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A SURVEY OF THE CURRENT CASE LAW

written by

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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.

ABSA BANK LTD v MOHAMMED

A JUDGMENT BY MAYA JA
(MALAN JA, PETSE JA, WILLIS JA
AND SALDULKER JA concurring)
SUPREME COURT OF APPEAL
14 JANUARY 2014

2014 SACLR 1 (SCA)

Banking

A bank agency which fails to comply with the terms of its agency agreement with the bank in regard to the procedures to be followed in taking investments does not have express authority to bind the bank. Such an agency also does not have implied authority when it enters into transactions which a bank would not normally enter into.

THE FACTS

Mahomed alleged that he had invested R5 432 099.88 with Absa Bank Ltd by way of fixed deposits. His nephew, the second respondent, alleged that he had invested R2 020 843.00. He alleged that the investments had been made by depositing various sums to various accounts and they were all made at an Absa agency operated by Mr N.R. Mistry, the sole proprietor of Mistry's Financial Services and Mistry's Estate Agencies. The agency agreement provided that Mistry as the agent could receive money from clients on Absa's behalf only against completion of the necessary documents in each case and in each case, he was to give the bank's official acknowledgement to the person making the deposit or payment.

In February 2009, Absa brought sequestration proceedings against Mistry on the grounds that he had perpetrated massive fraud against it by stealing millions of Absa clients' investments. Clients who had lost money as a result of the fraud claimed compensation from Absa. Mahomed and his nephew also claimed compensation. In proof of their investments, the provided purported Absa investment certificates and receipts. Absa was unable to verify the investments because they did not reflect on the Absa banking records. The account numbers reflected on the deposit receipts did not exist in its records, and the bank stamps on the deposit receipts were not teller stamps, as required by the bank. Mahomed and Mistry had used fictitious names when recording the investments, in order to conceal them from the South African Revenue Service.

Absa refused to pay Mahomed and his nephew compensation. They then brought an application against the bank to compel it to pay, basing their claim on breach of contract by the bank.

THE DECISION

The issue was whether Mistry was duly authorised to represent Absa in concluding the alleged investment agreements. In view of Absa's denial of such authority, the respondents had to prove that Mistry had actual authority.

When issuing the deposit receipts, Mistry had not followed the terms of the agency agreement, and the receipts themselves did not bear the teller stamps which the bank required. Furthermore, the bank did not authorise the unlawful concealment of the funds from S.A.R.S. and which Mistry and the respondents had conspired to conceal. In these circumstances, it was clear that Mistry had no express authority to bind the bank to any obligations toward the respondents.

As far as implied authority was concerned, the type of agreements which Mistry purportedly concluded with the respondents on Absa's behalf were not transactions that a branch of a bank and its agent would ordinarily conduct. The respondents could not reasonably have believed that engaging in fraudulent conduct fell within Mistry's functions and that Absa had authorised him to represent it in unlawful activity. The respondents, therefore, failed to prove that Mistry had implied authority to conclude the alleged investment agreements on Absa's behalf.

The application for payment was dismissed.

BENGWENYAMA-YA-MASWAZI COMMUNITY v GENORAH RESOURCES (PTY) LTD

A JUDGMENT BY NAVSA ADP (BRAND JA, MAJIEDT JA, SHONGWE JA and SCHOEMAN AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2014

[2014] 4 All SA 673 (SCA)

Property

Traditional occupiers of land may be represented by a representative council in asserting their rights to minerals on the land in terms of the Mineral and Petroleum Resources Development Act (no 28 of 2002). The fact that the land is not registered in their name is no bar to the assertion of such rights.

THE FACTS

In November 2010, the Bengwenyama-ya-Maswazi Tribal Council (the 'Tribal Council') and Miracle Upon Miracle Investments (Pty) Ltd ('MUM'), made an application for a preferent community prospecting right in respect of two farms, known as Nooitverwacht and Eerstegeluk. Both farms were registered in the name of the State. The application was made in MUM's name and was brought in terms of section 104(1) of the Mineral and Petroleum Resources Development Act (no 28 of 2002). The section provides that any community which wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister.

