was settled by agreement. Clause 6 of the agreement provided that for so long as Bothma & Seun held the right to let three tanks, then it could invoice its clients for the rental in respect of those tanks, which amount was then R245 000 and paid by Bothma & Seun's client, FFS. Bothma-Batho could invoice those clients in respect of the operating expenses and management fee but this was not to exceed R190 000, provided that if the invoices rendered for the hire of the tanks fluctuated, the invoice for the operating expenses would be correspondingly adjusted.

Bothma-Batho contended that this clause entitled it to render an invoice to Bothma & Seun's client for R190 000 each month and that Bothma & Seun would be guaranteed an amount of R55 000 per month. If the rentals payable by FFS increased, the invoices Bothma-Batho rendered to FFS would be adjusted by such increase, ie by the gross amount of the increase. Bothma & Seun contended that the clause meant that Bothma-Batho could recover a pro rata proportion, calculated on the relative tank capacity used by each of them, of the operating expenses, increased by a management fee of 10%, subject to a maximum of R190 000. If the rentals that it recovered increased or decreased the maximum would be adjusted by a like percentage increase or decrease.

THE DECISION

Clause 7 of the first agreement showed that the management fee was to be calculated as a proportion of the expenses. That could not be construed as requiring that administration fee be calculated as a percentage of the rentals received by Bothma & Seun. Clause 6 gave no suggestion that the parties wished to amend the basis upon which that fee was to be calculated. The parties' interest was in other issues, particularly those arising from Bothma-Batho's practice of invoicing FFS directly, which had been contrary to the provisions of

clause 7 of the original agreement. It therefore had to be accepted that the administration fee was to be calculated as a percentage uplift of Bothma & Seun's pro rata share of the monthly expenses of operating the tank farm.

Bothma-Batho contended that the proviso in clause 6 provided the basis upon which it was entitled to invoice FFS at a higher rate if a higher rental was payable. However, the proviso was a qualification to its right to invoice FFS and was not a separate and substantive right to invoice it. The proviso would take effect if the invoices for rental raised by Bothma & Seun either increased or decreased. In that event the invoicing in respect of the expenses had to be adjusted in accordance with that fluctuation in rental.

Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach.

ABSA BANK LTD v ZALVEST TWENTY (PTY) LTD

Contract

A JUDGMENT BY ROGERS J
(TRAVERSO DJP concurring)
WESTERN CAPE HIGH COURT
7 NOVEMBER 2013

2014 (2) SA 119 (WCC)

It is not necessary to provide the original documentary record of a contract in proving a case against a party based on that document if that document has been destroyed.

THE FACTS

Absa Bank Ltd brought an action against Zalvest Twenty (Pty) Ltd for repayment of a loan secured by a mortgage bond. It alleged that the terms of agreement were recorded in the bond but that the documentary record had been destroyed in a fire. In consequence, it was unable to annex the mortgage bond to its summons as required by Rule 18(6) of the Rules of Court. It annexed a copy of the standard mortgage bond which was regularly used by it at the time it concluded its agreement with Zalvest. It alleged that the terms and conditions were the same as the ones contained in the agreement concluded with Zalvest.

Zalvest excepted to the claim on the grounds that as it failed to comply with the Rule, the essential basis for its cause of action was missing.

THE DECISION

The exception was based on a contention that because Absa was unable to annex a copy of the written loan agreement it had no cause of action. Rule 18(6) states that a party who in his pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded; and if the contract is written a true copy thereof or of the part relied on in the pleading shall be annexed to the pleading. However, the Rule does not deprive a party of a cause of action merely because it is not followed. A rule which purported to say that a party to a written contract was deprived of a cause of action if the written document was destroyed or lost would be ultra vires. The Rule did not say so. Rule 18(6) was formulated on the assumption that the pleader is able to attach a copy of the written contract. In those circumstances the copy must be annexed. But Rule 18(6) is not intended to compel compliance with the impossible.

As far as the common law was concerned, there is no rule of substantive law to the effect that a party to a written contract is precluded from enforcing it merely because the contract has been destroyed or lost. Even where a contract is required by law to be in writing, what the substantive law requires is that a written contract in accordance with the prescribed formalities should have been executed; the law does not say that the contract ceases to be of effect if it is destroyed or lost.

In regard to the substantive law of evidence, the original signed contract is the best evidence that a valid contract was concluded. The general rule is that the original must be furnished, but there are exceptions to this rule, one of which is where the original has been destroyed or cannot be found despite a diligent search. In such a case the litigant who relies on the contract can adduce secondary evidence of its conclusion and terms.

This was the situation applicable in the present case. The exception was therefore dismissed.

COFACE SOUTH AFRICA INSURANCE CO LTD v EAST LONDON OWN HAVEN

A JUDGMENT BY NAVSA ADP and PILLAY JA
(MAYA JA, MALAN JA and SWAIN AJA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2013

2014 (2) SA 382 (SCA)

A guarantor of a construction contract is obliged to make payment according to the terms of the guarantee irrespective of underlying disputes between employer and contractor.

THE FACTS

East London Own Haven (ELOH) concluded a construction contract with Construct Construction (Pty) Ltd as contractor. The contract provided for the completion of building works at Kenwick Close, East London. Coface South Africa Insurance Co Ltd executed a construction guarantee in terms of which a guaranteed sum would be paid by Coface upon cancellation of the construction agreement if the contractor defaulted.

Clause 5.1 of the construction guarantee provided that Coface undertook to make payment upon receipt of a first written demand from ELOH, calling up the construction guarantee and stating that 'The agreement has been cancelled due to the Contractor's default and that the Construction Guarantee is called up in terms of 5.0.'

ELOH alleged that it had cancelled the construction contract due to the contractor's default and addressed a letter of demand to Coface as required by the terms of the guarantee. Coface blamed ELOH for faulty design and denied that the contractor had defaulted on its obligations, and denied that it was liable to pay in terms of the guarantee.

Coface alleged that the issue of an interim payment certificate together with a recovery certificate indicated a nil balance owing by the contractor, so that it as guarantor was not liable to make any payment to ELOH.

THE DECISION

It was stated in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 All ER 976 (CA) that a performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.

This was followed in a number of South African cases until *Dormell Properties 282 CC v Renasa Insurance Co Ltd N.O.* 2011 (1) SA 70 (SCA) which indicated a divergence from the established position. Such a divergence could not be maintained in the light of the clear principle that disputes regarding the underlying contract are irrelevant to the guarantor's obligation to make payment in terms fo the guarantee. This was lately affirmed in *Casey v FirstRand Bank Ltd* 2014 (2) SA 374 (SCA) and earlier in *FirstRand Bank Ltd v Brera Investments CC* 2013 (5) SA 556 (SCA).

Coface was accordingly not able to rely on Dormell. Since any underlying dispute regarding the construction contract was irrelevant to its obligation to pay, it had no grounds to refuse payment.

CASEY v FIRST NATIONAL BANK LTD

A JUDGMENT BY SWAIN AJA (NAVSA ADP, TSHIQI JA and PETSE JA concurring, WILLIS JA concurring but dissenting in part)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2013

2014 (2) SA 374 (SCA)

Banking

A bank is 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. It also contended that the amount of interest claimed by FirstRand on the capital advanced to Kimberley was in excess of that permitted in terms of the in duplum rule.

THE DECISION

Kimberley argued that the purpose of its application was not to interfere with the obligation on Bank of America to honour FirstRand's draw-down claim, but to obtain a declaration that Kimberley's debt had prescribed and with it FirstRand's entitlement to claim a draw-down on the letter of credit.

However, this argument would equate the legal standing of a letter of credit with a suretyship. As was pointed out in *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) and in aricless 3 and 9(a) of the Uniform Customs and Practice, a letter of credit is wholly independent of the underlying contract between the customer of the bank and the beneficiary. It establishes a contractual obligation on the part of the issuing bank to pay the beneficiary in accordance with its terms. An irrevocable letter of credit is not accessory to the underlying contract as a suretyship is.

The letter of credit was not furnished as surety by Casey. Although the letter of credit was expressly furnished as security for the due performance of Kimberley's obligations, this did not change its legal nature. The letter of credit was furnished as security in addition to a suretyship required by FirstRand. An order declaring that FirstRand had no right to draw-down on the letter of credit would have as a consequence that Bank of America was not obliged to honour this draw-down claim. Such an order would infringe upon the autonomy of the irrevocable letter of credit.

The allegation that the claim had prescribed was also irrelevant because it was not in dispute that the validity of the letter of credit still subsisted at the time it was presented for payment.

Firstrand was not entitled to interest exceeding the duplum. Its claim over and above the duplum failed.

ABSA BANK LTD v HANLEY

A JUDGMENT BY MALAN JA (PETSE JA, WALLIS JA, SALDULKER JA and VAN DER MERWE AJA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2013

2014 (2) SA 448 (SCA)

Although a bank's customer is under a duty to draw his payment instructions with reasonable care in order to prevent forgery or alteration and to warn of known or suspected fraud or forgery, a bank remains liable to a customer who may not have met his obligations if the bank negligently allows the transfer of funds from the customer's account without proper authority.

THE FACTS

Hanley opened a currency investment account with Absa Bank Ltd and deposited $1.75m into it.

A company which required a loan of $3.5m for the purchase of an aircraft arranged the loan from CP Corpcan, a company controlled by a certain Mr La Cote. La Cote required a security deposit of $1.75m and indicated that such a deposit into Hanley's account would be acceptable to CP.

Because the agreement for the purchase of the aircraft attracted a penalty of $100 000 on late payment of a deposit, Hanley attended to the payment of this from his investment account. For this purpose, he came to South Africa and completed a bank transfer form, headed 'Application for overseas payment'. This consisted of a single document printed on both sides with spaces to be filled in on the front page indicating the amount, customer name and address, as well as details of the beneficiary and its bank account. Hanley completed more than one of these forms because La Cote had not been satisfied with the manner of completion of earlier ones. He handed these documents to an associate of La Cote who presented them to Absa. Absa paid the $100 000 to the beneficiary indicated by Hanley in a covering letter.

The amount on the last document he completed was subsequently altered to provide for payment of $1.6m by writing a '1' before the 100 000 and changing the original '1' into '6'. After Hanley had left South Africa, La Cote requested him to provide a second covering letter for Absa in relation to the payment of further funds from the account to his firm's account which was to hold the funds as collateral of the loan.

A person pretending to be Hanley telephoned an official of Absa, a certain Ms Fourie and told her that a second request for a transfer was coming through. He attended the bank again and gave her a copy of the second letter and a two-page transfer form in which the transfer of $1.6m was requested. The documents were in an open Fedex envelope. Fourie was suspicious because the envelope was opened but thought that, because there was a pending business transaction between La Cote and Hanley, it was not unusual for one party to deliver the other's documents. Fourie signed a stamp on the transfer document confirming that Hanley's signature had been verified. She did not notice the alteration on the second page reading '1600 000 USD deposit see page 1'. The alteration was not initialled, nor was there a signature on the first page of the form. Fourie did not pay attention to the alteration and did not think that it stood out. She authorised the transfer. In deciding to authorise the transfer she did not rely on the accompanying letter.

When Hanley discovered that the funds had been transferred from his account to a party unknown to him, he brought an action against Absa claiming that the bank had been negligent in effecting the transfer without his authority. Absa defended the action on the grounds that that it was a term of the agreement between the parties that Hanley would execute all documents that contained written instructions to withdraw funds with due diligence and in a manner that did not facilitate fraud or forgery, and that he had failed to do so.

THE DECISION

The banker-customer relationship involves a duty on the part of the customer to draw his payment instructions with reasonable care in order to prevent forgery or alteration and to warn of known or suspected fraud or forgery. The question is whether Hanley complied with his duty to give his instructions with reasonable care.

Hanley realised that his signature on the second page had to refer to the first page where the amount and particulars of the beneficiary appeared. It must have been obvious to him that his signature on the second page could be used with a different, substituted, first page, as in fact happened. In doing so, despite having been aware of the risks involved and anxious to safeguard his position, he acted in breach of his contractual duty to draw his payment instruction with reasonable care. Page two of the transfer document in which he instructed the bank to transfer $100 000 was indeed used with a fraudulent page one in which payment of $1.6m was sought. It was, however, not foreseeable that the figures and words used to link the two pages would be altered as they were. Nor did the manner in which Hanley wrote them on the second page facilitate the alteration.

Hanley should have, and probably did, realise that in signing the second page of the bank's form the first page could be substituted with a different one reflecting a different amount and a different beneficiary. He could not, however, reasonably have foreseen the possibility that the amount stated on the second page would be altered as well. He did not facilitate the alteration, and wrote the figures and words with care. In these circumstances Fourie's negligence was the real, immediate or proximate cause of the loss.

Such negligence was evident in failing to notice the alteration and to confirm the details of the transfer with Hanley. Her conduct fell short of the conduct demanded of a reasonable banker. Her discomfort concerning the opened envelopes and the delivery of the documents by someone other than the customer added to her concerns. If the circumstances warrant it, a bank, before making payment, must make inquiries.

Absa was therefore not entitled to debit Hanley's account in the absence of his authority.

METTENHEIMER v ZONQUASDRIF VINEYARDS CC

A JUDGMENT BY BRAND JA (THERON JA, PILLAY JA, PETSE JA and MEYER AJA concurring)
SUPREME COURT OF APPEAL
19 NOVEMBER 2013

2014 (2) SA 204 (SCA)

Competition

In order to show that there has been a likelihood of confusion as envisaged in section 34(1)(b) of the Trade Marks Act (no 194 of 1993) it must be shown that the confusion relates to the product in respect of which a trademark has been registered and not a product from which such product is made.

THE FACTS

Mettenheimer was the registered proprietor of the trademark Zonquasdrift in class 33 in respect of alcoholic beverages, except beer. The trademark covered wine but not wine grapes. Mettenheimer and his wife were also the shareholders in a private company which was the owner of a farm called Zonquasdrift. That farm produced wine grapes which were sold to a co-operative which produced wine from its grapes and cited the wine of origin as the Swartland.

Zonquasdrif Vineyards CC conducted a farming business on a farm situated close to the second appellant's farm. It grew wine grapes which it sold under its registered name.

Mettenheimer and the second appellant brought an application against Zonquasdrif seeking that Zonquasdrif be interdicted in terms of section 34(1)(b) of the Trade Marks Act (no 194 of 1993) from infringing its trademark Zonquasdrift by, inter alia, selling wine grapes under that name. He also sought an order declaring that Zonquasdrif's registered name was calculated to cause damage to him and the second appellant, and ordering it to change its name in terms of section 20(2)(b) of the Close Corporations Act (no 69 of 1984).

THE DECISION

Section 34(1)(b) prohibits the unauthorised use of a mark which is identical or similar to the trade mark registered, in the course of trade in relation to goods or services which are so similar to the goods or services in respect of which the trade mark is registered, that in such use there exists the likelihood of deception or confusion. Zonquasdrif clearly used the mark in the course of trade. The question was whether it did so in the likelihood of deception or confusion.

The likelihood of confusion was slight. Zonquasdrif sold wine grapes, not wine. The nature of the two products was entirely different, the one being a fruit, and the other being an alcoholic beverage. Since wine grapes are not suitable for consumption as a fruit, they are not sold to the public and are therefore not to be found in any retail outlets. Wine however, is marketed, advertised and sold directly to the public in supermarkets, liquor stores and other retail outlets. The prospects of Zonquasdrift wine and Zonquasdrif grapes ever being marketed or sold in close proximity could therefore safely be excluded as non-existent.

The only possibility of confusion lay in the possibility of notional purchasers of Zonquasdrift wine believing that it originated from the same farm as Zonquasdrif's grapes. Since Zonquasdrif did not sell its product to the general public, there could be no such confusion. Furthermore, a purchaser of wine made from grapes produced on Zonquasdrif's farm would not be conscious of the fact that there was a farm on which grapes were produced which were used to produce a wine in respect of which a trademark existed.

As far as the change of name was concerned, because the use of Zonquasdrif's name did not result in an infringement of the trademark, it is not calculated to cause damage. There was no warrant for ordering a change of name.

The interdict was refused.

NKATA v FIRSTRAND BANK LTD

A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
20 NOVEMBER 2013

2014 (2) SA 412 (WCC)

Credit Transactions

A debtor which clears the arrears payable by it after summons has been issued for repayment of the debt may rely on section 129(3) of the National Credit Act (no 34 of 2005) to rescind a judgment taken against it after execution proceedings have been brought.

THE FACTS

In 2010, Nkata fell into arrears in repaying loans advanced to her by Firstrand Bank Ltd. The loans were secured by two mortgage bonds. In July of that year, the bank invoked its right to accelerate repayment of the full debt issued summons against her. The following month, she consulted a debt counsellor and made an application for debt review. The following month, the bank took default judgment against her.

The parties concluded a settlement agreement in terms of which Nkata undertook to pay the bank R10 000 per month and sell the property. The settlement agreement was not made an order of court.

On two occasions following the settlement agreement, Nkata paid the full arrear amount owing to the bank. In February 2013, she again fell into arrears. The bank then sold the property in execution. Nkata agree to pay a rental for her continued occupation of the property.

Nkata applied for rescission of the judgment given against her. The court rejected this application but raised the question whether, because Nkata had on two occasions paid the full arrear amount owing to the bank, section 129(3) of the National Credit Act (no 34 of 2005) applied. This provides that a consumer may (a) at any time before the credit provider has cancelled an agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of re-instatement, and (b) after complying with paragraph (a), may resume possession of any property that has been repossessed by the credit provider pursuant to an attachment order.

THE DECISION

The fact that the bank had invoked its right to accelerate repayment of the full debt did not obliterate the distinction between arrear debt and the full debt. The purpose of section 129(3) is to ensure that the consumer may put the agreement back into the position it was prior to his or her falling into default.

It followed that, in order to effect reinstatement in terms of section 129(3), Nkata did not need to pay the full accelerated debt but only the arrear instalments. It was clear that she did so on two separate occasions.

The question then was whether Nkata was precluded from depending on this section because of section 129(4). It provides that the consumer may not reinstate a credit agreement after there has been a sale of any property pursuant to 'an attachment order'. Reinstatement is not permitted after 'the execution of any other court order enforcing that agreement'. An 'attachment order' is not defined in the Act, but it would appear that it relates to the attachment of moveable property. A writ of execution, which is what the bank obtained, is not an attachment order. The default judgment granted against Nkata did not constitute an order for the attachment of property, nor did the default judgment acquire that character when the bank elected to obtain a writ of execution against the mortgaged property. It followed that section 129(4)(a)(i) was not applicable.

The question then was whether, by the time Nkata cleared the arrears, there had been

'execution' of the default judgment which was an order 'enforcing' the mortgage loan agreements. On the facts of the matter, there had been no execution against movable property. In regard to the immovable property, a writ of attachment was issued but no sale in execution had been held by the time Nkata cleared the arrears. Therefore, 'execution' of the default judgment had not occurred by the time Nkata brought the account up to date.

It followed that the mortgage loan agreements were reinstated by not later than when the arrears were cleared for the first time.

Nkata has not in the present case satisfactorily explained the lengthy delay in seeking rescission. The absence of a satisfactory explanation appears sufficiently, I think, from my summary of the facts. Even when she learnt in March 2013 of the sale in execution scheduled for 24 April 2013, she took until 13 May 2013 to launch the present application. By then the property had been sold in execution to Kraaifontein Properties and the latter had on-sold the property to a third party. Clearly there will be prejudice to third parties if the default judgment were to be rescinded.

I thus consider that Nkata's prayer for condonation of her non-compliance with the 20-day limit in rule 31(2)(b) should be refused and that in the exercise of the court's discretion I should decline to entertain the application in terms of rule 42(1) or under the common law.

Peremption

Quite apart from these considerations, FRB and Kraaifontein Properties contend that Nkata lost the right to seek rescission when she settled the first rescission application. I think that contention is correct.

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA v PANAMO PROPERTIES 103 (PTY) LTD

A JUDGMENT BY CLAASSEN J
GAUTENG LOCAL DIVISION, JOHANNESBURG
25 NOVEMBER 2013

2014 (2) SA 545 (GJ)

The Land and Agricultural Development Bank Act (no 15 of 2002) authorises the giving of loans for the purposes of the Act only and does not authorise the giving of loans for township development and engineering service fees.

THE FACTS

The Land and Agricultural Development Bank of South Africa agreed to lend R52 919 845.00 to Panamo Properties 103 (Pty) Ltd. The loan was given to enable Panamo to purchase certain agricultural land and to establish townships and engineering services on the land. The parties took the bank to be acting in terms of the Land and Agricultural Development Bank Act (no 15 of 2002). The Act empowers the bank to the Land Bank to assist previously disadvantaged persons in the acquisition and development of agricultural land, and establishes a preference in favour of the Land Bank over any other secured creditor regarding land hypothecated to the Land Bank.

A mortgage bond was passed over the land as security for the loans.

The bank brought an action against Panamo in which it sought an order that the loan agreement be declared void on the grounds that it was not authorised in terms of the Act. The parties approached the court for a determination of this issue as well as whether if the loan agreement was void, the mortgage bond was unenforceable, and whether the bank should be estopped from relying on the invalidity of the agreement.

THE DECISION

The Act's objects do not include advances for township development and engineering service fees whether or not the land is initially zoned as agriculture or agricultural holding. Such use or purpose is ultra vires the powers of the bank. A further indication of this was that if agricultural land is developed for township establishment, purchasers of the stands may have difficulty in obtaining loans from commercial banks to buy such stands and erect houses thereon. Commercial banks will be loath to grant financial assistance to such purchasers of township property if the bank has precedence over the attachment and sale in execution of such land.

The loan agreement was therefore void ab initio.

As far as the validity of the mortgage bond was concerned, a distinction had to be made between cases where the obligation, the performance of which is secured by the mortgage, is invalid, and those in which the obligation itself is not illegal, although it may have had its origin in, and been connected with, a transaction which was invalid. The present case fell within the latter category. Although the original obligation was invalid, the debt to repay advances made sine causa was not illegal.

Despite the invalidity of the agreement, the registered mortgage bond against the properties was still valid and enforceable

As far as estoppel was concerned, the Act requires that action taken in terms of it be within the policy directives made by the Minister under the Act. Consequently, any prior written approval by the minister for investing money could only relate to the investment of money in agricultural activities. Any purported written approval by the minister to a transaction which reduced the amount of agricultural land available in South Africa for purposes of establishing a township would be clearly ultra vires the Act.

There were therefore no grounds for applying estoppel against the bank.

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA v RYTON ESTATES (PTY) LTD

A JUDGMENT BY VAN DER MERWE AJA
(BRAND JA, THERON JA, MAJIEDT JA and MBHA AJA concurring)
SUPREME COURT OF APPEAL
13 SEPTEMBER 2013

2013 (6) SA 319 (SCA)

In the absence of agreement to the contrary, mora interest at the prescribed rate is payable on unpaid interest which is due and payable.

THE FACTS

The Land and Agricultural Development Bank of SA advanced loans to Ryton Estates (Pty) Ltd. It did so in terms of the provisions of the Land Bank Act (no 13 of 1944) which regulated the relationship between the parties. In terms of the Act the main object of the Land Bank was the development of agriculture in South Africa by providing financial assistance to commercial farmers, inter alia, from public funds.

In terms of each loan agreement the loan and interest were repayable in equal instalments annually in arrears. The first instalment was payable one year after the registration of the mortgage bond. Each instalment consisted of capital and interest and the date on which each instalment was due and payable was fixed by agreement. In many instances, instalments were not paid on the due date.

Ryton and the other borrowers took the view that the bank was entitled to charge simple interest on capital only and that no interest on interest should have been charged. The bank took the view that apart from simple interest on capital, it was also entitled to levy mora interest on the unpaid interest, calculated on a simple-interest basis only, at the rate then applicable on the balance of the capital outstanding.

THE DECISION

The question was whether the bank was entitled to levy mora interest on unpaid but due and payable interest.

As a matter of law, in the event that any instalment was not paid in full on the due date, mora operated ex re. Mora interest is not payable in terms of an agreement, but constitutes compensation for loss or damage resulting from a breach of contract, specifically mora debitoris. There is no legal principle which prevents, in the absence of agreement, a creditor being compensated by an award of mora interest on unpaid interest for the loss or damage suffered as a result of not receiving the agreed interest on time. It must similarly be assumed that the interest would have been productively employed had it been paid on the due date. No consideration of public policy points the other way. Taking into account that interest is the ‘life-blood of finance’ it is in the public interest that creditors be compensated when debtors fail to make payment of agreed interest on the due date.

In the absence of agreement to the contrary, mora interest at the prescribed rate is payable on unpaid interest which is due and payable.

STABILPAVE (PTY) LTD v SOUTH AFRICAN REVENUE SERVICE

A JUDGMENT BY MEYER AJA (BRAND JA, LEWIS JA, BOSIELO JA and THERON JA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2013

2014 (1) SA 350 (SCA)

If a debtor pays its creditor by means of a cheque, unless the parties agree otherwise, the risk of loss of the cheque before it reaches the creditor is born by the debtor.

THE FACTS

The South African Revenue Service issued a tax assessment form to Stabilpave (Pty) Ltd which reflected that an amount of R724 494,29 was owing by SARS to Stabilpave. The form stated:
'The credit amount reflected on your tax account will shortly be paid to you. This payment will be made by a cheque which can be obtained at your nearest post office, or if valid bank details are available, an electronic payment will be initiated using the bank details as per your tax record.
Note: The amount of credit refundable to you represents the amount reflected on your tax account as at date of the cheque or when the electronic transfer is generated . Because of financial transactions that may occur on your tax account during the date of issue of this assessment and the date on which the refund is generated, the amount repaid may differ from the amount shown as due to you.
In this assessment your current bank details as per your tax records are as follows:
Name of bank and branch
Branch
Type of account
Account number
Please note that if this information is not valid during the processing of the credit balance on your account, the repayment of the amount of credit will be made by means of a cheque which will be sent to your local Post Office for collection.'

Since the banking details of Stabilpave were not available to SARS, a cheque was drawn by SARS on Absa Bank Ltd. It was crossed and marked 'not transferable'. SARS handed the cheque in a sealed envelope to Securemail, a division of the South African Post Office. Securemail issued a delivery notification, but Stabilpave did not receive the delivery notice. A third party collected the envelope containing the cheque from the post office. The particulars of the directors of Stabilpave were fraudulently changed in the records kept by the Registrar of Companies to reflect a certain PM Radebe as its sole director. Radebe, acting fraudulently and without the authority of Stabilpave, opened a bank account with First National Bank in the name of Stabilpave (Pty) Ltd. The cheque was deposited, and the account opened by Radebe was credited with the amount of R728 474,74. The cheque was presented for payment and paid. The account of SARS was debited with the amount paid. The proceeds of the cheque were withdrawn by Radebe.

Stabilpave brought an action against SARS for payment of the tax refund. SARS defended the action on the grounds that its obligation to pay the tax refund was legally deemed to be fulfilled even though the amount of the cheque was never credited to Stabilpave. It contended that on a proper construction of the tax assessment form, Stabilpave was given the choice as to the mode of payment — by cheque through the post, or, by providing its banking details, by means of electronic transfer. By not providing its banking details Stabilpave chose to be paid by cheque through the post. Since Stabilpave as creditor requested SARS as debtor to settle the debt by sending a cheque through the post it agreed to run the risk in the transit.

THE DECISION

As stated in *Mannesman Demag (Pty) Ltd v Romatex Ltd* 1988 (4) SA 383 (D) when a debtor tenders

payment by cheque, and the creditor accepts it, the payment remains conditional and is only finalised once the cheque is honoured. Until that happens a real danger exists that the cheque may be misappropriated or mislaid and that someone other than the payee may, by fraudulent means, convert it into cash or credit. That risk is the debtor's since it is the debtor's duty to seek out his creditor. But when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account.

Any agreement about the particular manner of payment is reached only if the creditor stipulates, requests or authorises a particular mode of payment and the debtor accedes to the request. The decisive question in the present case was whether the notice contained in the tax assessment form gave Stabilpave a choice as to a mode of payment, and, if it did, whether the choice was made by Stabilpave, expressly or by necessary implication, that SARS should effect payment by means of sending a cheque through the post.

A plain reading of the notice contained in the tax assessment form led to the inevitable conclusion that it did not give Stabilpave a choice as to a mode of payment to be followed by SARS. The notice concerned the factual position as at the date of the tax assessment form. SARS informed the taxpayer that the credit amount reflected on its tax statement would be paid to Stabilpave shortly in the manner then described. There was no invitation, expressly or by implication, to furnish banking particulars, should Stabilpave wish to be paid by means of electronic transfer.

The clear implication of the notice was an advice from SARS that the tax record of Stabilpave reflected no banking particulars and that payment would therefore be effected by means of a cheque through the post. No choice was afforded to Stabilpave. Accordingly, the risk of loss of the cheque was not assumed by Stabilpave and remained with SARS. It thus did not discharge its indebtedness by posting a cheque for the amount of the refund that was due to Stabilpave.

MINISTER OF MINERAL RESOURCES v SISHEN IRON ORE CO (PTY) LTD

A JUDGMENT BY JAFTA J (MOGOENG CJ, MOSENEKE DCJ, NKABINDE J, SKWEYIYA J, VAN DER WESTHUIZEN J, MADLANGA J and MHLANTLA AJ, concurring
CONSTITUTIONAL COURT
12 DECEMBER 2013

2014 (2) SA 603 (CC)

Property

The effect of the conversion of an old order mining right by a party which holds an undivided share in such a right is not that the holder becomes the sole and exclusive holder of the mining right in respect of iron ore on all of its properties, if other parties holding undivided shares fail to apply for conversion of their old order mining rights.

THE FACTS

Sishen Iron Ore Company (Pty) Ltd, and ArcelorMittal South Africa Ltd were co-holders of an 'old order mining right' in respect of iron ore and quartzite situated on eight properties owned by Sishen. ArcelorMittal held an undivided 21.4% share in the old order mining right. When the Mining and Petroleum Resources Development Act (no 28 of 2002) (MPRDA) came into operation, the two companies became entitled to convert their mining rights in accordance with the Transitional Arrangements set out in a Schedule to the Act.

Within the five-year period allowed for conversion, Sishen converted its old order mining rights relating to all of its properties but ArcelorMittal did not. The Deputy Director General: Mineral Regulation: Department of Mineral Resources then purported to grant to Imperial Crown Trading 289 (Pty) Ltd a prospecting right in respect of iron ore on seven of the eight properties to which ArcelorMittal's old order right applied.

ArcelorMittal contested this grant, and obtained an order that Sishen had become the exclusive holder of a converted mining right for iron ore in respect of the properties and that, in consequence, any decision to accept or to grant any application for a prospecting or mining right in respect of the 21.4 per cent share in respect of iron ore on any of the Sishen Mine properties, lodged after Sishen became the exclusive holder of that converted mining right was void ab initio.

The Minister of Mineral Resources appealed against this order. The appeal court determined that the appeal on the effect of ArcelorMittal's failure to lodge its old order mining right for conversion.

THE DECISION

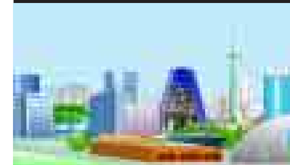
An old order mining right is both the underlying mineral right and the mining authorisation given by the State. It is that composite right that ceased to exist if not converted or when it was converted into a mining right under the MPRDA. It therefore comprised two elements, the common-law mineral right and the mining authorisation. It was a new right created by statute and which could be converted into a mining right. A failure to convert that old order mining right resulted in the right ceasing to exist.

When the MPRDA came into effect on 1 May 2004, Sishen and ArcelorMittal were holders of the common-law mineral rights and mining licences in terms of which mining was carried out. Sishen converted its old order mining right before the period expired. ArcelorMittal did not. This meant that its old order mining right ceased to exist at midnight on 30 April 2009. Sishen therefore did not convert its right together with that of ArcelorMittal. Sishen's old order mining right ceased when it lodged its converted right for registration. This meant that Sishen's old order mining right must have ceased to exist some seven months before ArcelorMittall's old order mining right terminated. Sishen's conversion therefore did not result in it acquiring ArcelorMittal's old order mining right.

It followed that the conversion of Sishen's old order mining right did not include the old order mining right of ArcelorMittal, whose old order mining right ceased to exist in terms of item 7 of sch II of the MPRDA. The old order mining right reverted to the state, as custodian of the right, in terms of the Act.

THERON v MINISTER OF TRANSPORT AND PUBLIC WORKS, WESTERN CAPE

Property



A JUDGMENT BY NDITA J
WESTERN CAPE HIGH COURT
25 NOVEMBER 2013

2014 (2) SA 557 (WCC)

The sale of State land must comply with the statutory provisions regulating such disposal.

THE FACTS

In 1998 an official on behalf of the Minister of Transport and Public Works wrote to Theron stating that it was possible for him to purchase the property where he resided and attached a guide and standard deed of sale to its letter as an indication of the further steps that had to be taken to implement a sale agreement. This was required in terms of regulation 4(4)(a), promulgated in terms of section 10 of the Western Cape Land Administration Act (no 6 of 1998).

In September 2005, the Department again wrote to Theron stating that the property where he resided had been valued at R800 000 and inquired if he was still interested in proceeding with the purchase of the property. If he was not, the property would be sold by public tender.

Theron responded by stating in a letter that he was interested in proceeding with the purchase and he inquired what further steps needed to be taken.

Theron took the view that he and the Department had concluded a binding sale agreement. He brought an action for specific performance to compel transfer of the property to him.

THE DECISION

It was clear that Theron's letter of September 2005 was an offer to purchase the property, and not an acceptance of an offer made by the Department. There was no reason why his letter, indicating that he was willing to purchase the property for an amount of R800 000, should be construed differently from his previous letters written in similar vein.

In any event, there had been no compliance with the procedures provided for in the Western Cape Land Administration Act (no 6 of 1998) for the disposal of State land. Were the purported agreement to be considered enforceable, this would allow an avoidance of the purpose of the Act.

The action was dismissed.

SOLENTA AVIATION (PTY) LTD v AVIATION @ WORK (PTY) LTD

A JUDGMENT BY MEYER AJA
(MTHIYANE AP, PONNAN JA, TSHIQI JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
12 SEPTEMBER 2013

2014 (2) SA 106 (SCA)

Prescription

If the party which as the plaintiff bringing an action as stated in a summons is not the creditor of the defendant, then prescription of the debt is not interrupted in terms of the Prescription Act (no 68 of 1969).

THE FACTS

Solenta Aviation Workshops (Pty) Ltd brought an action against Aviation @ Work (Pty) Ltd. Its claim was based on a lease concluded between Solenta Aviation (Pty) Ltd and Aviation. The lease was annexed to the summons. The claim alleged that in May 2006, Aviation had breached its obligations in terms of the lease.

More than three years after the summons was issued, Solenta amended the particulars of claim so as to cite the plaintiff as Solenta Aviation (Pty) Ltd and not Solenta Aviation Workshops (Pty) Ltd. Aviation raised a special plea of prescription, contending that Solenta Aviation (Pty) Ltd's claim had not been interrupted with the issue of summons, and was accordingly time-barred in terms of the Prescription Act (no 68 of 1969).

THE DECISION

The question was whether the combined summons served on Aviation by which action was instituted in the name of Solenta Aviation Workshops (Pty) Ltd was a claim by Solenta Aviation (Pty) Ltd.

While the lease annexed to the summons did show the name of Solenta Aviation (Pty) Ltd, one should not look only at the contents of the contract in order to conclude that Aviation must have appreciated, or even did appreciate, who the true creditor was. This was not conclusive of the enquiry as to whether payment of the debt was originally claimed by the creditor. The parties to an action were cited in the combined summons and particulars of claim, and the cause of action was set out in the particulars of claim. It was true that the debt which Solenta Aviation sought to claim was the same debt that Solenta Aviation Workshops sought to enforce in the combined summons that was served upon Aviation. This however, did not mean that the combined summons was issued by 'the creditor' in compliance with section 15(1) of the Act. The description of the plaintiff as Solenta Aviation Workshops and of the defendant as Aviation @ Work (Pty) Ltd on the face of the combined summons and in the particulars of claim and the further averments about the written agreement that was concluded between those two entities made it plain that the plaintiff was not the creditor that claimed payment of the debt, notwithstanding the reference to Solenta Aviation's name as the lessor in the annexed contract.

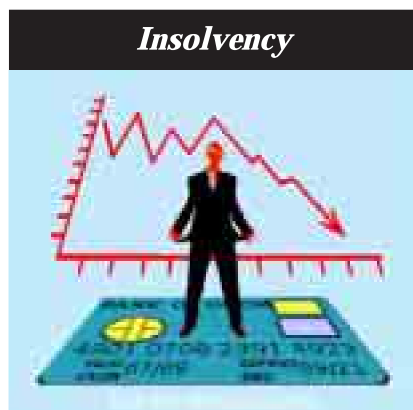
Service of the summons therefore did not interrupt the running of prescription.

VAN ZYL N.O. v THE MASTER, WESTERN CAPE HIGH COURT

A JUDGMENT BY BOZALEK J
WESTERN CAPE HIGH COURT
5 APRIL 2013

2013 (5) SA 71 (WCC)

Insolvency



A claim by a creditor against an insolvent estate cannot be rejected for the sole reason that it is based upon a transaction requiring treasury approval in terms of reg 10(1)(c) but which approval has at the relevant time neither been obtained nor refused.

THE FACTS

AIK Credit plc proved a claim in the insolvent estate of Black River Development (Pty) Ltd. AIK's claim arose from a loan it had made to Queensgate Wealth Manager (Pty) Ltd for which Black River had stood surety. The loan had required the approval of the South African Reserve Bank. The Reserve Bank had approved the loan, but at that stage, the creditor was cited as Four Elements Protected Cell Company, and the debtor as Queensgate Residential (Pty) Ltd.

When it was discovered that the parties had been cited incorrectly, AIK instructed attorneys to apply on its behalf to SARB's Exchange Control Department for approval of the original loan. The attorneys applied for the approval/ ratification of the loan agreement. On 16 August 2011 a meeting was held at the offices of the Reserve Bank's Financial Surveillance Department to discuss this application. At this meeting an official stated that the loan 'may be regarded as having been regularised'. The Reserve Bank later confirmed this upon receiving a minute of the meeting.

The application for the liquidation of Black River Development (Pty) Ltd had been brought on 8 October 2009, and the claim of AIK in the liquidated estate was admitted to proof in the amount of €831 750. This was an amount made up a portion of the original sum loaned to Queensgate Wealth as well as interest and costs.

Van Zyl, the liquidator of Black River, addressed a letter to the Master requesting that she expunge AIK's claim in terms of section 45 of the Insolvency Act (no 24 of 1936) on the grounds that the underlying loan agreement was void for lack of treasury approval in terms of regulation 10(1)*(c)* of the Exchange Control Regulations . The Master refused to do so. Van Zyl applied for an order compelling her to do so.

THE DECISION

It was held in *Oilwell (Pty) Ltd v Protec International Ltd* 2011 (4) SA 394 (SCA) that failure to obtain prior treasury consent for an agreement affected by reg 10(1)*(c)* did not render such agreement void. However, Van Zyl contended that this was subject to the common law rule that upon a determination of insolvency, no creditor in a liquidated estate can take steps to improve its position to the prejudice of other estate creditors.

To hold that a claim by a creditor based on a transaction in respect of which treasury approval has not been obtained is irrevocably unenforceable because a *concursus creditorum* intervened before such approval was sought would produce an arbitrary and inequitable result not intended by the regulations. The argument that until treasury consent is obtained the transaction is not enforceable, and that allowing the claim will impermissibly disturb the *concursus creditorum* is based upon a narrow reading of the Oilwell judgment.

A claim by a creditor against an insolvent estate cannot be rejected for the sole reason that it is based upon a transaction requiring treasury approval in terms of reg 10(1)*(c)* but which approval has at the relevant time neither been obtained nor refused. To hold otherwise would lead to 'greater inconveniences and impropriety', and deliver a windfall advantage to competing creditors in the estate. It ignores the fact that the underlying transaction, the loan agreement, was not void and that treasury approval therefor could still be sought.

The application was dismissed.

BORNMAN v NATIONAL CREDIT REGULATOR

A JUDGMENT BY MALAN JA (LEWIS JA, PONNAN JA, SHONGWE JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2013

2014 (3) SA 384 (SCA)

Credit Transactions

Although a person may act as attorney and debt counsellor for a consumer, the rules applicable to the practice of debt counselling must be adhered to. An attorney may therefore not charge collection commission in respect of amounts collected for a consumer in the course of debt counselling.

THE FACTS

Bornman was an admitted attorney, as well as a registered debt counsellor. As such, he was subject to general conditions of practice provided for by the National Credit Regulator. These required him to comply with all legislation and regulations applicable to the operation of the business of a debt counsellor, to perform debt counselling in a manner consistent with the purpose and requirements of the National Credit Act (no 34 of 2005) and to act professionally, thereby ensuring that he would not bring the regulator or debt counselling into disrepute, not to engage in any activity which would conflict with the interests of consumers to whom debt counselling services were provided, and not to enter into any agreement or engage in any activity which might prevent him from acting in the best interests of the consumers to whom his services were provided, to submit reports and returns prescribed by the regulations or required by the regulator and to only charge fees to or recover fees from consumers as provided for in the Act and Regulations. A debt counsellor was prohibited from receiving fees, commission or any other remuneration where such income might compromise his independence in respect of debt counselling services to consumers.

In terms of paragraph 1.7 of the Debt Counselling Fee Guidelines legal fees, if and when they occur, could be recovered from the consumer provided the amount of such fees was disclosed up-front to the consumer and agreed to in writing by the consumer.

In terms of section 86 of the Act, a debt counsellor is required to determine within 30 business days of receiving the consumer's application whether the consumer appears to be over-indebted. If the consumer seeks a declaration of reckless credit, he must determine whether any of the consumer's credit agreements appear to be reckless and then, as a result of his assessment, make one of three determinations.