The Tribal Council became aware of a competing application made by the Roka Phasha Phokwane Traditional Council and Roka Phasha Community and Genorah Resources (Pty) Ltd.

In due course, the Minister for Mineral Resources refused MUM's application in respect of Eerstegeluk on the grounds that the community was neither the registered land owner nor the occupier of the farm. The Minister granted preferent community prospecting rights over Eerstegeluk to the "Roka-Phasha Phkowane Tribal Council in Joint Venture with Genorah Resources (Pty) Ltd".

The Tribal Council and MUM sought an order reviewing and setting aside the decision taken by the Minister not to award exclusive prospecting rights in terms of section 104 of the Act to the them in respect of the farm Eerstegeluk, and an order reviewing and setting aside the decision taken to award prospecting right over Eerstegeluk to the the Roka Phasha Phokwane Traditional Council and Roka Phasha Community and Genorah Resources (Pty) Ltd. in joint venture. They contended that they were entitled to have a preferent community prospecting right awarded to its corporate vehicle, MUM, on the basis that they were the rightful owners and occupiers of Eerstegeluk. Genorah challenged the locus standi of the Tribal Council, which was described as the Bengwenyama-Ya-Maswazi community. It also disputed the authority of the Tribal Council and its existence as a legal person.

THE DECISION

The Tribal Council's description did not detract from the fact that it was a constitutional and statutorily established institution. Section 4 of the Traditional Leadership and Governance Framework Act (no 41 of 2003) sets out the functions of a traditional council. This is principally, to administer the affairs of the traditional community in accordance with custom and tradition. Having regard to this legislative underpinning, and to the extensive community consultation process the Tribal Council showed that it had embarked upon, in relation to the circumstances of this case there was not a more authoritative voice for the community than the Tribal Council. The Tribal Council and MUM had demonstrated the Tribal Council's de facto existence for a century and had proven its legal existence for much of that time.

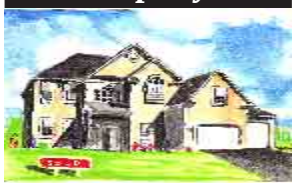
As far as the appropriate

application of section 104 was concerned, in the real world of high finance one could hardly imagine a community such as that represented by the Tribal Council being able to engage in mining without the necessary technical and financial assistance that the Act requires it to demonstrate. The Tribal Council and MUM had demonstrated that the people they represented had overwhelmingly endorsed an application for a prospecting right using MUM as a vehicle. That being so, it followed that the application in terms of section 104 by MUM was in substance, one by the people themselves.

As far as the lack of registered title to the land was concerned, section 104 of the Act contemplated that a prospecting right could be granted to a community in respect of land that either is registered or to be registered in the name of the community. In the present case, there was no indication of any result other than a successful land claim by the people, with the land ultimately being registered in the name of the people. There was no question of alternative land being granted.

I agree that in the real world of high finance – in the present case billions of Rands are required for a viable mining enterprise – one can hardly imagine a community such as the BYMC being able to engage in mining without the necessary technical and financial assistance that the MPRDA requires it to demonstrate. This fact was taken into consideration by the Minister and her Department. In my view, the Tribal Council and MUM have demonstrated that the BYMC has overwhelmingly endorsed an application for a prospecting right using MUM as a vehicle. That being so, and keeping in mind the context provided by the Constitutional Court as set out in the preceding paragraph, one is led to the compelling conclusion that the application in terms of section 104 by MUM is in substance one by the BYMC. The Department was not averse to the use of MUM and at least engaged the Tribal Council concerning the extent of the community's shareholding.

FLORENCE v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA



JUDGMENTS BY VAN DER WESTHUIZEN J (CAMERON J, FRONEMAN J and MAJIEDT AJ concurring, and KHAMPEPE J concurring only on the cross-appeal) and MOSENEKE ACJ (SKWEYIYA ADCJ, DAMBUZA AJ, JAFTA J, MADLANGA J and ZONDO J concurring, and Khampepe J concurring only on the main appeal)
CONSTITUTIONAL COURT
26 AUGUST 2014

2014 (6) SA 456 (CC)

A claim for compensation for dispossession of land in terms of the Restitution of Land Rights Act (no 22 of 1994) must be determined as at the date of dispossession. The present value of such amount should be determined by applying the Consumer Price Index.