Bornman used an 'expedited' form of process. After a consumer applied for debt review, receipt of his application was acknowledged. A Form 17.1 notification would then be transmitted to credit providers within the prescribed time (five days). In some cases a combined Form 17.1 and 17.2 was sent. In most cases Bornman did nothing after transmitting Form 17.1. Some of the Form 17.2 notifications stated that if no written correspondence was received within seven days from the date of the notice, the consumer(s) and the debt counsellor will have assumed the offer to be deemed acceptable to the credit provider.

In terms of the consumer's acknowledgment of obligation 10% of the monthly payments made by them had to be deducted and paid into the Bornman & Associates' trust account as a 'collection fee'.

Following a hearing, the National Consumer Tribunal declared that Bornman had been in repeated breach of the general conditions. These were specified as general conditions A1, 2, D 11 and sections 86(6), (7) and (8) read with regulations 24(6), (7), (8), (9) and (10). It found that his conduct was prohibited by the Act, and imposed a penalty. Bornman appealed.

THE DECISION

Bornman's inaction after transmitting Form 17.1 constituted a contravention of

section 86 and regulation 24. Bornman was not entitled to assume that credit providers to whom the combined Form was sent had accepted the proposal contained in it. He could not impose on credit providers a restructuring plan they had not agreed to. Furthermore, Form 17.1 could not be combined with Form 17.2. The first is transmitted within five days of the consumer's application to all credit providers and every registered credit bureau, the second within five days after a determination of over-indebtedness is made, ie within 30 days of the consumer's application. A Form 17.2 should be transmitted only after completion of the over-indebtedness assessment.

As far as the collection fee was concerned, Bornman's conditions of registration as a debt counsellor required him not to engage in any activity which would conflict with the interests of consumers to whom debt counselling services were provided, and not to enter into any agreement or engage in any activity which might prevent him from acting in the best interests of the consumers to whom these services were provided. One of the conditions requires him to charge or recover fees only as provided for in the Act and regulations, and not to receive fees, commission or any other remuneration where such income may compromise his independence as a debt counsellor. Special condition B1 is quite specific and prohibits a debt counsellor from receiving payments from consumers who have applied for debt review and from receiving payments in respect of debts that were rearranged. The Debt Counselling Fee Guidelines, in addition, make it quite clear when legal fees may be recovered by a debt counsellor.

These provisions made it clear that Bornman was not entitled to receive the collection commission. It followed that it had to be repaid.

The tribunal's determination was confirmed.

Neither the NCA nor the regulations provide for the building-up of a retainer for an eventual court application. Nor were any court applications launched by Bornman & Associates on behalf of the consumers: the appellant blames the shortcomings in the NCA for his attempting 'a more informal conciliatory process by trying to obtain universal acceptance and consent . . .'. Nor does it matter that the retained amounts were called 'collection fees' or 'legal fees': their deduction was not authorised by the NCA or the regulations.

FERRIS v FIRSTRAND BANK LTD

A JUDGMENT BY MOSENEKE ACJ (SKWEYIYA ADCJ, CAMERON J, DAMBUZA AJ, FRONEMAN J, JAFTA J, MADLANGA J, MHLANTLA AJ, NKABINDE J, VAN DER WESTHUIZEN J and ZONDO J concurring)
CONSTITUTIONAL COURT
12 DECEMBER 2013

2014 (3) SA 39 (CC)

Rescission of a judgment given in favour of a creditor will not be granted if the debtor is unable to show either that the judgment was erroneously granted or there is a reasonable explanation for the default.

THE FACTS

Firstrand Bank Ltd lent money to Ferris and his wife. They were unable to maintain the repayments for the loan and applied to a debt counsellor for debt review in terms of s 86(1) of the National Credit Act (no 34 of 2005). The debt counsellor made an offer to FirstRand for repayment of the loan on terms more favourable to Mr and Mrs Ferris than initially agreed, and then brought an application in the Randburg Magistrates' Court to have them declared over-indebted and to rearrange their debt obligations. While this application was pending, FirstRand sent a notice under section 86(10) to Ferris and the debt counsellor purporting to terminate the debt review. The magistrates' court granted a debt-restructuring order, based on terms requested by Ferris. It declared Mr and Mrs Ferris over-indebted, rearranged their debt obligations and specified that the original credit agreement would 'be revived and be fully enforceable' if the restructuring order were breached.

A week later, Mr and Mrs Ferris fell behind on their payments under the debt-restructuring order. After they had fallen even further behind on their payments, having paid only R1000 out of almost R9000 owed, FirstRand issued summons for payment of the full balance of the loan plus interest and for an order declaring their home specially executable.

They filed an intention to defend, but in due course, the bank obtained default judgment against them. They applied for rescission of judgment on the grounds that the notice under section 86(10) had not been properly delivered to them.

THE DECISION

Under rule 42(1)(a), unlike under the common law or rule 31, an applicant for rescission of judgment is not required to show good cause (including a bona fide defence) in order to succeed. Under this rule, a court may rescind a default judgment if it is 'erroneously sought or erroneously granted'.

However, in the present case, there was no error in the default judgment. Mr and Mrs Ferris breached the debt-restructuring order. Once the restructuring order had been breached, the bank was entitled to enforce the loan without further notice. Section 88(3)(b)(ii) of the National Credit Act does not require further notice but merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt-restructuring order.

The wording of the debt-restructuring order itself indicated that the original loan would be enforceable if the debt-restructuring order was breached. It followed that breach of the debt-restructuring order entitled the bank to enforce the loan without further notice. Even if further notice were required, its absence would be a purely dilatory defence, ie a defence that suspends proceedings rather than precludes a cause of action, and not an irregularity that establishes that a judgment has been 'erroneously granted'.

As far as rule 31 was concerned, its requirements and those of the common law had not been met. Under both grounds, Ferris had to show good cause for rescission, ie (a) give a reasonable explanation for their default; (b) show that the rescission application is brought bona fide;

and (c) show that they have a bona fide defence, including a prima facie case on the merits. They had not satisfied (a) or (c).

Mr and Mrs Ferris had not given a reasonable explanation for their default. Rescission of judgment was refused.

Mr and Mrs Ferris brought their rescission application in terms of rule 42(1)(a) or the common law or rule 31. I deal first with the requirements under rule 42(1)(a). Unlike under the common law or rule 31, an applicant is not required to show good cause (including a bona fide defence) in order to succeed under rule 42(1)(a). 13 Instead, under this rule a court may rescind a default judgment if it is 'erroneously sought or erroneously granted'.

But there is no error in the default judgment. Mr and Mrs Ferris breached the debt-restructuring order. Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88(3)(b)(ii) does not require further notice — it merely precludes a credit provider from enforcing a debt under debt review unless, among other things, the debtor defaults on a debt-restructuring order.

JANSE VAN RENSBURG v MAHU EXHAUST CC

A JUDGMENT BY OLIVIER J
NORTHERN CAPE DIVISION, KIMBERLEY
21 FEBRUARY 2014

2014 (3) SA 431 (NCK)

A creditor under and instalment agreement is entitled to depend on section 2(1)(b) of the Security by Means of Movable Property Act (no 57 of 1993) to obtain return of the goods sold even if the agreement makes no provision for the payment of interest by the debtor to the creditor.

THE FACTS

Janse van Rensburg sold gym equipment to Botes and Stander for R492 000. In terms of the agreement, the purchase price would be paid in 41 equal instalments of R12 000, ownership of the equipment would remain with Janse van Rensburg until all amounts due in terms of the contract had been paid, and interest would be payable on instalments not timeously paid.

The equipment was kept at premises which Mahu Exhaust CC, leased to The Body Palace CC. Botes and Stander, and The Body Palace CC, fell into arrears with the payments due to Janse van Rensburg and Mahu. Mahu obtained judgment against The Body Palace CC. The sheriff was about to have the equipment sold in execution when Janse van Rensburg obtained an interim order preventing the sale. When Janse van Rensburg requested return of the equipment, Mahu claimed to have a tacit hypothec over it.

Janse van Rensburg claimed return of the equipment. The claim was based on section 2(1)(b) of the Security by Means of Movable Property Act (no 57 of 1993) which provides that movable property to which an instalment agreement, as defined in section 1 of the National Credit Act (no 34 of 2005), relates shall not be subject to a landlord's tacit hypothec.

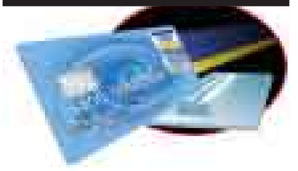
The National Credit Act defines an instalment agreement as a sale of movable property in terms of which (a) all or part of the price is deferred and is to be paid by periodic payments, (b) possession and use of the property is transferred to the consumer, (c) ownership of the property either (i) passes to the consumer only when the agreement is fully complied with, or (ii) passes to the consumer immediately subject to a right of the credit provider to re-possess the property if the consumer fails to satisfy all of the consumer's financial obligations under the agreement, and (d) interest, fees or other charges are payable to the credit provider in respect of the agreement, or the amount that has been deferred.

The parties agreed that (a), (b) and (c) had been complied with. The issue for determination was whether or not (d) had been complied with.

THE DECISION

The provisions of the National Credit Act concerning credit agreements is primarily aimed at agreements in terms of which interest is indeed payable, and not agreements - such as the agreement in the present case - in terms of which interest may become payable, but only in the event of default on the part of the purchaser. This is why an agreement of the latter kind, and which otherwise complies with the definition of an incidental credit agreement, will only be regarded and treated as a credit agreement once interest becomes payable.

The question remaining was whether the agreement would not constitute an instalment agreement for purposes of the Security Act. There is no reason why the interest component of the definition of an instalment agreement as incorporated in the Security Act by reference, should be interpreted to be limited to agreements in terms of which interest is payable from the outset and in return for the granting of credit. Such a narrow interpretation would exclude from the protection of that Act the movable property of Janse



van Rensburg and of any other seller who agrees to deferment of payment/s on the basis that ownership of the property is protected, pending final payment, but who chooses to negotiate for payment of interest only in the event of default. There was no reason why the legislature would have intended to protect only the movable property of sellers who negotiated interest as compensation for the granting of credit, and not the property of sellers who had been content to agree to payment of interest only in the event of default. Such a narrow interpretation of the incorporated definition would be irreconcilable with the context and purpose of the Security Act, and would fail to achieve the manifest purpose of the legislation.

Janse van Rensburg was therefore entitled to depend on the Security Act for return of the equipment. The application succeeded.

In my view it is extremely likely that the legislature, in having to amend s 2(1)(b) of the Security Act because of the repeal of the Credit Agreements Act (and of its definition of transactions in terms of which the ownership of movable property was reserved or protected pending final payment), simply substituted the reference to the definition in the repealed Credit Agreements Act with a reference to the definition of an instalment agreement in the NCA, while overlooking the interest component of the new definition.

This court would, however, not readily assume that the effective inclusion 27 of the interest component of the definition had been an oversight on the part of the legislature, and simply read and applied the A definition as if the requirement in para (d) of the definition did not exist.

KUBYANA v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY MHLANTLA AJ (MOSENEKE ACJ, SKWEYIYA ADCJ, CAMERON J, DAMBUZA AJ, FRONEMAN J, MADLANGA J and VAN DER WESTHUIZEN J concurring)
CONSTITUTIONAL COURT
20 FEBRUARY 2014

2014 (3) SA 56 (CC)

Once a credit provider has produced the track and trace report indicating that a section 129 notice was sent to the correct branch of the post office and has shown that a notification was sent to the consumer by the post office, that credit provider will generally have shown that it has discharged its obligations under the National Credit Act (no 34 of 20050 to effect delivery.

THE FACTS

Standard Bank of South Africa Ltd lent money to Kubyana for the purchase of a vehicle under an instalment sale agreement. He defaulted in repaying the loan. The bank contacted him telephonically on numerous occasions, and during these conversations he made promises to settle his outstanding debt.

On 15 July 2010 the bank sent Kubyana a notice in terms of section 129(1) of the National Credit Act (no 34 of 2005) setting out his statutory rights and requesting him to pay his outstanding debts. The notice was sent by registered mail to the address nominated by Kubyana in the instalment sale agreement. According to the track and trace report from the Post Office, the notice reached the Pretoria North Post Office on 20 July 2010. On the same day the Post Office sent a notification to the address nominated by Kubyana, informing him that an item had been sent by registered mail and was awaiting his collection. He failed to collect the registered item. Seven days later a second notification was sent to him. Again he did not respond and the notice remained at the Pretoria North Post Office. On 1 September 2010 the Post Office returned the unclaimed section 129 notice to the bank.

On 28 September 2010 the bank issued summons against Kubyana for the cancellation of the instalment sale agreement, the return of the motor vehicle and the payment of damages. Kubyana defended the action on the grounds that the High Court had no jurisdiction to hear the matter because the bank had failed to comply with its obligations in terms of section 129 of the Act, as well as the terms of the instalment sale agreement, as his account had not been in arrears when the notice was sent. He averred that he did not receive the notice until he was served with the summons.

At the trial, the bank led the evidence of what it had done to notify Kubyana of his default. Kubyana did not lead any evidence. Judgment was granted against Kubyana. Kubyana appealed against this judgment on the grounds that if there was evidence that a section 129 notice was sent by registered post but was returned to the credit provider unclaimed, this showed that there had not been proper delivery as required by the Act as it indicated that the notice had not come to the attention of the consumer for whom it was intended. In that event, the court hearing the dispute was obliged to adjourn the proceedings as contemplated in section 130(4)(b) of the Act and cannot grant judgment. In the circumstances of this case, the fact that the section 129 notice was returned to the bank uncollected constituted an indication contradicting the inference of proper delivery. Judgment therefore ought not to have been granted in the bank's favour.

Kubyana also contended that he was entitled to information held by the bank since that information was required for the exercise or protection of his rights. He submitted that his constitutional right to receive information was infringed when he did not receive delivery of the section 129 notice, as that notice contained information necessary for the exercise of his rights under the Act.

THE DECISION

Section 129 aims to establish a framework within which the parties to a credit agreement, in

circumstances where the consumer has defaulted on its obligations, can come together and resolve their dispute without expensive, acrimonious and time-consuming recourse to the courts. This form of dispute resolution is possible only if both parties agree to negotiate: the credit provider must avoid hasty recourse to litigation and the consumer must seek to rectify its default in a reasonable and responsible manner. If the credit provider complies with the delivery requirements set out in *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) and receives no response from the consumer within the period designated by the Act, no more can be expected of it.

The Act does not require a credit provider to bring the contents of a section 129 notice to the subjective attention of a consumer. Delivery consists of taking certain steps, prescribed by the Act, to apprise a reasonable consumer of the notice. Thus, a credit provider's obligation may be to make the section 129 notice available to the consumer by having it delivered to a designated address. When the consumer has elected to receive notices by way of the postal service, the credit provider's obligation to deliver generally consists of despatching the notice by registered mail, ensuring that the notice reaches the correct branch of the post office for collection, and ensuring that the post office notifies the consumer (at its designated address) that a registered item is awaiting her collection. This is subject to the narrow qualification that, if these steps would not have drawn a reasonable consumer's attention to the section 129 notice, delivery will not have been effected. The ultimate question is whether delivery as envisaged in the Act has been effected. In each case, this must be determined by evidence.

If a consumer elects not to respond to the notification from the post office, despite the fact that it is able to do so, it does not lie in its mouth to claim that the credit provider has failed to discharge its statutory obligation to effect delivery.

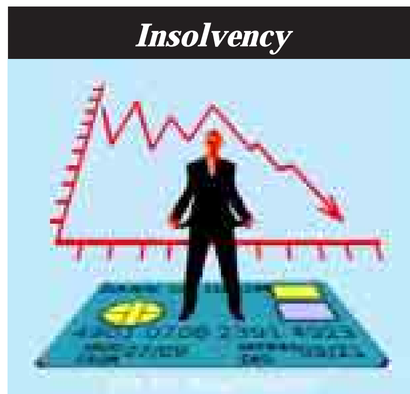
Once a credit provider has produced the track and trace report indicating that the section 129 notice was sent to the correct branch of the post office and has shown that a notification was sent to the consumer by the post office, that credit provider will generally have shown that it has discharged its obligations under the Act to effect delivery. The credit provider is at that stage entitled to aver that it has done what is necessary to ensure that the notice reached the consumer. It is then for the consumer to explain why it is not reasonable to expect the notice to have reached its attention if it wishes to escape the consequences of that notice. The consumer bears this burden of rebutting the inference of delivery, because the information regarding the reasonableness of its conduct generally lies solely within its knowledge. In the absence of such an explanation the credit provider's averment will stand. Even if there is evidence indicating that the section 129 notice did not reach the consumer's attention, that will not amount to an indication disproving delivery if the reason for non-receipt is the consumer's unreasonable behaviour.

GAINSFORD N.O. v TANZER TRANSPORT (PTY) LTD

A JUDGMENT BY THERON JA (NAVSA JA, MHLANTLA JA, LEACH JA and SWAIN AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2014

2014 (3) SA 468 (SCA)

Insolvency



The well-established rule of law prohibits any disposition by a company after the commencement of its winding-up.

THE FACTS

Costa Logistics (Pty) Ltd operated a centre for the distribution of retail goods. It contracted with Tanzer Transport (Pty) Ltd for the provision of transport services. After operating for two years, the company a creditors voluntary winding up resolution was passed. The directors of the company completed a statement of affairs which showed that as at 13 February 2009 the company was hopelessly insolvent and that its liabilities exceeded its assets.

Two main creditors lodged claims against the company, Pick n Pay and State Logistics (Pty) Ltd. Pick n Pay's claim was admitted to proof in the sum of R14 244 630,65, and State Logistics' claim, in respect of supplies and services rendered by it to the company, was R27 534 209,95. During March and April 2009, and after the commencement of the company's winding-up, the company paid an amount totalling R14 236 161,86 to Tanzer.

The liquidators brought an application to declare void the payment made to Tanzer. They did so on the authority of a resolution passed at the second meeting of creditors 'to collect any outstanding debts due to the company' Tanzer defended the application on the grounds that the application should not have been brought by the liquidators in their capacity as such rather than by the company in liquidation, that the resolution was not wide enough to authorise the action and that the liquidators should have proceeded by trial action and not application. On the merits, Tanzer contended that the payments sought to be set aside by the liquidators were made bona fide in the ordinary course of business of the company.

THE DECISION

It was clear that the liquidators had never purported to act in their personal capacities but were always acting in their representative capacities as duly appointed joint liquidators of the company. The claim for the declaratory order and the order for payment had always been pursued by the liquidators on behalf of the company. The result of them litigating in such capacity is that the payment sought would not be for their personal benefit but for the benefit of the creditors of the company. There could therefore be no objection to the liquidators having brought the action in the capacities as liquidators.

As far as the authority of the liquidators was concerned, the contention that the resolution was not framed sufficiently wide to cover the main application as it did not make specific mention of voidable dispositions, could not be sustained. The terminology of the resolution was broad enough to encompass any debt due to the company, including a debt arising by virtue of a voidable disposition. The liquidators were authorised by the second meeting of the creditors to institute legal proceedings and recover debts, and the authority so obtained extended to include declaratory relief in respect of voidable dispositions.

As far as the third point was concerned, since there was no dispute of fact regarding the solvency of the company, there was no reason for the liquidators to have brought proceedings by action rather than by application.

The well-established rule of law prohibited any disposition by the company after the commencement of its winding-up. The liquidators were thus entitled to the relief they sought.

ABSA BANK LTD v MAKUNA FARM CC

A JUDGMENT BY
BORUCHOWITZ J
GAUTENG LOCAL DIVISION, JOHANNESBURG
30 AUGUST 2013

2014 (3) SA 86 (GJ)

It is permissible to grant a final winding-up order against a company in respect of which an application for business rescue has been made. To do so would not be inconsistent with the object and purpose of 131(6) of the Companies Act (no 71 of 2008).

THE FACTS

Makuna Farm CC had been trading under insolvent circumstances since 2008. It was unable to comply with its contractual obligations to Absa Bank Ltd, and its outstanding indebtedness was approximately R14m. On 24 April 2013 the bank obtained an order placing Makuna under provisional winding-up.

The sole member of Makuna then brought an application to place Makuna under supervision and commence business rescue proceedings in terms of section 131(1) of the Companies Act (no 71 of 2008).

Makuna opposed the granting of a final winding up order on the grounds that section 131(6) of the Act applied. The section provides that if liquidation proceedings have already been commenced by or against the company at the time an application for business rescue is made in terms of subsection (1), the application will suspend those liquidation proceedings until (a) the court has adjudicated upon the application, or (b) the business rescue proceedings end, if the court makes the order applied for.

THE DECISION

The pivotal question for determination was whether the words 'liquidation proceedings' as they appear in the section are a reference to the substantive application taken by a creditor to obtain a winding-up order, or to the liquidation proceedings and processes that follow the grant of such order. If the reference in the section is to the application proceedings to obtain a winding-up order, then clearly the suspension envisaged therein would apply to the grant of a final winding-up order.

Winding-up proceedings only commence, albeit with retrospective effect in terms of s 348 of the 1973 Act, once a winding-up order is granted. This is an indication that the words 'liquidation proceedings' in section 131(6) refer to the proceedings that follow the grant of a winding-up order, and not to the application to obtain a winding-up order. The clear purpose of the section 131(6) suspension is to delay implementation of the winding-up order pending the outcome of the business rescue application, but the company remains under winding-up, whether finally or provisionally.

As was held in *Absa Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP), it is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of a business rescue application in terms of section 131(6), but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company can proceed carrying on business.

It was therefore permissible to grant a final winding-up order and to do so would not be inconsistent with the object and purpose of 131(6) of the Act.

ABSA BANK LTD v SUMMER LODGE (PTY) LTD

Insolvency

JUDGMENT BY VAN DER BYL AJ
NORTH GAUTENG HIGH COURT, PRETORIA
22 FEBRUARY 2013

2014 (3) SA 90 (GP)

The bringing of an application for business rescue does not prevent the giving of an order for the liquidation of a company.

THE FACTS

Absa Bank Ltd brought applications for the liquidation of Summer Lodge (Pty) Ltd and two others, alleging that they were hopelessly insolvent.

On the date of the hearing of the applications Summer Lodge and the others opposed the application. They contended that affected persons had launched an application under section 131 of the Companies Act (no 71 of 2008), in which orders were sought that the respondents be placed under supervision and that business rescue proceedings be commenced against them.

Summer Lodge contended that because these applications had been brought, the applications for liquidation were suspended, and that, accordingly, the court was debarred from considering a liquidation application. The contention was based on section 131(6) which provides that if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until (a) the court has adjudicated upon the application, or (b) the business rescue proceedings end, if the court makes the order applied for.

THE DECISION

The issue depended upon the proper interpretation of 'if liquidation proceedings have already been commenced'.

The words could not mean 'if an application for the liquidation of a company has already been filed, but not yet considered'. An application for a liquidation order which has not been adjudicated upon cannot be regarded as having 'commenced'. Liquidation proceedings can only commence after an order to that effect has been granted.

The sub-section means that once liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application suspends the liquidation process. It is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of a business rescue application in terms of s 131(6), but to suspend the order so as to delay the implementation of the order. It can also not have the effect that the company can proceed carrying on business. The company remains in provisional or final liquidation until such time as the business rescue proceedings have been finalised.

Absa was accordingly not debarred from moving for the orders claimed in its applications filed long before the applications for business rescue proceedings were filed. The applications for liquidation were granted.

appellant would contact the attorney acting on behalf of the majority of the investors who had instituted action, to discuss the Anglo-Euro matter.

Niemann could have investigated the merits of the matter at a far earlier stage than he said he did. However his indifference to the various investor's claims, appeared to have been due to the partners having left the litigation in the hands of Basson and their insurers.

Prescription therefore commenced to run against the partners by early 2006 at the very latest. Their claims had therefore prescribed before they instituted their action against Basson more than three years later

The special plea was upheld.

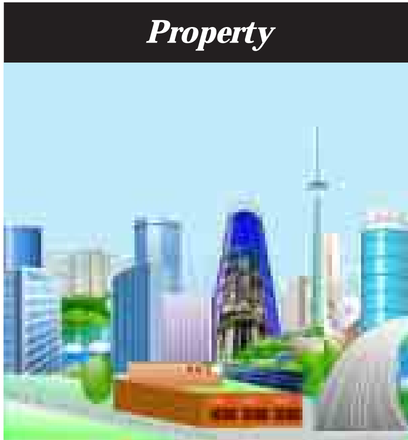
In my opinion what s 131(6) means is that once liquidation proceedings have commenced by the granting of a liquidation order, whether provisional or final, the mere issue and service of a business rescue application would suspend the liquidation process.
It is not the intention of the section to render a liquidation order to be set aside or to be discharged by the issue of a business rescue application in terms of s 131(6), but to rather suspend the order so as to delay the implementation of the order, and it can also not have the effect that the company can proceed carrying on business. The company remains to be finally or provisionally liquidated, as the case may be, until such time as the business rescue proceedings have been finalised.
The applicant in these applications is accordingly not debarred from moving for the orders claimed in its applications filed long before the applications for business rescue proceedings were filed.

NIELSON v RAUTENBACH N.O.

A JUDGMENT BY MABUSE J
NORTH GAUTENG HIGH COURT
15 NOVEMBER 2013

2014 (3) SA 17 (GNP)

Property



A defendant may apply for security for costs on the grounds that the plaintiff's action is reckless and vexatious.

THE FACTS

Rautenbach, in his capacity as a liquidator of Dreamworld 53 (Pty) Ltd, brought an application for the eviction of Nielson from 1819 Augustus Avenue, Dainfern Valley, Johannesburg. Due to certain defects in the application, it was withdrawn and Rautenbach tendered the costs thereof. A second eviction application was then brought against Nielson.

Nielson contended that the application was vexatious as it was affected by various shortcomings, and the payment of the tendered costs in the first application was inordinately delayed. She contended that she was therefore entitled to security for the costs of the application.

Rautenbach contended that Nielson's defence to the eviction application was merely technical and that there were no grounds for an entitlement to security for costs.

THE DECISION

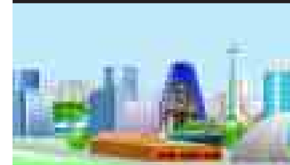
Since the repeal of section 13 of the Companies Act (no 61 of 1973) there is no statutory basis for a defendant to be entitled to security for costs of an action or application brought against it. A defendant may only depend on the common law.

The basic rule of the common law was stated in Ecker v Dean 1938 AD 102 in which it was held that the operative principle is that every application for security must be decided on the merits of the particular case before the court, bearing in mind that the basis of granting an order for security is that the action is reckless and vexatious.

Bearing in mind that the question of security is one of practice, and not of substantive law, courts have an inherent discretion to grant or refuse an order of security, and in coming to such a decision will consider all the relevant circumstances of a particular case. Applying this in the present case, there were no exceptional circumstances on the basis of which one could digress from the common law and make an order based on vexatious proceedings.

The application for security for costs was therefore dismissed.

QUARTERMARK INVESTMENT (PTY) LTD v MKHWANAZI



A JUDGMENT BY THERON JA
(MAYA JA, BOSIELO JA, PILLAY JA and PETSE JA concurring)
SUPREME COURT OF APPEAL
1 NOVEMBER 2013

2014 (3) SA 96 (SCA)

A contract induced by fraudulent misrepresentation may be declared void, and on the basis of a claim for vindication, 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 Quartermark 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 Quartermark 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 Quartermark 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, Quartermark 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, which was effected on 20 November 2008, 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. Quartermark 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.

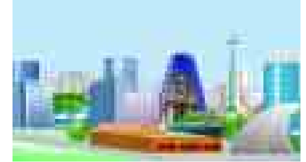
Mkhwanazi negotiated for a loan only and at all material times Quartermark, through Mthebe as its duly authorised representative, held out and fraudulently misrepresented to her that she was only concluding a loan agreement and that the documents she was given to sign hurriedly were so limited, knowing that she would rely on and be induced by these misrepresentations to sign, as it turns out she was. The misrepresentations made by Mr Mthebe were material. It followed that Mkhwanazi was induced by the fraudulent misrepresentations to sign the contract documents and that she was entitled to rescind the contracts.

It was not necessary for Mkhwanazi to tender return of what she had received because the basis of her claim was not restitution but the rei vindicatio. A party that proceeds by way of the rei vindicatio need not tender restitution of what has been received pursuant to a contract sought to be set aside, because the cause of action is complete without such tender.

Mkhwanazi was entitled to vindicatory relief — the reregistration of the property in her name, and a declaration that the agreements she entered into with Quartermark were null and void.

ADIDAS AG v PEPKOR RETAIL LTD

Property



A JUDGMENT BY SOUTHWOOD AJA (BRAND JA, HEHER JA, PETSE JA AND ERASMUS AJA concurring)
SUPREME COURT OF APPEAL
28 FEBRUARY 2013

2013 SACLR 99 (A)

The fact that trademarks are famous, does not justify the conclusion that there is no likelihood of deception or confusion because purchasers of the goods to which the trademarks are applied will see that similar marks are not those of the trademark holder. Purchasers who are used to seeing a party's trademarks will nevertheless experience imperfect perception or imperfect recollection and will be far more likely to conclude that the similar mark is that of the trademark holder or is associated with the trademark.

THE FACTS

Adidas AG held four trademarks which were used on sports shoes and clothing. Each of the trademarks consisted of three parallel stripes of a specific configuration which had become associated with the Adidas products over a period of many years. The second appellant, Adidas International Marketing BV, held the rights in respect of the get-ups of two sports shoes, the 2006 Predator soccer boot and the adi Racer/Tuscany shoes.

Adidas discovered that Ackermans and Pep Stores were selling trainers and soccer boots which prominently featured two and four parallel stripes. Adidas considered this to be an infringement of its four trademarks and a passing off by the store owners, Pepkor Retail Ltd, of its goods as being those of Adidas. It alleged that Pepkor was infringing its rights in terms of section 34(1)*(a)* of the Trade Marks Act (no 194 of 1993) by using the parallel stripes on six different items of sporting footwear. The section provides that the rights in respect of a trademark are infringed by the unauthorised use in the course of trade in relation to goods in respect of which the trademark is registered, of an identical mark or of a mark so nearly resembling the registered trademark as to be likely to deceive or cause confusion.

Adidas sought an interdict to prevent Pepkor from using the stripes on its products.

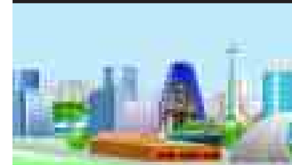
THE DECISION

Pepkor contended that the stripes on its shoes were not used as trademarks, but as embellishments or decoration, and that Adidas's own or licensed trademarks served only to indicate the source of the goods. However, it was unlikely that a consumer would perceive the stripes in this way. Their use as embellishments or decoration involved their use to distinguish the goods, and therefore to identify them. This amounted to trademark use.

Pepkor also contended that Adidas was attempting to expand the scope of its trademark rights by seeking to include four-stripe marks within its ambit. However, Adidas did not rely on an expanded definition of its trademark rights. It was only seeking to protect its rights as registered trademarks by alleging that the Pepkor marks so nearly resembled its registered trademarks as to be likely to deceive or cause confusion.

As far as trademark infringement is concerned, the issue to be decided was whether the two and four stripe marks so nearly resembled any of Adidas's trademarks as to be likely to deceive or cause confusion. This required a comparison to be made between the four registered trademarks and the two and four stripe marks.

The fact that Adidas's three stripe trademarks were famous, did not justify a finding that there was no likelihood of deception or confusion because purchasers of the goods will see immediately that Pepkor's marks were not Adidas's trademarks. The contrary was true. The more distinctive the trademark, or the greater its reputation, the greater the likelihood that there will be deception or confusion where a similar mark is used on competing products. Purchasers who are used to seeing the first appellant's trademarks will still experience imperfect perception or imperfect recollection and will be far more likely to conclude that the similar mark is the first appellant's trademark or is associated with the first



appellant's trademark and consequently that the competing products come from the same source.

Applying these principles to Pepkor's products, in respect of four of them[1], no likelihood of deception or confusion could arise. In respect of two of them however, in which the stripes were grouped together, ran parallel from the fastening of the shoe or boot to the sole, slant towards the heel, the configuration of the four stripes was the same. Both Adidas's trademarks and Pepkor's four stripe marks made the same general impression.

As far as the case based on passing off was concerned, in respect of two of Pepkor's shoes[2], the marks on them clearly identified the products in such a way that a purchaser of the shoes would not be misled. Adidas had therefore not made out a case of passing off in respect of these shoes. In respect of the others, taking into account the distinctiveness of Adidas's footwear, the market and the purchasers of the competing goods, the get-ups were misleading and would be likely to cause a purchaser to think that Pepkor's products were connected with Adidas's goods. Adidas had established a passing off in respect of that footwear.

An interdict was granted.

CIRCUIT BREAKER INDUSTRIES LTD v VAN NIEKERK

A JUDGMENT BY KOLBE AJ
SOUTH GAUTENG HIGH COURT
2 SEPTEMBER 2011

2013 SACLR 73 (A)

Contract

A provision entitling one party to an agreement to vary its terms should not be interpreted so as to allow that party to substitute a different principal debtor from that for whose debts a surety has bound itself as surety.

THE FACTS

In terms of a credit agreement, Circuit Breaker Industries agreed to supply Dual Electric (Pty) Limited with certain goods. The agreement included suretyship undertakings by various parties associated with the company, including Van Niekerk and the other defendants. The agreement provided that those parties understood that:

'1. your terms of credit are as agreed upon from time to time with you and that you have the right to alter such terms without notice;

2. I/We by my/our signature hereto on behalf of the Applicant bind myself/ourselves in my/our private and individual capacity/ies under renunciation of the benefit of excussion and division as surety and co-principal debtor in solidum with the applicant for the payment to you of all amounts which may at any time become owing to you by the applicant from whatever cause arising. This guarantee shall be a continuing guarantee which may only be cancelled by me/us by notice in writing to you and then only provided that all sums then owing by the applicant to you have been paid in full.'

Purchase orders for the purchases were made out by Dualtech Investment Holdings. Dual Electric traded under the name of Dualtech.

Circuit Breaker brought an action against the sureties for payment of R643 596,64 alleged to be due in terms of their suretyship obligations as a result of Circuit Breaker having supplied goods to Dual Electric.

The sureties defended the action inter alia on the grounds that the goods had not been supplied to the principal debtor but to Dualtech Investment Holdings.

THE DECISION

Circuit Breaker had not shown that the goods reflected in its invoices, were sold and delivered to Dual Electric and not Dualtech Investment Holdings. Dual Electric was an entity different from Dualtech Investment Holdings, and was therefore not the principal debtor for which Van Niekerk and the other defendants stood surety.

A secondary question arose as to whether the terms of agreement had been varied so as to include Dualtech Investment Holdings as an alternative principal debtor. Clause 1 expressed a somewhat contradictory term, but it could not be interpreted to mean that Van Niekerk and the other defendants would be liable to Circuit Breaker for a debt incurred by Dual Electric in terms of an entirely different contract, ie one concluded with Dualtech Investment Holdings.

The claim was dismissed.

GLENRAND MIB FINANCIAL SERVICES (PTY) LTD v VAN DEN HEEVER N.O.

Contract

A JUDGMENT BY THERON JA (SWAIN AJA (MTHIYANE DP, MHLANTLA JA AND SALDULKER AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2012

2013 SACLR 13 (A)

The fact that money is transferred via third parties to a party which ultimately receives payment does not mean that that party is not enriched. If the agreement by which the money is first transferred is invalid, then the ultimate receiving party will have been unjustly enriched by the payment.

THE FACTS

In November 2003, the directors of Glenrand MIB Financial Services (Pty) Ltd, a wholly owned subsidiary of Glenrand MIB Ltd resolved to dispose of Financial Service's 65% shareholding in Protector Group Holdings (Pty) Ltd. It did so by selling the shares to 'Newco or its nominee', the director signing this agreement doing so as agent. At this point, the directors of Protector were unsure of the identity of the purchaser, but later nominated Freefall Trading 65 (Pty) Ltd as the purchaser.

Protector then sold its entire business as a going concern to a newly established company, New Protector Group Holdings (Pty) Limited. The Industrial Development Corporation provided loan finance for this acquisition, and paid R69 188 647 to New Protector. This money was then transferred to a firm known as Fehrsen, Harms & Associates. R50m of this was paid into an attorneys' firm trust account, and in June 2004, this amount was transferred from the trust account to Glenrand MIB's bank account. This was paid to settle the purchaser's debts to Financial Services in respect of the sale of the latter's shareholding in Protector. Payment was made to Freefall Trading 65 (Pty) Ltd.

Protector Group Holdings was placed in liquidation. Van den Heever and the other respondents were appointed its joint liquidators. They brought an action against Glenrand MIB Financial Services, Glenrand MIB and the directors of those companies and of Freefall. The action was based on a number of causes, one of which was that in receiving payment of the R50m, Financial Services had been unjustly enriched.

THE DECISION

The money paid to Protector represented payment of the price of its business as a going concern. The money became its property for this reason, and there was no reason for its transfer to Fehrsen, Harms & Associates. The fact that transfer was effected firstly to this party and then to Glenrand MIB Financial Services did not detract from the fact that it was a payment to the latter party without reason. It was therefore clear that that company had been enriched at the expense of Protector.

The question was whether the enrichment was without cause. Financial Services contended that it was not without cause because it was in payment for the shares it had disposed of. This depended on whether or not the sale of the shares from Financial Services to Freefall was valid. If the agreement was valid then the payment made by Freefall was one in discharge of a true liability, it would not be sine causa.

Protector's director had qualified his signature and indicated that he had signed the share-sale agreement as agent for Newco. The director therefore purported to act as agent for Newco, which was in existence at the time. It was clear however, that the director had no authority to act on behalf of Newco so that the principle of the undisclosed principal could not apply. The signature to the agreement was given without authority. The agreement was therefore invalid.

There was no legal ground for the money to have been transferred from Protector to Freefall. Neither was there a legal ground for it to have been transferred from Freefall to Financial Services. In these circumstances the enrichment did not leave Protector's estate in

terms of a valid legal ground, nor did it enter Financial Services' estate in terms of a valid legal ground, as the payment to Financial Services was without cause.

The appeal by Glenrand MIB Financial Services was dismissed.

It seems that the appellants' alternative argument is that Financial Services was not enriched, because the assets it owned before the sale of shares agreement was concluded, namely the shares in Protector and indirectly the business of Protector, were without value by the time of the action and the shares were the equivalent in value of the payment made. In other words, Financial Services was not enriched, because it was not better off financially, after the invalid sale of the shares. This argument is without merit because it seeks to consider whether Financial Services was enriched, in isolation from a consideration of whether Protector was impoverished by the transaction. A plaintiff's claim is the amount by which it has been impoverished, or by which the defendant has been enriched, whichever is the lesser. Every enrichment action must therefore embrace an enquiry not only into the defendant's enrichment, but also into the plaintiff's impoverishment. It is quite clear that Protector was impoverished by the payment of the amount of R50 million and that Financial Services was enriched by this amount. The fact that the assets which Financial Services parted with, in terms of the void agreement for the sale of shares, were valueless at the time of the action is irrelevant. In the circumstances, Protector should be successful in its enrichment claim against Financial Services.

TRANSNET LIMITED v TEBEKA

JUDGMENT BY PLASKET AJA (MTHIYANE DP, SHONGWE JA, SOUTHWOOD AJA AND MBHA AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2012

2013 SACLR 63 (A)

In order to prove that cancellation of an agreement has taken place by placing the debtor in mora, it must be shown that demand was made against the debtor and the debtor failed to satisfy the demand.

THE FACTS

In July 1989, Transnet Ltd sold a house to Tebeka, the purchase price to paid in monthly instalments over a period of 38 years. Tebeka was then living in the house with his family. He was an employee of Transnet. In December 1999, Tebeka was dismissed from his employment. His pension payout was applied in partial satisfaction of the amount still owing to Transnet in terms of the sale agreement.

Transnet stated that in October 2009, its attorneys wrote to Mr Tebeka to inform him that he had not paid his monthly instalments on the house and that as a result, he was in arrears in the sum of R95 635.44. The letter stated that he was required to either settle his indebtedness or make suitable arrangements to do so and to communicate his intentions by 15 November 2009, failing which the agreement of sale would be cancelled. It further stated that in November 2009, the same attorneys sent a letter to Mr Tebeka in which they recorded that they had received no reply to their previous letter and informed him of the cancellation of the agreement of sale. Tebeka denied that he had received either letter.

Transnet applied for the eviction of Tebeka from the house.

THE DECISION

The central issue was whether or not Transnet had effectively cancelled the agreement of sale.

It was accepted that Tebeka had defaulted, at least to some extent, in his obligations. There was however, no forfeiture clause in the sale agreement. Transnet could therefore not forthwith cancel the agreement, merely on the basis of Tebeka's default. Tebeka needed to be placed in mora for cancellation to take place.

The demand alleged to have been made on Tebeka had however, not been established. Since Tebeka denied having received either letter from Transnet's attorney, there was no evidence of demand having been made on him. It followed that Transnet was not in a position to cancel the agreement of sale, and consequently never did so. It had not been established that Tebekas did not have a right in law to occupy the house.

The application failed.

SENWES LIMITED VAN DER MERWE

Contract

JUDGMENT BY SHONGWE JA
(HEHER JA, LEACH JA, THERON JA AND SOUTHWOOD AJA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2012

2013 SACLR 90 (A)

An agreement which entitles one of the parties to cancel or enforce the agreement upon breach by the other does not confine that party to that remedy if other provisions entitle the party to claim damages.

THE FACTS

Van der Merwe purchased from Senwes Ltd, its claim against a corporation in liquidation for R10.5m. This sum was payable in four instalments at specified dates in the future. Clause 5 of the agreement provided that in the event of failure to pay any of the instalments on due date, the full amount would become due and payable. Clause 6 of the agreement provided that notwithstanding the acceleration provision, should Van der Merwe fail to pay the first instalment, Senwes would be entitled to consider the agreement cancelled as if Van der Merwe had never purchased its claim, or hold Van der Merwe bound to the agreement and enforce payment in terms of clause 5. Clause 9 provided that in the event a party failed to remedy any breach, the other party would be entitled to cancel the agreement and enforce its rights.