THE FACTS

Florence and her family lived in a house in Cape Town, from December 1952 until November 1970. On 9 January 1957 Mr Florence and his two brothers entered into a written agreement to purchase the land from the owner, Dr Yeller. It was agreed that the purchase price was to be paid off in instalments every month for 13 years and 10 months. These instalments were met.

The area in which the land was situated was classified a 'white group area' in terms of the Group Areas Act (no 41 of 1950). The Act prevented the transfer of the property into Mr Florence's name, as he was not classified as 'white'. On 16 October 1970 Mr Florence, his brothers and Dr Yeller agreed to cancel the sale and the Florence family was refunded an amount of R1 350.

In 1995 Mr Florence instituted a restitution claim, in his own right and on behalf of his two brothers, in terms of the Restitution of Land Rights Act (no 22 of 1994). The claim initially sought restoration of the entire plot of the property, but was later amended to seek financial compensation.

One of the issues for determination in the case was how such financial compensation was to be calculated.

THE DECISION

Per Van der Westhuizen J: The measure of compensation had to be determined as at the date on which compensation was paid and the claimant should generally be placed in the position that it would have been in, but for dispossession. The question was what factor should be used for this purpose, that represented by the Consumer Price Index or something other than this?

The CPI is not always the most appropriate factor for determining equitable redress in the form of financial compensation for property that accrues investment value. It is even more problematic when used as a fixed determinant of a claimant's entitlement to equitable redress. The CPI is not always appropriate when property was intended for investment and not consumption. Although current value will generally be relevant to determining investment claims, not all rights in land under the Restitution Act relate to ownership for the purposes of investment. Some rights in land relate to ownership for the purposes of consumption or profit and some do not relate to ownership at all. This is where the CPI as a measure could be useful: in escalating these kinds of claim for equitable redress to current monetary terms.

Per Moseneke ACJ: the financial loss was to be calcualted as at the time of the dispossession and for the purpose of placing Florence in the same position she would have been immediately after the dispossession.

There is nothing to show that that the CPI does not appropriately measure changes over time in the value of money in order to calculate financial compensation under the Restitution Act. Florence's claim was not for the restoration of a right to land but was for equitable redress in the form of compensation. Nothing in the scheme of the Restitution Act provides that financial compensation shall be an equivalent of restoration in kind. A claimant is entitled only 'to the extent provided by an Act of Parliament'. And the Restitution Act makes it clear that compensation may be granted in lieu of the land claimed or that it will be determined as an equivalent of the restoration of the subject land.

MALAN v CITY OF CAPE TOWN

A JUDGMENT BY MAJIEDT AJ (MOSENEKE ACJ, SKWEYIYA ADCJ, CAMERON J, JAFTA J, KHAMPEPE J and VAN DER WESTHUIZEN J concurring)
CONSTITUTIONAL COURT
18 SEPTEMBER 2014

2014 (6) SA 315 (CC)

A public body is entitled to apply a breach clause and cancel a lease on the grounds that the tenant has failed to comply with obligations provided for in the lease provided that it has given the tenant an opportunity to remedy the default.

THE FACTS

The City of Cape Town leased a house to Malan. Clause 2 of the lease provided that the lease would be terminated on one month's notice in writing given by either party to the other. Clause 24 provided that in the event of the lessee being convicted of unlawfully selling, supplying or possessing intoxicating liquor or dagga or any other habit-forming drug upon the premises, or of assault in any form or any other offence involving violence, the lessee would be deemed to have committed a breach of the lease.

Malan fell into arrears with her rental payments. She was afforded an opportunity to remedy her default, but she failed to do so, and failed to keep up with arrear payments of R50 per month as arranged with the city.

The city cancelled the lease. She was given until the end of December 2008 to vacate the property. The reasons for cancellation of the agreement, as set out in the letter of cancellation, were that, as at the end of April 2008, she was in arrears with rental payments in the amount of R8290,90. A second reason was that the South African Police Service had reported to the city that, on numerous occasions, drugs, liquor and illegal firearms had been confiscated from the property and arrests had been made for illegal activities conducted on the property. In terms of the letter of cancellation, the lease was cancelled with effect from 31 December 2008.