Van der Merwe failed to pay any of the instalments. Senwes then issued a demand on him to make payment. He failed to meet the demand. Senwes issued summons against him for payment of damages in the sum of R9 172 394.69, being the agreed price for the claim against the corporation less an amount Senwes had received as a dividend in the liquidation of the corporation.

Van der Merwe contended that Senwes was not entitled to claim damages as this was not provided for in clause 6. Senwes contended that in terms of clauses 5 and 9 of the agreement, it was entitled to claim damages.

THE DECISION

Clause 6 should not be interpreted in isolation of the rest of the provisions of the agreement. The other provisions had to be read in the light of the fact that the main interest of Senwes lay in receiving payment of the purchase price. This was provided for in clauses 5 and 9. In terms thereof, Senwes was entitled to claim damages.

The claim succeeded.

Current Commercial Cases

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The Web Site address of The Law Publisher CC is: http://www.lawpublisher.co.za

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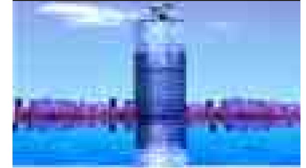
PUBLISHER
Current Commercial Cases is published by **The Law Publisher CC**, CK 92/26137/23.

ISSN 1019-2530



information. A party's belief that information is confidential is of no consequence. The fact that the plaintiff was not, or may not have been, aware of the patent is to my mind insignificant. Boost had failed to show that the concept constituted confidential information. It had also failed to show that any agreement had been concluded between it and SAB which would have obliged SAB to not use the marketing concept already in the public domain.

Further factors weighed in favour of an order for security. These were: (i) SAB had conceded that it would be unable to satisfy an adverse costs order; (ii) the costs in the main action were likely to be substantial; (iii) there was no evidence whether the order for security would put an end to the litigation or not; (iv) Boost had not established that an order compelling it to provide security might very well result in it having to abandon its claim; (v) an order compelling security would not, as a matter of course, put an end to the litigation; (vi) when Boost decided to litigate it must have considered and made provision for the consequence of unsuccessful litigation.

Boost was ordered to provide security for costs of the action.

I am satisfied that, despite the repeal of s 13 of the Companies Act, 1973, an incola plaintiff company can be ordered to provide to a defendant security for any adverse costs order. I can find no compelling reason why incola plaintiff companies should be immune from providing security for costs where the company will not be able to satisfy an adverse costs order, whereas incola plaintiffs who are natural persons may be ordered to furnish such security. A distinction between these two classes of plaintiff will be unreasonable and irrational.

MISSOURI TRADING CC v ABSA BANK LTD

Corporations

A JUDGMENT BY KOEN J
KWAZULU NATAL DIVISION, DURBAN
20 MARCH 2014

2014 (4) SA 55 (KZD)

The reinstatement of a close corporation in terms of section 82(4) of the Companies Act (no 71 of 2008) does not operate retrospectively but an order that actions taken against the close corporation at a time when it was deregistered were validly made may be given if it is just and equitable that such actions be validated.

THE FACTS

On 29 July 2011, Missouri Trading CC was deregistered due to its failure to submit annual returns. Three days later, Absa Bank Ltd brought an application for the provisional winding-up of Missouri. On 31 May 2012 a provisional winding-up order was granted, and on 27 August 2012 a final winding-up order was granted. These orders were granted and given effect to, and the insolvent estate administered, at a time when none of the parties was aware that deregistration had taken place on 29 July 2011.

When Missouri became aware that it had been deregistered, it applied for an order declaring the orders of court for its liquidation to be void ab origine and of no force and effect.

Absa secured Missouri's reregistration and counter-applied for an order that the liquidation orders given were of full force and effect.

THE DECISION

The issue for determination was whether a reinstatement pursuant to section 82(4) of the Companies Act (no 71 of 2008) operated retrospectively to the date of deregistration or not.

When Missouri failed to render returns and was administratively deregistered for that reason, since the factual basis for its deregistration existed, its dissolution was not void. The act of deregistration was lawful and justified. In those circumstances, reinstatement revived the corporation prospectively, but only after it had cured its default.

Missouri therefore terminated upon its deregistration on 29 July 2011. It was revived on its later reinstatement, and revested with all its assets and liabilities. In the ordinary course, all corporate activities and actions taken during that period would lack any legal efficacy. But the order claimed by Absa could granted if this would be just and equitable in the circumstances. The grant of that relief was clearly not only just and equitable in the circumstances, but also necessary. All the interested parties had been cited. The liquidation orders were granted bona fide after a full ventilation of all the issues. In those circumstances the orders of this court dated 31 May 2012 and 27 August 2012 respectively, whereby the first applicant was placed under provisional winding-up and final winding-up, respectively, should be declared of full force and effect and binding on the affairs of Missouri and its estate. The appointment of the liquidators in the insolvent estate pursuant to the said orders should be confirmed and declared valid, and all actions taken by them pursuant to their appointment as liquidators should be declared valid and enforceable.

It followed that the assets of Missouri, which in the ordinary course became bona vacantia when it was deregistered and would have revested in Missouri when it was reinstated on 18 April 2013, revested ex lege in the liquidators on behalf of the insolvent estate.

VISSER SITRUS (PTY) LTD v GOEDE HOOP SITRUS (PTY) LTD

Corporations

A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
19 JUNE 2014

2014 (5) SA 179 (WCC)

A board of directors of a private company may reject the transfer of shares to a particular person in order to prevent a person from acquiring an increased shareholding in the company where the obtaining of the increased shareholding was regarded as being contrary to the best interests of the company.

THE FACTS

In terms of clause 6.1.7.1 of the Memorandum of Incorporation of Goede Hoop Sitrus (Pty) Ltd, no shareholder could transfer the registered or beneficial ownership of any ordinary shares in the company to any other party without first complying with the requirements for transfer as set out in the Act and in the Memorandum and obtaining the approval of the board for such transfer. In terms of clause 6.1.7.3, the board could, at any time, decline to register any transfer of ordinary shares in the securities register of the company without giving any reason therefor and the directors would be deemed to have so declined until they had resolved to register the transfer.

Visser Sitrus (Pty) Ltd held some one million shares in Goede Hoop. It sold the shares to Mouton Citrus. Approval for transfer of the shares was then requested from the board of that company. The company refused its approval. It did not give reasons for its refusal, but stated that it considered the transfer not to be in the best interests of the company.

Visser alleged that the refusal amounted to oppressive and unfairly prejudicial conduct, and sought an order in terms of section 163 of the Companies Act (no 71 of 2008) that the company transfer the shares to Mouton Citrus.

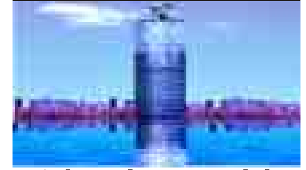
THE DECISION

The essence of clauses 6.1.7.1 and 6.1.7.3 is a common restriction on transfer of shares in the articles of private companies. Company legislation in South Africa has always required a private company's articles of association to restrict the transfer of the company's shares. It has been retained in section 8(2)(b)(ii) of the new Companies Act. There is nothing repugnant about a clause in a memorandum of incorporation stating that the board does not need to give reasons for its decision on a request to register a share transfer.

Section 163(1) entitles a shareholder or a director of a company to apply for relief under the section if (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant, (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant, or (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

Section 76 provides that the duties of the directors in exercising their power as a board must be exercised (a) in good faith and for a proper purpose, (b) in the best interests of the company, and (c) with the degree of care, skill and diligence that may reasonably be expected of a person (i) carrying out the same functions in relation to the company as those carried out by the directors, and (ii) having the general knowledge, skill and experience of that director.

The circumstances of a case would have to be exceptional before one could find that a board decision, taken in accordance with the standard set by section 76, has caused a shareholder



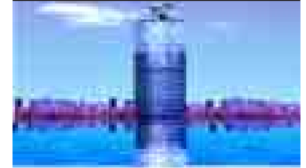
prejudice which can properly be described as unfair within the meaning of s 163. The power to refuse to register a transfer of shares must be exercised in what the directors consider to be the best interests of the company. The clause conferring the power envisages that there may be circumstances in which a company's best interests would be served by not having the proposed transferee as the holder of the shares in question.

The actual purpose for which Goede Hoop's board exercised the power to refuse the proposed transfer fell within one of the intended purposes of the empowering provision, ie to enable the board to prevent a person from acquiring an increased shareholding in the company where the obtaining of the increased shareholding was regarded as being contrary to the best interests of the company. The standard set by section 76 was met.

The application was dismissed.

I do not see anything repugnant about a clause in an MOI stating that the board does not need to give reasons for its decision on a request to register a share transfer. Many powers are typically entrusted by the MOI to the directors. The administration of corporations would become unwieldy if directors were bound on request to provide reasons for their decisions. In relation specifically to share transfers, there might be sound business reasons not to provide reasons. To do so might jeopardise the company's business relations with third parties. The directors might be reluctant publicly to state reservations they have concerning the character of the proposed transferee. The giving of reasons might require the company to disclose matters of strategy.

TUNING FORK (PTY) LTD v GREEFF



A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
28 MAY 2014

2014 (4) SA 521 (WCC)

The effect of an implemented business rescue plan which discharges a company of its debts to a creditor may be to release sureties of their accessory obligations in respect of those debts. This will be so if the business rescue plan can be interpreted as having this effect.

THE FACTS

Tuning Fork (Pty) Ltd was a creditor of a company which was placed in business rescue under chapter 6 of the Companies Act (no 71 of 2008). The business rescue practitioners prepared a business rescue plan, and the plan was considered and adopted by a meeting of the relevant stakeholders.

The business rescue plan provided that should the creditors approve the business rescue plan, the payment under the business rescue plan to them would be in full and final settlement of their claims against the company with the exception of one party.

The business rescue plan was implemented, and on that day Tuning Fork (Pty) Ltd received a concurrent dividend of R176 637,87. The business rescue proceedings formally terminated on 5 December 2013 upon the filing of a notice of substantial implementation.

Tuning Fork brought an action against Greeff who had signed a deed of suretyship in its favour in respect of the debts of the company. Greeff defended the action on the grounds that the adoption and implementation of the business rescue plan resulted in his discharge as surety.

Tuning Fork applied for summary judgment to be given against Greeff.

THE DECISION

The effect of the implementation of the business rescue plan was that the company was released from its former obligations. The question was whether the effect of this was to discharge the surety since the debt had been discharged.

The Companies Act made no specific provision for the consequences to a surety of the implementation of a business rescue plan. This was in direct contrast with section 155(9) which expressly provides that a compromise does not affect the liability of any person who is a surety of the company. It was unlikely that the lawmaker intended there to be a similar safeguarding of rights in the case of business rescue proceedings but chose not to say so. The fact that there was no express provision in this respect meant that the matter had to be decided on the basis of what the common law provides. This was the approach adopted in the case of *Moti and Co v Cassim's Trustee* 1924 AD 720.

In the Companies Act, the lawmaker re-enacted, with some modifications, the offer of compromise provisions and repeated the preservation which formerly existed in respect of rights against sureties. It also introduced the new procedure of business rescue. It did not deal expressly with the position of sureties and there is no basis for implying a term into the Act preserving rights against sureties. The common law must thus be applied once the distressed company has been released from its liabilities pursuant to a duly adopted business rescue plan. The common law is that because the obligation of a surety is accessory, the general legal position is that extinction of the principal obligation extinguishes the obligation of the surety. As in *Moti*, there is no distinction between the position of creditors who voted for the plan and of those who voted against it. A creditor who votes in favour of the adoption of the business rescue plan conveys nothing more than that he is willing to be subjected to the effects which the scheme in law will have,

whatever they may be. Those effects are the same for those who support and those who oppose the plan.

The question whether Greeff had been discharged depended on the terms of the approved plan. Since the question arose at the stage of summary judgment, it had to be clear that the plan was not reasonably capable of an interpretation that the company's indebtedness to Tuning Fork had been discharged. The most natural reading of the business rescue plan was that the company has been absolutely released from its debts to the creditors in question. The result of this would be that creditors lost their right to enforce the debt. It could not be accepted that this did not affect creditors' rights against sureties such as Greeff.

Summary judgment could therefore not be granted.

In my opinion, one has here a similar situation to that which confronted the court in Moti. The lawmaker re-enacted, with some modifications, the offer of compromise provisions and repeated the preservation which formerly existed in respect of rights against sureties. The lawmaker also introduced the new procedure of business rescue. The lawmaker failed expressly to deal with the position of sureties and there is no basis for implying a term into the Act preserving rights against sureties. The common law must thus be applied once the distressed company has been released from its liabilities pursuant to a duly adopted business rescue plan.

BOTHA v RICH N.O.

A JUDGMENT BY NKABINDE J (MOSENEKE ACJ, SKWEYIYA ADCJ, CAMERON J, DAMBUZA AJ, FRONEMAN J, JAFTA J, MADLANGA J, MHLANTLA AJ and ZONDO J concurring)
CONSTITUTIONAL COURT
17 APRIL 2014

2014 (4) SA 124 (CC)

Property

A purchaser of fixed property under an instalment sale agreement is entitled to enforce its right of transfer of the property in terms of section 27(1) of the Alienation of Land Act (no 68 of 1981) and is not confined to cancellation of the agreement should the seller refuse to comply with a demand for transfer.

THE FACTS

Botha bought certain fixed property from the JJW Hendriks Trust for R240 000.00. The purchase price was payable in monthly instalments of R4000.00. Transfer of the property would be effected as soon as possible after payment of the purchase price and all other obligations. In the event of breach of the agreement by Botha, the trustees would be entitled to cancel the agreement, in which event Ms Botha would forfeit in favour of the trust all payments effected in terms of the agreement.

By December 2007, Botha had paid a sum of R180 000.00, but defaulted in her repayments for that month and the previous month. In May 2008, she asserted her right to take transfer of the property in terms of section 27(1) of the Alienation of Land Act (no 68 of 1981). She called for transfer of the property to herself on condition that simultaneously with the registration of transfer there would be registered in favour of the trust a first mortgage bond over the land to secure the balance of the purchase price.

The trust responded by demanding payment of arrear instalments in the sum of R40 000.00, and five months later notified her of its intention to cancel the contract. Botha tendered payment of the balance of the purchase price in the sum of R56 000 together with interest, as well as the outstanding amounts of municipal rates, taxes and service fees against transfer of the property into her name. The trust did not respond to this but, relying on the breach clause in the sale agreement, instituted motion proceedings in the high court in which it sought an order declaring the contract of sale cancelled, alternatively that the court cancel the contract and that Botha be evicted from the property.

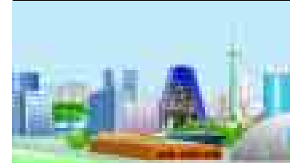
Botha appealed against judgment given in favour of the trust.

THE DECISION

Section 27(1) provides that any purchaser who in terms of a deed of alienation has undertaken to pay the purchase price of land in specified instalments over a period in the future and who has paid to the seller in such instalments not less than 50 per cent of the purchase price, shall, if the land is registrable, be entitled to demand from the seller transfer of the land on condition that simultaneously with the registration of the transfer there shall be registered in favour of the seller a first mortgage bond over the land to secure the balance of the purchase price and interest in terms of the deed of alienation.

Section 27(3) provides for the remedies available to a purchaser in the event of a seller failing to give transfer of the property. The sub-section provides that a purchaser may cancel the sale agreement in these circumstances. The question was whether the effect of this section was to confine the purchaser to this remedy, effectively excluding the remedy of specific performance.

At common law, a contracting party is entitled to specific performance in respect of any contractual right. Section 27(1) creates a contractual right implied by law. The purchaser is therefore entitled to specific performance in respect of that right unless the legislation means to depart from the common-law position. The section did not indicate such a meaning. Although section 27(3) refers to cancellation only, there is no reason to infer that this remedy was exhaustive of all those



available to a purchaser. Botha elected to invoke s 27(1) and persisted with her demand for the transfer of the property. She sought a remedy that would compel the trustees to register the property and sign all documents necessary for transferring that property into her name. It would be incorrect to hold that section 27(1) does not afford her that remedy. Such a conclusion would be inconsistent with the constitutional injunction to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.

The provision does not allow the purchaser to obtain rights in the property unless she first purges her arrears. Botha would therefore be entitled to transfer of the property against payment of all arrears owing and outstanding amounts levied in respect of municipal rates, taxes and service fees, under the instalment sale agreement and registration of a first mortgage bond over the property in favour of the trust to secure the balance of the purchase price and interest thereon in terms of the agreement.

But the argument advanced by the trustees, relying on Dongwe and academic authority, 54 is that the purchaser's only remedy if the seller refuses to honour her demand for transfer is cancellation. This, they said, follows from the fact that the section only mentions cancellation. It does not mention specific performance. But specific performance is what Ms Botha sought in her counter-application. Essentially, she sought an B order compelling the trustees to register the property and sign all documents necessary for transferring the property into her name.

The trustees' argument cannot be sustained. The starting point is that at common law a contracting party is entitled to specific performance in respect of any contractual right. 55 Section 27(1) creates a contractual right implied by law. The purchaser is therefore entitled to specific performance in respect of that right unless the legislation means to depart from the common-law position. The section indicates no meaning of this kind.

COOL IDEAS 1186 CC v HUBBARD

Property

A JUDGMENT BY MAJIEDT AJ MOSENEKE ACJ, SKWEYIYA ADCJ, KHAMPEPE J, MADLANGA J, (JAFTA J and ZONDO J with differing reasons) concurring FRONEMAN J, CAMERON J, DAMBUZA AJ and VAN DER WESTHUIZEN J dissenting)
CONSTITUTIONAL COURT
5 JUNE 2014

2014 (4) SA 474 (CC)

A home builder may not claim payment for work done at a time when it is not registered as a home builder in terms of the Housing Consumer Protection Measures Act (no 95 of 1998).

THE FACTS

Hubbard appointed Cool Ideas 1186 CC to undertake certain building works for her, the construction of a residential dwelling unit, being unit number two of the Chesterfields in Bryanston for the contract sum of R2 695 600.00.

Clause 14 of the building contract provided that any dispute arising between the parties out of and during the currency of the contract or upon termination thereof could be referred to arbitration. The arbitrator was to be appointed at the request of either party by the president for the time being of the Master Builders Association having jurisdiction in the area or by the president of the Building Industries Federation (SA), whose decision would be final and binding on both parties.

Disputes arose between the parties. In terms of clause 14, they were referred to arbitration by Hubbard. Mr C D Cook, an architect and valuer, was appointed the arbitrator. Cook's award ordered Hubbard to pay Cool Ideas R550,211.00, interest and costs.

Cool Ideas applied for the award to be made an order of court. Hubbard opposed the application on the grounds that Cool Ideas was not registered as a home builder in terms of the Housing Consumer Protection Measures Act (no 95 of 1998), the effect of which was that Cool Ideas was not entitled to carry on the business of a home builder, or to receive any consideration in terms of any agreement with a person, defined as a housing consumer in terms of the Act, in respect of the sale or construction of a home.

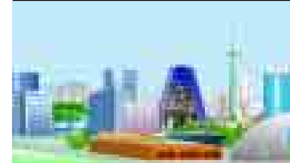
THE DECISION

The purpose of the Act is to protect housing consumers. It envisages registration of a home builder before construction commences. This is stated in plain language.

The effect of section 10(1) of the Act is not to invalidate a building contract concluded by an unregistered home builder but its effect is to disentitle a home builder from receiving any consideration. A home builder which claims consideration in conflict with that provision might expose itself to criminal sanction and will be prevented from enforcing its claim.

The section makes it clear that a home builder may not act in that capacity without the requisite registration. If a court were to find that although a home builder had acted in conflict with the section it would nonetheless be entitled to payment of the consideration, this would be giving legal sanction to the very situation that the legislature wished to prevent. One of the objects of the Act is to protect members of the public who have to do business with home builders. Its prohibitions and penalties are intended to make that protection effective. It accordingly does not matter that an arbitration intervened. Even were Hubbard not to have disputed Cool Ideas' claim, the legislation operated to preclude a court from entering judgment in its favour.

The further question was whether this conclusion amounted to an arbitrary deprivation of property. The issue was whether the penalisation for failure to register: was the deprivation of consideration for services rendered by the home builder proportionate to the purpose of



protecting housing consumers? It was. The section is aimed at achieving a legitimate and important statutory purpose and that there is a rational, proportional connection between the statutory prohibition and its purpose. There was accordingly no arbitrariness in the deprivation and thus no violation of section 25 of the Constitution.

While the underlying agreement remained valid, because of its inconsistency with the Act, the application of it could not be enforced. The arbitral award was contrary to public policy and therefore could not be applied against Hubbard.

The purpose of the Housing Protection Act is to protect housing consumers. This appears from the name and preamble of the statute. 22 Unsurprisingly, this aspect was not in issue before us. The entire legislative scheme is predicated upon a building contract between a registered home builder and a housing consumer being concluded. The statute is not capable of being construed as permitting after-the-fact registration of a home builder when construction has already commenced (or may even have been completed) when it seeks payment from the housing consumer.

ELLERINE BROTHERS (PTY) LTD v MCCARTHY LTD

Property

A JUDGMENT BY VAN ZYL AJA
(NAVSA JA, MHLANTLA JA,
LEACH JA and PETSE JA concurring)
SUPREME COURT OF APPEAL
1 APRIL 2014

2014 (4) SA 22 (SCA)

A lessor may validly cancel a lease after the lessee has been placed in liquidation.

THE FACTS

Ellerine Brothers (Pty) Ltd leased certain business premises to Toits Motor Group (Pty) Ltd. Toits sub-let a portion of the property to McCarthy Ltd. Some three years into the lease, Toits failed to timeously pay the agreed rental. On 16 January 2009, acting in terms of a cancellation clause in the lease, Ellerine notified it in writing that should it fail to remedy its breach of the lease within seven days of receipt of the letter, Ellerine would take steps to cancel the agreement. On 21 January, an application for the liquidation of Toits was lodged by a creditor with the registrar of the high court. The application was enrolled for hearing on 27 January but was postponed to 27 February when a final order was issued for the winding-up of Toits.

In June, Ellerine and the liquidators of Toits ceded to Ellerine Toit's rights to the rental payable by McCarthy under the sub-lease. It was recorded in the deed of cession that the lease was still in existence, that Ellerine was not entitled to cancel the lease from the date of the presentation to court of the application for the liquidation of Toits, and that the liquidator had exercised an election to continue the lease.

Ellerine sued McCarthy for payment of rental due in terms of the sub-lease. McCarthy defended the action on the grounds that the sub-lease was terminated on 27 January when Ellerine advised Toits that it had elected to cancel the lease, and that there were no rights in existence which the liquidator could cede to it.

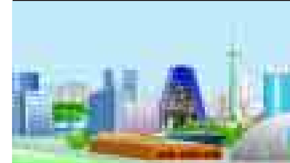
Ellerine contended that by reason of the winding-up of Toits, it could not validly cancel the lease when it purported to do so on 27 January. It depended on section 348 of the Companies Act (no 61 of 1973) which provides that a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up.

THE DECISION

The basis of Ellerine's argument was that a concursus creditorum interposed between the giving of notice on 16 January and the expiry of the seven-day period specified therein, thus preventing the effective cancellation of the lease.

An examination of the cancellation clause in the lease showed that in terms thereof, Ellerine reserved the right to cancel the lease upon the fulfilment of a condition, namely the failure of the lessee to comply with the notice within the required time period. The letter of 16 January was clearly written in compliance with this clause. Its purpose was to enable Ellerine to bring the lease to an end should the rental not be paid within seven days. Following on the insolvency of the lessee the position was governed by the ordinary principles of the common law which apply when a party to an executory contract goes insolvent. As in the case of any other uncompleted contract, the liquidator inherits the lease in its entirety. The creation of the concursus creditorum does not terminate the continuous operation of a lease agreement to which the insolvent is a party.

The consequence of the concursus creditorum is that the other party to the contract cannot demand performance by the liquidator of the insolvent's contractual obligations. The fact that a liquidator in insolvency has a right of election whether or not to abide by a contract means no more than that by reason of the existence of the concursus the other party cannot exact specific



performance against the liquidator if the latter should decide to abandon the contract.

There was therefore no merit in Ellerine's argument that the demand for payment in the letter of 16 January offended against the concursus because it constituted a claim for specific performance, nor that payment of the amount demanded would have meant that one creditor was preferred over another.

Ellerine had the right to cancel the lease, and its cancellation was valid.

Section 37 therefore does not materially change the common-law position and none of its provisions prevent the lessor from exercising a H right to cancel which became enforceable after the concursus. I should mention that in this context it is unhelpful to speak of an 'accrued right to cancel' which survives the establishment of the concursus or of a right to cancel which only matures after the commencement of the winding-up (as has been done in certain cases). The issue is simply whether there was an effective and enforceable right at the critical time — the time of the cancellation. In this case, Ellerine had such a right and its cancellation was valid.

KALIL N.O. v MANGAUNG METROPOLITAN MUNICIPALITY

Property

A JUDGMENT BY LEACH JA (MPATI P, BRAND JA, BOSIELO JA and WALLIS JA concurring)
SUPREME COURT OF APPEAL
4 JUNE 2014

2014 (5) SA 123 (SCA)

Subject to section 19(1)(b) of the Rates Act (no 6 of 2004) municipalities are entitled to prescribe different rates for commercial properties compared to residential properties.

THE FACTS

The Mangaung Metropolitan Municipality passed a resolution approving an increase in property rates on commercial properties within its area of jurisdiction. Commercial property rates were 3.8 times higher than that of residential properties.

Prior to the passing of the resolution, no publication of the intended increase in rates had been made and there was no proper consultation with the community on the proposal. Kalil, a trustee of a trust owning a number of immovable properties within the municipal area, brought an application to prevent the municipality from passing the resolution. The application was based on the conclusion of Southwood AJA in *South African Property Owners Association v Johannesburg Metropolitan Municipality* 2013 (1) SA 420 (SCA) that section 19(1)(*b*) of the Rates Act (no 6 of 2004), as read with the regulations promulgated thereunder, prohibits the imposition of a rate on any category of non-residential property higher than the rate levied on residential property. Kalil relied on this, and the allegation that the rate levied by the Municipality in respect of business properties in the present matter was 3.8 times the rate to be levied in respect of residential properties. He alleged that the municipality was prohibited from determining this rate in the budget and that no more than the same rate it intended to apply to residential properties could legally be imposed on commercial properties.

After the application was dismissed, Kalil appealed. The following year, leave to appeal was granted.

THE DECISION

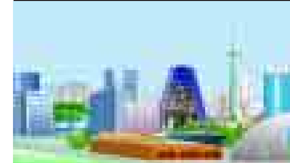
It is true that, as stated in *Glenister v President of the Republic of South Africa & others* 2009 (1) SA 287 (CC), courts are to be conscious of the ‘vital limits on judicial authority and the Constitution’s design to leave certain matters to other branches of government’ and should not interfere ‘in the processes of other branches of government unless to do so is mandated by the Constitution’. However, the exercise of all public power must comply with the Constitution and the doctrine of legality. The question was whether the municipality’s resolution offended the principle of legality.

The rate ratios to be applied between residential and non-residential properties were promulgated in regulations made under the Rates Act. These do not refer to business or commercial property but to other categories of property. They cannot be construed as referring to these categories, and therefore must be understood not to prescribe any ratio in relation to business or commercial property. The determination of this ratio is therefore properly a matter within the powers of a municipality.

The conclusion of Southwood AJA in *SAPOA* that section 19(1)(*b*) of the Rates Act, as read with the regulations, prohibited the imposition of a rate on business or commercial properties higher than that imposed on residential properties, was therefore incorrect. It was not part of the ratio decidendi of that judgment as it was not necessary for the purposes of reaching the decision made in that judgment. As a result, the rate which the municipality imposed in respect of business properties when it passed the resolution had not been shown to have offended the principle of legality.

PEZULA PRIVATE ESTATE (PTY) LTD v METELERKAMP

Property



A JUDGMENT BY THERON JA (BRAND JA, TSHIQIJA, PETSE JA and ZONDI AJA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2013

2014 (5) SA 37 (SCA)

In order for acquisitive prescription to operate in favour of a party, that party must use the property or right of way as if he is the owner thereof and not with the permission of another party.

THE FACTS

In 1980 Metelerkamp and Geo Parkes & Sons (Pty) Ltd entered into a lease agreement in terms of which Mr Metelerkamp rented from Geo Parkes a small portion of property, on which a single garage was situated. At the time, a strip road existed over adjoining property, and this was used by Meterlerkamp as an access route between his property and the garage.

The strip road had been built by a Mr Henderson. Mr Henderson, as lessee, was entitled to build the strip road, use it, and control and permit access thereto. He permitted Metelerkamp and others to use the strip road.

In 2000, Pezula Private Estate (Pty) Ltd became the owner of certain property which it had purchased from Geo Parkes. In 20004, it became the owner of Henderson's property.

Pezula closed the strip road during May 2006 by putting a shade-cloth barrier across the steps, thereby prohibiting entrance onto the strip road as well as by posting a security guard to prevent people from using the strip road.

Metlerkamp contended that he had acquired the right to use the strip road by prescription, he having used the road over a period of thirty years. He sought an order declaring that he had acquired a servitude of right of way over Pezula's property.

THE DECISION

It would be incorrect to hold that Geo Parkes retained control over the strip road: there was no factual basis for finding that Geo Parkes could have been legally entitled to interfere with the use of the strip road by persons, including Mr Metelerkamp, who had permission from Mr Henderson to do so. Unless there was an indication in the lease that Mr Henderson did not have control over the strip road, the latter, as lessee, had control over and the right to use the strip road within reason. Geo Parkes would have had no right to interfere with Mr Henderson's use of the strip road, or anyone else's use of the property if such latter use was with the permission of Henderson, unless the use was in breach of a provision of the lease agreement or was such as to prejudice Geo Parkes' residuary rights as owner.

Geo Parkes therefore had no right to interfere with the use of the strip road by persons, including Mr Metelerkamp. They were permitted to do so by Mr Henderson.

Since Metelerkamp's use of the road was subject to the permission given by Mr Henderson and was not used as if he was the owner, prescription could not run in his favour.

The order sought could not be granted.

CITY OF JOHANNESBURG v CHAIRMAN, VALUATION APPEAL BOARD

A JUDGMENT BY LEACH JA (MTHIYANE DP, MAYA JA, WILLIS JA and MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
12 MARCH 2014

2014 (4) SA 10 (SCA)

Where a property is being used for multiple permitted purposes, it is necessary for the municipal valuer compiling the valuation roll to determine and record those uses and to apportion the market value of the property between them.

THE FACTS

Under the applicable Johannesburg town planning scheme, a property on which stood a ten story building known as 'Park Mews' was zoned as 'Residential A' although the use rights included 'shops and offices on the ground floor'. There were shops on the ground floor of the building and the remaining nine floors consisted of residential apartments.

The property was categorised as 'property used for multiple purposes' under the rates policy in the city's valuation roll that became effective on 1 July 2008. Park Mews was valued at R3 379 000 for rates purposes, but without there being any mention of the two categories of use to which the property was being put, nor an apportionment of value between those categories. Property categorised as 'business, commercial and industrial' attracted a higher rate than that categorised as 'residential'. Consequently, as Park Mews was zoned as 'property used for multiple purposes' and one of its permitted uses was to have shops and offices on the ground floor, a use falling within the rates category of 'business', the city's rates policy rendered the property owner liable to pay rates determined by applying the higher 'business' rate to the overall value of the property. No allowance was then made for the fact that nine of the ten stories of the building were being used for residential and not business purposes.

The owner filed an objection to the valuation roll while it was still lying for inspection. It contended that there ought to have been an apportionment of the market value between the different categories of 'business' and 'residential'. The valuation board held that section 9 of the Local Government: Municipal Property Rates Act (no 6 of 2004) required the valuation roll to reflect the apportionment of the market value of each property between the different purposes for which it was being used.

The city objected to this. It contended that it had elected to levy rates according to the permitted uses of properties as zoned and not on their actual use, and section 9 of the Act relates to the actual uses of property and is of no application to a rating system based not on actual use but on permitted use.

THE DECISION

The compilation of the municipal valuation roll is the responsibility of the municipal valuer designated by the municipality under section 33(1) of the Act who is to determine both the rates category and the market value of each property and to record this information on the roll. This does not mean however, that the apportionment in section 9(2) is a function of the municipal council and falls beyond the function of the municipal valuer. After collecting the necessary data and doing whatever else may be necessary, the municipal valuer must value the property 'in accordance with generally recognised valuation practices, methods and standards' and, after doing so, draw the valuation roll.

The municipal valuer must carry out the valuation of rateable property in accordance with the provisions of the Act. This clearly makes section 9 applicable to the compilation of the valuation roll. The obvious intention is that where a property is used for multiple purposes, those categories of use, in respect of which different rates

are to be applied, should be determined and recorded, as should the values apportioned to each such category.

Where a property is being used for multiple permitted purposes, it is necessary for the municipal valuer compiling the valuation roll to determine and record those uses and to apportion the market value of the property between them. In the present case, this had not been done. The municipal valuer therefore incorrectly dismissed the owner's objection to the valuation roll and the valuation appeal board correctly ordered that it should be amended.

The inevitable conclusion is that where a property is being used for multiple permitted purposes, it is necessary for the municipal valuer compiling the valuation roll to determine and record those uses and to apportion the market value of the property between them. In the present case, this was not done. The municipal valuer therefore incorrectly dismissed the second respondent's objection to the valuation roll and the valuation appeal board correctly ordered that it should be amended.

INVESTEC BANK LTD v RAMURUNZI

A JUDGMENT BY LEWIS JA
(PONNAN JA, BOSIELO JA,
SALDULKER JA and MOCUMIE
AJA concurring)
SUPREME COURT OF APPEAL
19 MAY 2014

2014 (4) SA 394 (SCA)

Credit Transactions

Provided that a summons is valid, the issue thereof interrupts the running of prescription in terms of section 15(1) of the Prescription Act (no 68 of 1969). This occurs whether or not the summons was preceded by a proper notice in terms of section 129 of the National Credit Act (no 34 of 2005).

THE FACTS

Investec Bank Ltd extended loans to Ramurunzi by means of the issue of a credit card and the financing of the purchase of a motor vehicle. In March 2008, it advised him that he was in arrears and the following month it sent to him a notice in terms of section 129 of the National Credit Act (no 34 of 2005) advising him of his default and requiring payment of the balance outstanding for the motor vehicle. The bank then issued summons.

Ramurunzi alleged that he had not received the notice and that he had informed the bank of a change of address. In terms of an agreement concluded between the parties, the bank despatched a second notice in terms of section 129 to Ramurunzi. That was done in April 2012.

Ramurunzi contended that the summons did not have the effect of interrupting the running of prescription because it had not been preceded by a notice in terms of section 129 properly delivered to him. The bank contended that prescription was interrupted by the date of issue of summons whether or not the notice had been delivered to him prior to that date.

THE DECISION

Section 15(1) of the Prescription Act (no 68 of 1969) provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. Ramurunzi contended that the saving provision of section 16 applied in that section 129 imposed conditions on the institution of an action for the recovery of a debt.

However, section 130(4) of the National Credit Act allows for compliance with the notice requirements to be effected after proceedings have commenced. The subsection provides that in any proceedings contemplated in this section, if the court determines that

'(b) the credit provider has not complied with the relevant provisions of this Act, as contemplated in subsection (3) *(a)* the court must (i) adjourn the matter before it, and
(ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed ...'

In *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC) it was noted that section 130 makes it clear that where action is instituted without prior notice, the action is not void. Therefore, whether or not there was some defect in the summons, the effect of its issue would be to interrupt the running of prescription. In the present case, there was nothing to indicate that the summons was invalid. The effect of its issue was to interrupt the running of prescription.

PAULSEN v SLIP KNOT INVESTMENTS 777 (PTY) LTD

A JUDGMENT BY WALLIS JA (MPATI P, SHONGWE JA and MATHOPO AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2014

2014 (4) SA 253 (SCA)

The in duplum rule operates until the creditor commences legal proceedings for payment of the debt. Interest on the capital sum claimed by the creditor will accrue from that date even if the maximum interest permissible under that rule has been reached at that point. Interest on the sum of all amounts so due to the creditor may also run from date of judgment given in its favour.

THE FACTS

Slip Knot Investments 777 (Pty) Ltd lent R12m to Winskor 139 (Pty) Ltd. In terms of clause 6 of the loan agreement, Slip Knot would be entitled to interest on the loan calculated at 25% of the nett profit of a property development undertaken by Winskor. Winskor guaranteed a minimum interest repayment of R17m.

The loan agreement was a large agreement as referred to in section 9(4) of the National Credit Act (no 34 of 2005) and Winskor was a juristic person the asset value or annual turnover of which exceeded the prescribed threshold. Accordingly, in terms of section 4(1)*(b)* of the Act it was one of the credit agreements to which the Act did not apply.

Paulsen and his wife signed deeds of suretyship for the debt.

Winskor failed to repay the loan and was placed in liquidation. On 10 January 2010, Slip Knot brought an action against Paulsen and his wife for payment of R12m plus interest in terms of clause 6. Paulsen defended the action on the grounds that the interest payable violated the in duplum rule in that it exceeded the capital amount owing under the loan. They also defended the action on the grounds that Slip Knot was not a registered credit provider and was required to be one under the National Credit Act (no 34 of 2005). They contended that despite the provisions of section 9(4) and 4(1)(b) the loan agreement was invalid in terms of the provisions of section 89(2)*(d)* of the Act, because Slip Knot was not registered as a credit provider.

In the court of first instance, judgment was given against them on 24 February 2012.

THE DECISION

The effect of the in duplum rule is that where a debt is owed and bears interest, the amount of such interest may not exceed the capital amount. The stipulation for the payment of interest in clause 6 contravened the rule. The effect of this was that until Slip Knot commenced legal proceedings, the interest it could claim was limited in the sum of R12m. After Slip Knot began legal proceedings, interest accumulated afresh on the capital debt from the date of service of the summons. When judgment was given against them on 24 February 2012, the capital and interest accumulated up to that date were consolidated and interest began to run again on the consolidated debt. This would happen until it reached the *duplum*.

The operation of the *in duplum* rule accordingly limited the interest recoverable on the debt at two points in time: until the commencement of litigation and until judgment is pronounced. The effect is that at the stage of judgment the whole judgment debt, that is, capital plus all accumulated interest to date of judgment, will bear interest until it again reaches the *duplum*. It made no difference that Slip Knot had not sued Winskor. Its liability, as at the date of commencement of the litigation was limited to the total amount of R24m by virtue of the operation of the *in duplum* rule, and so was that of the Paulsens. However, once they were sued, interest on what they owed Slip Knot as co-principal debtors began to run again. That did not impose upon them a liability different from that of Winskor, because Winskor would similarly have been liable had it been sued.

As far as the defence based on the applicability of the National Credit Act was concerned, there were no grounds for applying the provisions of section 89(2)*(d)* to excluded agreements, when none of the other provisions in the chapter did so.

Slip Knot was therefore entitled to interest to the maximum of R12m until 10 January 2010, further interest on the capital sum from that date until date of judgment, and interest on all of those amounts from 25 February 2012 to date of payment.

VAN HEERDEN v NOLTE

A JUDGMENT BY MURPHY J
GAUTENG DIVISION, PRETORIA
28 JANUARY 2014

2014 (4) SA 584 (GP)

A claim for repayment of a loan by a person who is not a registered credit provider must allege that he falls within the exception provided for in section 40(1) of the National Credit Act (no 34 of 2005).

THE FACTS

Nolte sold certain fixed property to Van Heerden for R700 000. Van Heerden paid the purchase price.

Because Nolte could not transfer the property to Van Heerden without settling a loan due to a financial institution, Van Heerden agreed to lend Nolte money for this purpose. Nolte agreed to pay Van Heerden interest on the purchase price of R700 000 calculated at the prime rate from 25 April 2008 capitalised monthly. Van Heerden also agreed to advance Nolte R467 734,97 to pay the financial institution for the purpose of cancelling a bond over the property in order to allow the transfer of the property to the plaintiff. Nolte agreed to pay interest on this loan at a rate of 10% per annum from 10 November 2010 capitalised monthly. Van Heerden agreed to a third loan of R85 964,91 to pay VAT on the transfer transaction, at a rate of 10% interest capitalised monthly.

After certain payments had been made, as at 30 April 2012, under the first loan, Nolted owed Van Heerden R249 347,78 under the second loan, R269 826,34, and under the third loan, R101 856,96.

Van Heerden claimed payment of these amounts. Nolte excepted to the claim on the grounds that the loans were subject to the National Credit Act (no 34 of 2005) and Van Heerden had not alleged he was a registered credit provider. Van Heerden contended that as he did not frequently provide credit, he was not obliged to register as a credit provider.

THE DECISION

In terms of section 40(1) of the National Credit Act, a person must apply to be registered as a credit provider if (a) that person, alone or in conjunction with any associated person, is the credit provider under at least 100 credit agreements, other than incidental credit agreements, or (b) the total principal debt owed to that credit provider under all outstanding credit agreements, other than incidental credit agreements, exceeds the threshold prescribed in terms of section 42(1). The threshold was R500 000.00.

The purpose of section 40(1) is to require credit providers, who make more than 100 loans or who lend more than R500 000, to register. In terms of section 40(1)(b), the total amount of the principal debt is relevant. The reference to ‘all outstanding agreements’ does not show an intention to exclude a single agreement in excess of R500 000. An amount owing under a single agreement may be seen as the principal debt owed under ‘all outstanding agreements’. If there is only one transaction then it will constitute ‘all’ of the outstanding agreements. Section 40(1)(a) regulates the position from the perspective of the number of agreements, while section 40(1)(b) is intended to govern the position with regard to the total capital advanced by any provider. If the total principal debt exceeds R500 000, the Act requires the credit provider to register.