Malan refused to vacate the premises. She defended an action for eviction on the grounds that clauses 2 and 24 of the lease were unconstitutional.

THE DECISION

The first question was whether or not a public authority could properly cancel a lease agreement on the ground of arrear rentals alone? It could. The contrary conclusion would mean that a poor tenant, once she took occupation of public housing, could decline to pay any rent, assured in the knowledge that no amount of arrear rentals would provide a reason for eviction. The city is the custodian of an exceptionally scarce public resource - housing - and is entitled to ration it according to just principles of payment. The city must fulfil its constitutional obligations fully cognisant of the need to allocate housing to the needy and deserving on a fair and equitable basis.

Nevertheless, the city first had to afford Malan proper notice to settle her arrear rentals. It would have contradicted important constitutional values had it not done so. These include the duty of procedural fairness a public authority owes its poor housing tenants. But a fair process was followed in this case. It was not necessary to decide whether the arrears, in and of themselves, would have been a sufficient ground for eviction, taking into account considerations of constitutionality and fairness. This was because there was a further strongly compelling ground for cancellation and subsequent eviction: the wide-ranging illegal activities that were being conducted on Malan's property.

The question became: when then was it legitimate for a public authority to enforce 'illegal activities' clauses in public-housing rental contracts? It would be unfair to impose more onerous burdens on poor people simply because they are reliant

on social housing. Their unequal bargaining power was a factor here. These clauses and reliance on them was legitimate as long as (1) they make it clear what conduct is prohibited, (2) the tenant had the means to control the prohibited conduct, and (3) the tenant had an opportunity to rectify a breach before cancellation. These conditions were fulfilled in the present case. Malan was well aware of what was happening on her property and at no stage averred that she could not control the prohibited conduct. The city's cancellation letter expressly relied on the illegal activities at the property, and gave Malan a warning, on one month's notice, that the city intended to cancel the lease on the ground of illegal activities being conducted at the property.

The cancellation itself took effect just under a month later, on 24 January 2009. That period enabled her to protest the allegation that there were illegal activities, or, if it was admitted, to take steps to bring them to an end. She did neither. In the face of this bare, unsubstantiated denial and the continuation of the illegal activities beyond the date of the notice of cancellation, the unavoidable conclusion was that Malan has failed to remedy the breach.

The city thus complied with the requirements of section 26(3) of the Constitution. It lawfully and validly cancelled the lease agreement on the ground of the illegal activities on the property.

Tenants in public housing thus may not be evicted merely on notice. There must be something more: either further breaches of the lease agreement, or the necessity to secure vacant premises for other pressing public reasons. It is unnecessary to decide in this case what those pressing public reasons may be. It is sufficient to say that, absent good cause, the Constitution forbids a government agency from using a F contractual power of termination against a tenant in need of public housing.

TURNBULL-JACKSON v HIBISCUS COAST MUNICIPALITY

A JUDGMENT BY MADLANGA J (MOSENEKE ACJ, SKWEYIYA ADCJ, DAMBUZA AJ, JAFTA J, KHAMPEPE J, MAJIEDT AJ and ZONDO J concurring)
CONSTITUTIONAL COURT
11 SEPTEMBER 2014

2014 (6) SA 592 (CC)

Any recommendation made by a decision-taker for a local authority must be made after being satisfied that the requirements of the Building Standards Act (no 103 of 1977) have been met, including those that require the local authority to be satisfied that a building to be erected does not derogate from the value of neighbouring properties.

THE FACTS

In 2005 Pearl Star Investments 14 CC submitted revised plans to erect two apartment blocks situated within the area of jurisdiction of the Hibiscus Coast Municipality. Each of them comprised three storeys and a basement. In terms of the National Building Regulations and Building Standards Act the municipality approved Pearl Star's revised plans. Turnbull-Jackson, a neighbour, appealed against this approval on the grounds, inter alia, that (a) whereas the plans designated the lowest levels of the buildings as 'basements', each of which should not count as a storey for planning purposes, this designation was erroneous as the proposed basements did not meet the requisite test, and thus the proposed buildings in fact exceeded the three-storey limit beyond which there were certain requirements on how far each storey beyond the limit should be recessed from the normal building line and side spaces, (b) the proposed development encroached into the side spaces and no special consent had been obtained for this encroachment, and (c) erecting the apartment blocks would substantially reduce the market value of his property, and of the entire neighbourhood, and be unsightly and affect the views as well as his privacy. The appeal was upheld.