It followed that Van Heerden was obliged to register as a credit provider in terms of the Act before extending credit and making a loan with an aggregate principal debt in excess of R500 000. Van Heerden’s claim was therefore excipiable on the grounds that it did not allege compliance with section 129 of the National Credit Act.

PLAASKEM (PTY) LTD v NIPPON AFRICA CHEMICALS (PTY) LTD

A JUDGMENT BY HANCKE AJA (MTHIYANE DP, MHLANTLA JA, SHONGWE JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
29 MAY 2014

2014 (5) SA 287 (SCA)

Contract

An agreement which makes no provision for termination may be terminated on notice if it is possible to import a tacit term into the agreement that such termination was envisaged by the parties.

THE FACTS

In 2005, Plaaskem (Pty) Ltd concluded an agreement with Nippon Africa Chemicals (Pty) Ltd which entitled Plaaskem to distribute locally imported agricultural chemical products. Plaaskem's obligation was to distribute the products and then pay Nippon an amount equal to 15%, calculated on the gross profit earned in respect of the products sold.

The agreement provided that Nippon would work with Plaaskem to improve and develop products, and that Plaaskem would be involved in the marketing of products, such products to include those marketed by Japanese trading houses under which products were marketed.

Ón 18 May 2010 Plaaskem notified Nippon by letter that it was terminating the contract with effect from 30 June 2010. Nippon contended that Plaaskem did not have the right to terminate the agreement. It brought an action against Plaaskem for performance in terms of the agreement.

The court determined the dispute by determining whether or not the agreement had a tacit, alternatively implied term that it was terminable (by either party thereto) on reasonable notice to that effect, alternatively the agreement, properly construed, was terminable (by either party) on reasonable notice to that effect.

THE DECISION

It was clear from the agreement that there was no express term dealing with its duration. Having regard to the wording of the contract it was also clear that there was no indication that the parties intended to be bound in perpetuity. The question then was what the intention of the parties was, having regard to the nature of the relationship between the parties, as well as the surrounding circumstances.

It was clear that the agreement required the parties to form and maintain a close working relationship with regular contact and interaction between them. It also covered a wide spectrum of products in respect of both existing and new products. It was reasonable to assume that the nature of the relationship might change over time. This commercial reality strongly suggested an intention by the parties not to be bound in perpetuity. It was unlikely, given the unpredictable and variable nature of the factors affecting the performance of the agreement that the parties would have intended being bound in perpetuity.

Taking the surrounding circumstances into account and in view of the fact that the agreement was silent as to its duration, it was necessary that a tacit term be imported. Apart from this, there was no doubt that it was necessary and commercially efficacious that the tacit term should be to the effect that the agreement would be terminable on reasonable notice. It was difficult to imagine circumstances indicating that the parties intended to be bound in perpetuity.

ROSHCON (PTY) LTD v ANCHOR AUTO BODY BUILDERS CC

Contract

A JUDGMENT BY SHONGWE JA (MAYA JA, WALLIS JA, PETSE JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
31 MARCH 2014

2014 (4) SA 319 (SCA)

To show that an agreement is a simulation, it is necessary to show that the agreement does not properly reflect the true intention of the parties. Estoppel will operated against the owner of property only if the owner makes a representation that another party had the power to dispose of ownership of the property.

THE FACTS

Roshcon ordered the five trucks from Toit's Commercial (Pty) Ltd. Toit's obtained the trucks for Roschon from the supplier, Nissan Diesel (SA) (Pty) Ltd. The transaction was financed by Firstrand Bank Ltd, trading as Wesbank. Nissan Diesel supplied the vehicles under a 'supplier agreement' it had concluded with Wesbank in terms of which it sold and Wesbank purchased and paid for the vehicles that authorised Nissan dealers, such as Toit's, wanted for their customers. Toit's had a separate 'floor plan agreement' with Wesbank in terms of which Wesbank provided finance to Toit's for the acquisition of motor vehicles. The vehicles purchased by Wesbank from Nissan Diesel were delivered directly to Toit's or to such person as Toit's may from time to time direct.

Clause 6.1 of the 'supplier agreement' provided that the express purpose of the agreement was to ensure that ownership in the vehicles would pass to and remain vested in Wesbank until such time as payment has been received therefor from the relevant authorised dealer. Clause 8.1 of the 'floor plan agreement' provided that the sale of the goods was made on the suspensive condition that, until payment of the selling price was made by the dealer in full in terms of the relevant invoice with interest and any other amounts due, the ownership in the goods would not pass to the dealer but remain with Wesbank.

The five trucks were delivered to Anchor Auto Body Builers CC on Toit's' instructions to have modifications undertaken to the subframes and load bodies to enable cranes to be fitted to the trucks. Roshcon paid for the work done by Anchor, but by then Toit's had gone into liquidation, and Anchor refused to release the trucks on the instructions of Wesbank, which claimed ownership of the trucks since Toit's had not yet paid for them.

Anchor released the three trucks to Wesbank. Roshcon contended that the supplier agreement and the floor plan agreement were a disguise or simulation. It alleged that the floor plan agreement was a loan against the security of the trucks without Wesbank having to take possession thereof, thereby securing an advantage which the law would otherwise not allow.

Roshcon claimed that it was the true owner of the trucks, and that Wesbank should be estopped from asserting ownership in respect of them, as well as the three trucks already in the possession of Wesbank.

THE DECISION

The fundamental issue was whether the parties intended that the agreement that they had entered into should have effect in accordance with its terms.

It had not been shown that Wesbank, Nissan Diesel and Toit's had a secret understanding between them. Therefore, the agreements as they stood had to be taken to properly reflect the intention of the parties, and not to disguise it.

As far as estoppel was concerned, it was necessary to prove that a representation by the owner had been made, by conduct or otherwise, that the person who disposed of his property was the owner or was entitled to dispose of it. In the present case, this meant that it was necessary to prove that the party to be estopped (Wesbank) had made a representation that it was the owner of the trucks. However, Wesbank could not have made any representation to Roshcon because the trucks were delivered to Anchor, at the request of Roshcon. At that stage Roshcon was not even aware of the involvement of Wesbank. Toit's was well aware of the floor plan agreement and the fact that ownership had been reserved in favour of Wesbank — therefore the indications of ownership were absent.

Roschcon's claim was dismissed.

AMDOCS SA JOINT ENTERPRISE (PTY) LTD v KWEZI TECHNOLOGIES (PTY) LTD

A JUDGMENT BY MYBURGH AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
15 APRIL 2014

2014 (5) SA 532 (GJ)

Corporations

A shareholder does not stand in a fiduciary relationship with his company and therefore cannot depend on any such relationship in making a claim against the company. A demand issued in terms of section 165(2) of the Companies Act (no 71 of 2008) may be set aside on the grounds that it is without merit in the sense that it cannot succeed.

THE FACTS

Kwezi Technologies (Pty) Ltd was a shareholder in Amdocs SA Joint Enterprise (Pty) Ltd, a company which had been formed in 2007 to supply services to Telkom SA Ltd. It and the other shareholders were bound to each other and the company in terms of a founders' agreement.

The business objectives provided for in the agreement were not realised. In consequence of this, the agreement lapsed, and in August 2011 Kwezi delivered a notice to the 51% shareholder, Amdocs Development Ltd, and the other shareholders asserting that notwithstanding the termination of the founders' agreement and the position of Kwezi with regard to the founders' agreement, Amdocs and other parties had continued to unlawfully operate and/or run the company and the company had continued to operate unlawfully, to the detriment of Kwezi. It indicated that it intended to refer the dispute to arbitration and proposed one of three senior advocates practising at the Johannesburg Bar for appointment to that position.

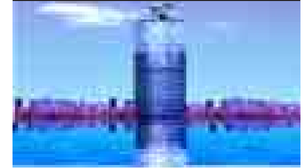
In April 2012 Kwezi served a demand on Amdocs in terms of section 165(2) of the Comapnies Act (no 71 of 2008). The section provides that a person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person is a shareholder or a person entitled to be registered as a shareholder, of the company. It alleged that Amdocs Development had proceeded to renew its various contracts with Telkom in its own name and for its own benefits, which conduct had been unlawful as it had been contrary to the terms of Telkom's acceptance of the company's proposal. Kwezi also alleged that Amdocs Development's activities had amounted to a diversion of 'corporate opportunities, business and income that rightfully belonged to Amdocs and that Amdocs Development had, as a result, unlawfully and to the detriment of Amdocs benefited to the extent of US$153 590 000. Kwezi accordingly demanded that Amdocs urgently commence legal proceedings or take related steps, to protect the interests of the company with regards to the income, profits and benefits that should have accrued to it from the contracts.

Amdocs applied in terms of section 165(5) of the Companies Act for an order setting aside the demand.

THE DECISION

Section 165(5) provides that a company that has been served with a demand in terms of subsection (2) may apply to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

An applicant for relief in terms of s 165(3) is entitled to succeed if he is able to demonstrate that the demand is without merit in the sense that it cannot succeed. The starting point was to consider the nature of the relationships between the shareholders. This in itself was problematic for Kwezi, since nothing in the nature of fiduciary duties attached to shareholders in their dealings with one another qua shareholder. The position was different when the shareholders in question were also directors — for as directors they would owe obligations to the company to act in its best interests. However, no such obligations apply as between shareholders per se. Shareholders are at liberty to



conduct themselves relative to their shares, and, in their dealings with the company generally, as they see fit, subject only to the provisions of the founding statute or any shareholders' agreement that may exist.

In the present case, the shareholders' agreement (ie the 'founders' agreement') had lapsed early. It could therefore not form the basis of a claim against the company.

The demand was set aside.

Several difficulties stand in the respondent's way in casu. In the first instance, that letter did not, as I see things, amount to a contract. On the contrary, it was, as I see it, simply a communication in which Telkom informed Amdocs of the fact that it resolved to accept a proposal which had been made by the 'Amdocs companies' — subject to certain conditions. That having been said, I am prepared to apply the argument to the complementary agreement which, as pointed out above, incorporated those provisions of Telkom's letter of 15 December 2006 upon which the respondent sought to rely for this part of its case. 22 On that basis the provisions in question still do not appear to me to meet the requirements of a stipulatio alteri. The reason I say this is that it does not appear from the provisions under consideration that the applicant would have been entitled to simply adopt any contract and so insert itself in place of the relevant 'Amdocs service provider'. On the contrary, my understanding of those provisions is that they entitled Telkom, in its discretion, to place orders for certain products and services with the applicant rather than with the relevant 'Amdocs Company' without thereby breaching the applicable long-term contract. And inasmuch as the decision lay with Telkom rather than with the applicant, the provisions under consideration did not, on my understanding of the law, amount to a stipulatio alteri.

MOODLEY v ON DIGITAL MEDIA (PTY) LTD

A JUDGMENT BY MEYER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
11 JULY 2014

2014 (6) SA 279 (GJ)

Section 133 of the Companies Act (no 71 of 2008) is no bar to an application that an adopted business rescue plan be executed and implemented strictly according to its terms and in accordance with the applicable provisions of the Companies Act

THE FACTS

Moodley, a minority shareholder of a company in business rescue sought to proceed with the remainder of an application against the company and its business rescue practitioner in terms of which certain transactions (a share buy-back, an issue of new shares and the adoption of a new memorandum of incorporation and a draft subscription agreement) were to be declared not in accordance with the adopted business rescue plan and/or certain provisions of the Companies Act, and accordingly unlawful. He also sought an order that the company and its business rescue practitioner be interdicted from implementing the transactions or that they be set aside insofar as they had been implemented.

The question arose whether or not the general moratorium on legal proceedings against a company in business rescue provided for in section 133 of the Companies Act (no 71 of 2008) applied.

Section 133 provides that during business rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except in certain defined circumstances.

Moodley argued that the requirements of section 133(1) do not apply to proceedings such as the present ones, which were aimed at enforcing the implementation of an adopted business rescue plan consistently with its terms and in accordance with the provisions of the Companies Act.

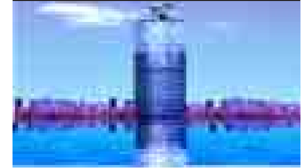
THE DECISION

The language of section 133, when read in context and having regard to its purpose, does not include within its ambit proceedings relating to the development, adoption or implementation of a business rescue plan. It is the business rescue practitioner who must develop a business rescue plan and implement it if adopted, and the company, under the direction of the practitioner, must take all necessary steps to attempt to satisfy any conditions on which the business rescue is contingent and implement the plan as adopted. Legal proceedings, such as the present case, which seek that an adopted business rescue plan be executed and implemented strictly according to its terms and in accordance with the applicable provisions of the Companies Act, are legal proceedings against the business rescue practitioner and the company in business rescue in connection with the business rescue plan. They are not legal proceedings against the company or property belonging to the company or lawfully in its possession within the meaning of s 133(1).

Section 133, therefore, did not apply in legal proceedings against a company in business rescue and its business rescue practitioner in connection with the business rescue plan, including its interpretation and execution towards implementation.

Not one of the transactions referred to in the notice of motion had been shown to be unlawful, and no right that has been infringed had been established.

THUNDER CATS INVESTMENTS 92 (PTY) LTD v NKONJANE ECONOMIC PROSPECTING & INVESTMENT (PTY) LTD



A JUDGMENT BY MALAN JA
(NAVSA ADP, SHONGWE JA, WALLIS JA and MEYER AJA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2013

2014 (5) SA 1 (SCA)

A party which is partly responsible for the breakdown of co-operation between members of a company which has rendered the company liable to be wound up on the grounds that it is just and equitable to do so is entitled to bring an application for the winding up of the company on that ground.

THE FACTS

Thunder Cats Investments 92 (Pty) Ltd and the second appellant were shareholders in Nkonjane Economic Prospecting & Investment (Pty) Ltd. An application was brought for the winding up of Nkonjane on the grounds that it was just and equitable to do so, there having developed a deadlock in relations between Thunder Cats, the second appellant and other shareholders. The deadlock arose because Thunder Cats and the second appellant opposed the sale of the other shareholders' shares in the company. A shareholder could not, without the consent of the other shareholders, sell its shares.

In terms of clause 8 of the shareholders' agreement, if the required majority for the passing of a directors' resolution could not be obtained, such resolution would cease to be within the directors' domain and was to be put to the shareholders in a general meeting. A deadlock would not constitute grounds for the winding-up of the company.

The winding-up application was motivated by the desire of the second and third respondents to dispose of their shares. The shareholders agreement provided a mechanism for this but required that all the other shareholders consent thereto in writing. The appellants were unwilling to consent to the respondents disposing of their shares or to meet in order to discuss a reasonable basis for their leaving the company. The respondent shareholders contended that as a result of the impasse and the consequent lack of trust between the parties the management of the company had been rendered dysfunctional and the company moribund, justifying its winding-up. The appellants contended that the respondents were to blame for the breakdown in the parties' relationship and that, for this reason, they were precluded from seeking the liquidation of the company. They invoked the principle that a person who applies for winding-up on the just and equitable ground must come to court with 'clean hands'. If the breakdown in the relationship is due to an applicant's misconduct, it cannot insist on the company being wound up.

THE DECISION

The lack of clean hands is not an absolute bar to a person applying for the liquidation of a company. In the present case. The shareholders agreement and the equal holding of shares and voting power on the board required the shareholders to co-operate. Without such co-operation the company could not function. It was not possible to meet and approve the financial statements for the year ending February 2010. In these circumstances their relationship has broken down irretrievably and it had been correctly found that it was just and equitable that the company be wound up. Only a winding-up would break the paralysis in which the company found itself.

It was therefore appropriate that the company be wound up. An order to that effect was given.

ATHOLL DEVELOPMENTS (PTY) LTD v VALUATION APPEAL BOARD, JOHANNESBURG

A JUDGMENT BY VALLY J
GAUTENG HIGH COURT, JOHANNESBURG
31 JANUARY 2014

2014 (5) SA 485 (GJ)

Property

A valuation of property for purposes of the Local Government: Municipal Property Rates Act (no 6 of 2004) should take into account the value of improvements made to the property, and may incorporate the 'building cost approach', or the 'willing buyer, willing seller' approach to attaching an appropriate value.

THE FACTS

Atholl Developments (Pty) Ltd held a registered 99-year lease over certain properties which fell within the area of jurisdiction of the Johannesburg municipality. It built a hotel on the properties and ran them as a going commercial concern.

In 2010 the municipality objected to the valuation as reflected in the valuation roll in terms of section 50(1)(c) of the Local Government: Municipal Property Rates Act (no 6 of 2004). The municipal valuer upheld the municipality's objection and valued the properties at R151 019 000 for one of them, and R309 267 000 for the other. The new valuations were reflected in a supplementary valuation roll.

When the valuer attached values to the land and the buildings thereon, he had no engagement with the owner of the land nor with Atholl. He was not aware of the leases and accordingly attached no values to them.

Atholl contended that only the properties, separated from the hotel built on them, should be valued for purposes of determining the true value of the rateable property. It objected to the valuations, and brought an application for an order reviewing and setting them aside.

THE DECISION

Atholl's contention could not be upheld. The fact that it was not the owner of the properties, but a holder of rights against them was not material for the valuation of the properties for purposes of determining the rates that should be payable on them. In terms of the Act the municipality and the municipal valuer could, if they so desired, assign separate values to them, but they were not obliged to do so.

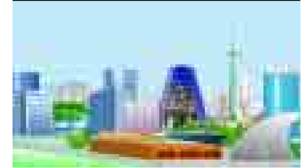
However, in the valuation finally given, there was no explanation as to how the valuer came to assign the respective values to each of the leases that were registered against each of the properties. No valuation was placed on the improvements to the properties, which included the structure of the hotel and all other incidental improvements necessary for the operations of the hotel, such as, for example, the parking areas.

The only issue was what evidence the valuer relied upon to determine the value of the leases. This was not clear from its decision. There was no indication as to what criteria it used to assign value to the registered leases, or what evidence it relied upon to make the determination it did. An examination of the evidence led at the hearing demonstrated that there was nothing before the valuer that justified it assigning the values it did to the leases registered against the properties. The valuer did not identify the evidence it relied upon to assign values to the leases, what methodology it applied and why it came to the conclusions it did. The valuer should have focussed on the value of the properties, together with the improvements thereon. It should have assigned values thereto.

Had the evidence and discussion before the valuer remained focussed on the 'building cost approach', or the 'willing buyer, willing seller' approach, there would be no doubt that the valuer could have made a determination on the value of the properties that was fair to the owners as well as to the municipality. The valuation therefore had to be re-done. The matter was remitted to the Valuation Board for reconsideration.

HYPROP INVESTMENTS LTD v NSC CARRIERS AND FORWARDING CC

Property



A JUDGMENT BY LEWIS JA (THERON JA, WILLIS JA, VAN DER MERWE AJA and MEYER AJA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 2013

2014 (5) SA 406 (SCA)

A court may exercise its discretion to reject a plea of res judicata (the issue already having been decided) if it is possible a trial court will reach a different conclusion from that reached by a court which determined the issue on the papers of an application alone.

THE FACTS

Hyprop Investments Ltd leased two premises in a shopping mall to NSC Carriers and Forwarding CC. Hyprop cancelled the leases because of NSC's failure to pay rental. It applied to the South Gauteng High Court for an order confirming the cancellation of the leases, ejectment of NSC and payment of rental in the sums of R711 208 and R88 794 for the two shops. NSC defended the application on the grounds that Hyprop had made misrepresentations which induced it to conclude the leases. The high court rejected its defence and granted the orders sought.

Two years later, NSC and its shareholder, Costa, together with the third and fourth respondents, close corporations which were to have run the operations of the two shops, instituted action against Hyprop and two of its employees claiming damages for fraudulent misrepresentation. Hyprop raised special pleas: that the cause of action pleaded had been adjudicated by the high court in the application for ejectment, a plea of res judicata, and that the employees of Hyprop, had not represented it when concluding the lease agreements and did not owe NSC and Costa a duty of care.

The special pleas were rejected. Hyprop appealed.

THE DECISION

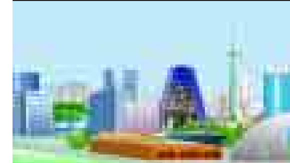
If a trial might yield a different result to that obtained in an application, this is a substantial factor to be taken into account in deciding whether or not to relax the requirements of the plea of res judicata. The court which rejected the special pleas, had exercised a discretion in this regard and determined that the fact that the question of fraud had been determined on the papers alone was sufficient to justify the dismissal of the special plea. This does not mean that there is a general principle that whenever a trial action follows upon an application a res judicata plea should fail. It would be inequitable if NSC and Costa were not entitled to have their claims in delict adjudicated in terms of the applicableprinciples of law.