The approval process itself was governed by section 7 of the Act. This section provides that if a local authority, is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof. In terms of sub-section (b), if (i) it is not so satisfied or (ii) is satisfied that the building to which the application in question relates is to be erected in such manner or will be of such nature or appearance that the area in which it is to be erected will probably or in fact be disfigured thereby, or it will probably or in fact be unsightly or objectionable, or it will probably or in fact derogate from the value of adjoining or neighbouring properties, or it will probably or in fact be dangerous to life or property, such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal.

In 2007, the municipality approved revised plans. Turnbull appealed against this decision. He contended that section 7(b)(ii) should have been interpreted so as to ensure it is consistent with the Constitution. The municipality contended that the section need not be interpreted in this manner, as was held in *Walele v City of Cape Town* 2008 (6) SA 129 (CC).

THE DECISION

In *Walele* it was held that any recommendation made by a decision-taker for a local authority must be made after being satisfied that the requirements of the Building Standards Act (no 103 of 1977) have been met, including those that require the local authority to be satisfied that a building to be erected does not derogate from the value of neighbouring properties. This was not an obiter dictum, but formed part of the reasons for the decision in that case. It had to be applied in the present case. The contentions of the municipality could not be upheld.

In applying the law to the facts of the case, the matter had to be decided against Turnbull. There was nothing to indicate that, based on what was before the decision-maker, there was not enough to satisfy him that the proposed construction would not in fact or probably derogate from the market value of Turnbull's property.

The appeal failed.

BLIGNAUT v STALCOR (PTY) LTD

A JUDGMENT BY POHL AJ
FREE STATE DIVISION
14 NOVEMBER 2013

2014 (6) SA 398 (FB)

Suretyship

A statutory compromise formed in terms of a business rescue does not absolve a surety from its obligations in terms of section 154 of the Companies Act (no 71 of 2008).

THE FACTS

Stalcor (Pty) Ltd took security in the form of a mortgage bond over Blignaut's property when he stood surety for the debts of a company. The company placed itself in business rescue and Stalcor then enforced its security by proceeding with a sale in execution of Blignaut's property. It obtained an order declaring the property specially executable.

At one of the meetings held in terms of the business rescue procedure it was resolved by the majority of creditors with voting interests that they would each forfeit 75% of their claims against the company, and that the remaining 25% of their claims would be paid back to them on a monthly basis. Stalcor's claim in the amount of R2 666 482 was included in the repayment plan. It forfeited the amount of R1 999 862, being 75% of its claim, and the remaining R666 621 was to be paid back to it in monthly instalments of R30 998,58.

Blignaut contended that the acceptance of the business plan amounted to a statutory compromise which was available as a defence in rem to him as either surety or co-principal debtor. He contended that this was the effect of section 154 of the Companies Act (no 71 of 2008) which provides that a business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of the debt owing to that creditor will lose the right to enforce the relevant debt or part of it. If a business rescue plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.

THE DECISION

The pertinent question to be decided was whether or not the business rescue amounted to a 'statutory compromise' within this context and would thus amount to a defence in rem. If so, then it would be a defence which would be available to Blignaut as surety or co-principal debtor singuli in solidum. If the business rescue was, however, a defence in personam attaching to the company alone, it would not be a defence available to Blignaut.

The purpose of the whole business rescue scheme was to, inter alia, enable a company in financial distress to return to profitability. It is thus a temporary measure, by the very nature of it, which can only be achieved if it is afforded to the company, and the company alone. It could not have been the intention of the legislature with the enactment of section 154 to include sureties and co-principal debtors as beneficiaries within the scheme of business rescue provided for in the Companies Act. It therefore did not include any sureties and/or co-principal debtors singuli in solidum like Blignaut.