Insofar as the second special plea was concerned, that the employees of Hyprop were not properly joined, that had to be determined in favour of NSC. The argument of Hyprop was that these respondents were not parties to the contract and owed no duty of care to NSC, Costa or the other respondents. That plea also raised res judicata in the sense that Hyprop argued that the issue of fraudulent misrepresentation had been adjudicated in the application. It had to fail for the same reasons. The other basis for the plea — that the employees of Hyprop were not parties to the contracts, only representatives — also could not be sustained since no contractual claim was in issue as between the parties in the action. If NSC and Costa could prove that they acted fraudulently then a claim against them in delict for fraudulent misrepresentation might well be proved.

The special pleas were correctly rejected.

BARONT INVESTMENTS (PTY) LTD v WEST DUNE PROPERTIES 296 (PTY) LTD

Property



A JUDGMENT BY SISHI J
(JAPPIE DJP and SEEGOBIN J concurring)
KWAZULU NATAL DIVISION, PIETERMARITZBURG
30 JANUARY 2014

2014 (6) SA 286 (KZP)

A property owner should not be required to register a servitude over its property without its consent as this would be contrary to property rights as enshrined in the Constitution.

THE FACTS

Baront Investments (Pty) Ltd owned property over a portion of which was registered a temporary road servitude in favour of the municipality having jurisdiction over the area. West Dune Properties 296 (Pty) Ltd and the second respondent used the road for access purposes to their properties. When the township was first laid out, it was intended that the primary entrance their properties would not be via this road servitude but via another entrance. West Dune and the second respondent however, used the temporary road servitude for primary access to their properties.

Baront's predecessor in title had indicated to West Dune that it intended to improve the primary entrance and close off the temporary entrance, and concluded an agreement with the municipality that this would be done. Baront cancelled the temporary road servitude. After the cancellation Baront gave notice to West Dune and the second respondent that the road which previously existed through the servitude was to be cordoned off.

West Dune contended that an agreement had been reached between in and the municipality and Baront's predecessor in title which conferred on it a servitude entitling it to continue using the existing road servitude. Baront denied any awareness of such an agreement. West Dune brought an application for an order that the road servitude in favour of the municipality be registered over Baront's property as a public road.

THE DECISION

The servitude in question was a personal servitude as it existed in favour of a particular entity, the municipality. The alleged unregistered servitude created by agreement between West Dune and Baront's predecessor in title could not affect this because West Dune had failed to show that Baront was aware of the agreement and in any event, there was no written recordal of such an agreement.

To order a new servitude to be registered, without the consent of Baront, the owner of the land as sought by West Dune would be to deprive the owner of a portion of his property, without any compensation therefor. This would be contrary to the provisions of section 25 (Bill of Rights) of the Constitution. Even in the case where a portion of land is taken away as a via necessitate, it has been held that adequate compensation therefor should be paid: Aventura Ltd v Jackson NO 2007 (5) SA 497 (SCA).

The application was dismissed.

COMAIR LTD v MINISTER FOR PUBLIC ENTERPRISES

A JUDGMENT BY JORDAAN J
GAUTENG DIVISION, PRETORIA
6 DECEMBER 2013

2014 (5) SA 608 (GP)

Competition

An official which has disclosed information required under Rule 53 must disclose other information which is equally confidential, provided that the party requiring the information abides by a confidentiality undertaking.

THE FACTS

Comair Ltd brought an application against the Minister for Public Enterprises to review its decision to provide South African Airways (SAA) with a R5 billion guarantee and to declare that the guarantee decision was unconstitutional and unlawful and it sought an order setting aside the guarantee decision and suspending the setting aside of the guarantee decision.

The notice of motion required the Minister and the other respondents to provide minutes, submissions, memoranda and other documentation in relation to all meetings between the Minister and second respondent in relation to the guarantee decision, and minutes, submissions, memoranda and other documentation in relation to all meetings between SAA and other interested parties, in relation to the guarantee decision, and all requests for funding by SAA leading up to the guarantee decision.

Some of the documentation provided by the Minister in response to this requirement were subject to extensive deletions (‘redaction’). Comair objected to the deletions. The Minister provided some of the information requested in the form of a diagnostic review, but refused to provide minutes of the meetings in question. Comair then brought an application for an order compelling the Minister to provide this documentation in unredacted form. The Minister contended that the redacted portions of the minutes contained confidential information and that their contents were of a commercially sensitive nature in that they related to the financial and operational information of SAA. On behalf of Comair an undertaking was made that the contents of the minutes, as in the case of the diagnostic review, would not be shown to the applicant.

THE DECISION

It was argued that the minutes contained matters of a confidential nature relating to the operations of SAA. However, Comair merely asked for limited disclosure thereof, in the sense that only the legal advisors and independent experts would have access thereto. The Minister had had the identical view regarding the diagnostic review which it later disclosed on the very basis that Comair now sought access to the minutes. By making the minutes part of the rule 53 record, the Minister conceded the relevance thereof. The fear that confidential information would be disclosed was therefore unfounded. Furthermore the minutes in their present redacted form would be of no use to the court hearing the matter.

Comair would be at an unfair disadvantage without the documentation. The respected members of the legal profession would abide by the confidentiality undertakings. In any event, if the order sought was granted they would be prevented by a court order from disclosing information at variance therewith. The same applied to the diagnostic review which the Minister disclosed on the same basis Comair now sought the minutes to be disclosed.

The application was granted.

GRAINCO (PTY) LTD v VAN DER MERWE

Competition

A JUDGMENT BY ROGERS J
WESTERN CAPE DIVISION, CAPE TOWN
11 JULY 2014

2014 (5) SA 444 (WCC)

An interdict cannot be granted prohibiting a party from trading with former customers of a competitor who have already switched their business to that party, even if the switch occurred pursuant to unlawful canvassing of the customers by that party.

THE FACTS

Van der Merwe and Kitshoff established an agricultural trading and logistics business in May 2000 through a company known as Old GrainCo. In terms of an agreement signed on 15 February 2007, Old GrainCo sold its business and all its assets to BKB Ltd with effect from 1 October 2006 (the effective date of the agreement). The sale included the businesses conducted as divisions of Old GrainCo as well as Old GrainCo's shares in a subsidiary. Goodwill was one of the assets listed in the schedule of assets sold. The purchase price was R28 450 430.

BKB immediately on-sold the business and assets to GrainCo (Pty) Ltd on loan account for the same price. Van der Merwe and Kitshoff took up employment with GrainCo, although this was not mentioned in the amalgamation agreement and was not a condition to which it was subject. Service contracts were executed and Van der Merwe was employed as GrainCo's managing director and Kitshoff as the head of its trading division. They were both appointed as directors of GrainCo.

In terms of clause 12.2 of the agreement, Old GrainCo, Van der Merwe and Kitshoff agreed with BKB that none of them would during any of the years of the restraint period be interested in any entity which is interested in any competitive activity in the territory or themselves be interested in any competitive activity in the territory, during any of the years of the restraint period do anything outside the territory which had the effect of causing BKB prejudice in the territory, during any of the years of the restraint period canvass any customer and/or client of BKB for or on behalf of any entity in which they are interested, or on their own behalf, or at any time disclose the confidential information.

The service contracts concluded by Van der Merwe and Kitshoff made clause 12 of the amalgamation agreement applicable to their employment.

On 30 April 2013 Kitshoff and others gave notice of their resignations. They all joined a new trading venture established by Van der Merwe, which began business on 1 June 2013. The vehicle for the new business was Perdigon.

Grainco sought an order restraining Van der Merwe and Kitshoff and Perdigon from soliciting its customers, passing off Perdigon as being associated with GrainCo, unlawfully interfering in GrainCo's contractual relations and publishing injurious falsehoods.

THE DECISION

The issues between the parties were (i) whether the sale of Old GrainCo's business to BKB gave rise to an implied prohibition against the canvassing of former customers and the effect in that regard of the express restraint clause, and if so (ii) whether the implied prohibition applied to all of New GrainCo's customers as at 1 June 2013 or only to those persons who were customers of Old GrainCo as at 1 October 2006, and, in the latter event, whether Grainco was entitled to relief confined to customers as at 1 October 2006, (iii) whether the respondents, as distinct from Old GrainCo, were bound by the implied prohibition, (iv) whether, by virtue of the on-sale of the business by BKB to Grainco the latter could enforce the implied prohibition, (v) whether the respondents were guilty of

passing off Perdigon's business as being associated with GrainCo's business, having regard in particular to the fact that Perdigon's corporate documentation made reference to the name GrainCo, (vi) whether the respondents unlawfully interfered in GrainCo's contractual relations, (vii) whether the respondents disseminated injurious falsehoods concerning GrainCo to customers, in particular as to the scope of GrainCo's current operations and ambitions.

On the basis of the evidence presented, an interdict could not be granted prohibiting Perdigon from trading with former customers who had already switched their business to Perdigon, even if the switch occurred pursuant to unlawful canvassing of the customers by the respondents. If the customers were already trading with Perdigon, they would have an interest in relief which prohibited Perdigon from continuing to trade with them. In any event, the implied prohibition does not prevent the seller of a business from dealing with former customers, only from canvassing them. If the respondents have already successfully, though unlawfully, canvassed a former customer, the appropriate remedy would be damages.

As far as passing off was concerned, there had to be at least be an intention to make a representation (ie a conscious or voluntary act). In the present case, after the respondents had received confirmation of the change of name and changed the corporate documentation, did not intend that their company and its business should be described in any way as being 'GrainCo' or any variant of that name.

The application was dismissed.

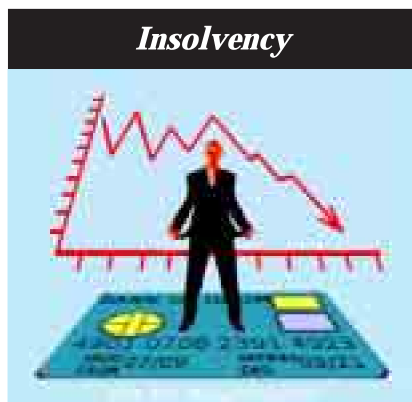
I do not think it is an answer to a passing-off claim to say that one was obliged to reflect a particular name on one's corporate documentation because that was the company's name. There would be a passing-off if the use of the existing corporate name constituted a representation calculated to deceive members of the public into believing that Perdigon's goods and services were connected with GrainCo's business, in the sense that there was a reasonable likelihood that members of the public would be deceived into so thinking

COPPER SUNSET TRADING 220 (PTY) LTD v SPAR GROUP LTD

A JUDGMENT BY MAKGOBA J
LIMPOPO DIVISION
9 MAY 2014

2014 (6) SA 214 (LP)

Insolvency



A creditor or shareholder voting against a business rescue plan must do so on a rational basis. If it does not, the vote may be set aside in terms of section 153(1)(a)(ii) of the Companies Act (no 71 of 2008).

THE FACTS

Copper Sunset Trading 220 (Pty) Ltd owed the Spar Group Ltd R7.6m, an amount almost equal to Copper Sunset's total assets. In order to secure its position, the Spar Group brought an application to perfect its security which it held in the form of a notarial bond. While the application was pending, negotiations between an independent broker and the Spar Group regarding a turnaround plan were conducted. While they were still in progress, Copper Sunset's directors resolved to place the company under business rescue.

The proposed first business rescue plan was rejected at the second creditors meeting. A revised business rescue plan was then published. This would have resulted in the Spar Group obtaining a dividend of 45c in the rand, and other creditors obtaining nothing. At the third creditors meeting, the revised business rescue plan was introduced but also rejected, the Spar Group and second respondent voting against its adoption.

Copper Sunset then brought an application for an order setting aside the Spar Group's vote, and for an order that the revised business rescue plan was properly adopted, on condition that Copper Sunset obtain post commencement finance in the sum of R2m within 30 court days.

THE DECISION

The application was brought in terms of section 153(1)(a)(ii) of the Companies Act (no 71 of 2008) which provides that if a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests on the grounds that it was inappropriate.

The purpose of the business rescue plan need not be to save the company from liquidation and thus return the business to solvency. If the goal is simply to ensure a better return for creditors than would be achieved in liquidation, such goal is a valid goal in terms of the Act. Given the outcome of the implementation of the business plan, the question arose whether it was not an option worth trying.

The attitude of the Spar Group in insisting on liquidation was self-serving and unreasonable, regard being had to the fact that it is probably the only creditor and would gain at most a 45c dividend. The Spar Group's vote against the adoption of the business plan was irrational as it voted against the business plan notwithstanding the fact that in the absence of such a plan it would receive no dividend in liquidation. The conduct of the Spar Group in rejecting the revised business rescue plan at the meeting of creditors was inappropriate.

The application was granted.

MOTALA N.O. v MOLLER

Insolvency

A JUDGMENT BY MYBURGH AJ
GAUTENG LOCAL DIVISION,
JOHANNESBURG
2014

2014 (6) SA 223 (GJ)

The transfer of property of a spouse of a person whose estate has been sequestrated is not void ab initio.

THE FACTS

At a time when her husband's estate had been provisionally sequestrated, Stein sold her fixed property to Moller. The property was then transferred to Moller. He was unaware of the sequestration.

Motala, the trustee of the insolvent estate, brought an application for an order declaring the transfer of the property from Stein to Moller, and the registration of a bond in favour of Nedbank, void ab origine. The application was brought on the basis of section 21(1) of the Insolvency Act.

The section provides that the effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the trustee all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate, and to empower the trustee to deal with such property accordingly.

Motala contended that since the effect of section 21(1) is to divest the spouse of an insolvent of the capacity to deal with her property, it was clear that the sale was void ab initio.

THE DECISION

Motala's contention could not be supported. Notwithstanding the clear language of section 21(1), there is nothing in law which prohibits the spouse of an insolvent from dealing with her property, and also that any alienation by her will be valid unless and until the insolvent's trustee successfully assails it. If the trustee does not do that, then the transfer will remain valid with the result that the original defect in the transaction is, in effect, made good.

Moller contended that section 25(4) of the Act applied and that under this section, Motala as trustee would be unable to recover anything from him. This analysis of the section was correct: it deals specifically with the rights of trustees relative to disposals of immovable property. The subsection accordingly creates specific remedies, which vary according to the circumstances in which the disposal took place and the extent to which the estate was thereby impoverished.

The application was dismissed.

RICHTER v BLOEMPRO CC

A JUDGMENT BY BAM J
GAUTENG DIVISION, PRETORIA
14 MARCH 2014

2014 (6) SA 38 (GP)

It is not possible to bring an application for business rescue after the company in question has been finally liquidated.

THE FACTS

Following an application brought by Absa Bank, Bloempro CC was finally liquidated on the grounds that it was unable to pay its debts. Richter, who described himself as employed by Bloempro as general manager, served on the corporation and its liquidators a business rescue application in terms of the provisions of chapter 6 of the Companies Act (no 71 of 2008), in respect of Bloempro.

The court raised the questions whether (a) Richter had locus standi to lodge the application, and the business rescue application, and (b) whether the business rescue application could be brought in view of the final liquidation order.

THE DECISION

The effect of a liquidation order is to suspend all the contracts with employees and all legal proceedings by or against the company until the appointment of a liquidator.

Business rescue proceedings and a final liquidation order are two different concepts that are incompatible. They involve separate considerations that cannot coexist. It also appears that, more specifically from the definitions of 'business rescue' and 'financially distressed' in ss 128(b) and 128(f) respectively, the legislature intended to provide for business rescue proceedings before a final liquidation.

A business rescue application is not in law possible after a final liquidation order has been made, unless that order is set aside on appeal. It follows that in view of the fact that the liquidation order was made that the court, in any event, did not have jurisdiction to entertain a business rescue application before the liquidation order had been set aside. The fact that Richter presented the business rescue application to the court did not mean, in view of the court's finding regarding the lack of jurisdiction, that the court did have jurisdiction to entertain that application. Accordingly, although Richter might be an affected person contemplated in section 128 of the Companies Act, for the application could not succeed.

EX PARTE SNOOKE

A JUDGMENT BY DAFFUE J
FREE STATE DIVISION, BLOEMFONTEIN
27 JUNE 2014

2014 (5) SA 426 (FB)

A rehabilitation application must explain the circumstances of discrepancies in the estimated costs of sequestration with the actual costs of sequestration.

THE FACTS

In December 2010, Snooke's estate was sequestrated following a voluntary surrender application. In his statutory statement of affairs attached to his application for voluntary surrender, applicant stated that there were 10 creditors in his estate, five claims by Standard Bank in respect of different accounts, and one each by Absa, Nedbank, Massmart (Game), RCS debt collectors and a private person, Mr S Levin. The total debts F amounted to R448 339,18. Daffue also stated that assets of R65 000 less sequestration costs of R20 000 left R45 000, and if this were divided by R448 339,18, the total of the claims of concurrent creditors as alleged, 10-cents-in-the-rand dividends would be paid to concurrent creditors. No creditors lodged any claims against the insolvent estate and consequently no claims were proved. The bill of costs of the sequestration was taxed in an amount of R40 229,99. The trustees filed a report after the second meeting of creditors.

Daffue applied in terms of section 124(3) of the Insolvency Act (no 24 of 1936) for his rehabilitation.

THE DECISION

The sequestration costs appeared to be excessive. Where an applicant's attorney presents to the court an application for voluntary surrender or sequestration in which allegations are made that the costs of the sequestration will amount to a stated figure, and the court grants that application, it does so in the belief that those figures are correct and that the dividend will be paid. Even though the court does not make an order that the attorneys' fees and expenses are to be limited that is the clear assumption on which the order is made. It is therefore essential that all funds received by the attorney from the applicant and all funds held by the attorney on behalf of the applicant and all expenses incurred in connection with the application must be disclosed. In the light of the allegations in the application regarding the attorneys' costs, and the necessity for limiting these costs to arrive at the dividend alleged, the order must be understood to contain such a limitation. In addition the application must be understood to contain an undertaking by the attorney to limit his fees and expenses to those stated in the application.

The trustees' report technically complied with section 81 of the Act but they did nothing to appeal to creditors to lodge claims. Creditors were not informed that there was no possibility of any contributions being payable should they file claims. There was no indication in the report as to the approximate sequestration and administration costs, and it would be impossible for any concurrent creditor to ascertain whether there would be a free residue and that dividends would be payable. It could be expected the trustees would report that there was no fear of any contribution, bearing in mind the costs known to them at that stage.

In view of the deficiencies of the rehabilitation application, the matter had to be postponed to enable the rectification thereof.

NEDBANK LTD v THOMPSON

A JUDGMENT BY A GAUTSCHI AJ
GAUTENG DIVISION,
JOHANNESBURG
28 JANUARY 2014

2014 (5) SA 392 (GJ)

Credit Transactions

A minor default in keeping to a debt review order made by an agency not appointed by the consumer does not provide ground for the creditor to proceed to enforcement of payment of the debt.

THE FACTS

Nedbank Ltd lent money to Thompson. Thompson fell into arrears in repaying the loan and commenced debt review proceedings under the National Credit Act 34 of 2005 (the NCA). A debt review order was made on 16 February 2012 which included the bank's indebtedness.

The debt review order required Thompson to pay an amount of R12 000 monthly to the National Payment Distribution Agency (NPDA). After deducting credit life insurance, debt counsellor and payment distribution agency fees, the balance of R11 189,60 had to be distributed by the NPDA to credit providers within 30 business days after the date on which the R12 000 was I received. The legal fees due to an attorney could be deducted from the first and second payments as preferent payments, but not thereafter.

The bank alleged that repayments had not been made as required by the order, and applied for judgment in the full amount of the outstanding balance of its loan. At the time when the application was launched, Thompson was technically in default of his obligations under the debt review order, in the amount of R440,91. The reason for the default was that the NPDA paid additional legal fees out of the third contribution as a preferent payment before paying creditors. This resulted in the bank being short-paid.

THE DECISION

The question to be answered is what the effect was of the 'default' on the debt review order as at the date of the launching of this application.

Section 88(3) of the National Credit Act (no 34 of 2005) provides that a credit provider who receives notice of court proceedings contemplated in section 83 or 85, or notice in terms of section 86(4)(b)(i), may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement until (a) the consumer is in default under the credit agreement, and (b) one of the following has occurred: (i) an event contemplated in subsection (1)(a) through (c), or (ii) the consumer defaults on any obligation in terms of a re-arrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

In the present case, the requirement of section 88(3)(b)(ii) was not met. The default was caused by the NPDA which was not Thompson's agent. The National Payment Systems Act (no 78 of 1998) provides for the management, administration, operation, regulation and supervision of payment, clearing and settlement systems in the Republic. Although section 7 of the National Payment Systems Act refers to the actions of the payment distribution agency in question as 'making payment on behalf of that other person to a third person to whom that payment is due', that does not create a relationship of agency between the NPDA and the consumer. It seems that the debt counsellor in question appoints the payment distribution agency in order to receive the consumer's contributions and pay them to persons to whom payments are due. It is an administrative appointment, in this case demanded and sanctioned by the court order, over which the consumer has no control. In the absence of agreement between the payment distribution agency and the consumer that the former will

act as the latter's agent, it cannot be held that the payment distribution agency in question acts as the agent of the consumer, and that its actions or inactions would bind the consumer.

Thompson did not choose the NPDA or have any say in its appointment and he did not enjoy any contractual relationship with the NPDA and had no control over or say in its actions. Errors of the NPDA could not be laid at the door of Thompson.

The application was dismissed.