FIRSTRAND BANK LTD v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA

A JUDGMENT BY WALLIS JA (MAYA JA, SHONGWE JA, SWAIN JA and LEGODI AJA concurring)
SUPREME COURT OF APPEAL
18 SEPTEMBER 2014

[2014] 4 All SA 425 (SCA)

Insolvency

The preference afforded to the holder of a general notarial bond in terms of section 102 of the Insolvency Act extends only to such portion of the free residue as may consist of the proceeds of moveable property.

THE FACTS

Firstrand Bank Ltd held a notarial bond over the movable assets of Rubaco Boerdery (Edms) Bpk. The notarial bond covered all of Rubaco's movable assets. Prior to the liquidation of Rubaco, Firstrand obtained an order perfecting its security up to an amount of R5,5m. Pursuant to that order the sheriff attached certain movables. In terms of section 83 of the Insolvency Act (no 24 of 1936) they were realised and the proceeds paid to Firstrand. An amount of some R3.8m remained owing to Firstrand.

Most of the free residue in the estate came about by the realisation of immovable properties. After meeting disbursements, expenses and certain prior preferences, this amounted to a little more than R1.9m. Firstrand claimed that it was entitled to all of this because of the effect of section 102 of the Act. It provides that any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond. It contended that the bond secured its entire claim and, accordingly, that it was entitled to the entire balance of the free residue.

The Land and Agricultural Development Bank of South Africa, another creditor, contended that the bank had no preferent claim to any part of the balance of the free residue arising from the realisation of assets not subject to its bond. As the bulk of the free residue arose from the disposal of immovable assets, the bank held no preference in respect thereof.

THE DECISION

In terms of section 86 of the Act, no general mortgage bond shall confer any preference in respect of immovable property. This was a restatement of a similar provision in the preceding Act, and a statutory expression of the common law preceding that Act.

The question was how section 102 was to be interpreted in the light of this. The section provides that any balance of the free residue shall be applied in the payment of any claims proved against the estate in question which were secured by a general mortgage bond, in their order of preference with interest thereon. The critical words in this section are "any claims . . . which were secured by a general mortgage bond". The question was whether these words related to the entire claim of the holder of a general mortgage bond, or only to that part of the claim that is in fact secured by the bond. In other words, do they apply only to the portion of the claim equivalent to the realised value of the hypothecated movables? Firstrand contended for the former construction and the Land Bank contended for the latter.

The effect of the interpretation of section 102 contended for by Firstrand would be that the holder of a general notarial bond would acquire on liquidation greater rights than it enjoyed at the date of liquidation and its security would be enhanced. In the absence of any clear indication that this was the purpose of section 102 it is not a construction that should be favoured. It was a construction which was in conflict with the principle that upon insolvency, a concursus creditorum is created.

The preference afforded to the holder of a general notarial bond in terms of section 102 of the Act extends only to such portion of the free residue as may consist of the proceeds of moveable property.

LAMPRECHT v KLIPEILAND (PTY) LTD

A JUDGMENT BY BOSIELO JA (CACHALIA JA, SHONGWE JA, SWAIN JA and DAMBUZA AJA concurring)
SUPREME COURT OF APPEAL
19 SEPTEMBER 2014

[2014] 4 All SA 279 (SCA)

An admission that a party is a creditor of a company suing for winding up of the company in terms of section 345(1)(a) of the Companies Act (no 61 of 1973) is sufficient basis to confirm a provisional order winding up the company, and that party is not required to prove its claim in order to obtain confirmation of that order.

THE FACTS

Lamprecht and Klipeiland (Pty) Ltd concluded an agreement in terms of which Klipeiland appointed Lamprecht as its Project Manager to have its property rezoned and proclaimed a township. This entailed the planning, co-ordination and supervision of all the professionals to be employed in the process of establishing a township.

Lamprecht averred that he was to be paid R6m as remuneration for the project under the agreement. However, four years after the conclusion of the agreement, Klipeiland terminated the agreement and appointed Dynadeals Three (Pty) Ltd in Lamprecht's position. The alleged reason was that Lamprecht had failed to perform in terms of the agreement.

Lamprecht considered the agreement cancelled. He demanded the R6m remuneration as his compensation. When Klipeiland failed to pay, Lamprecht served a formal demand for payment in terms of section 345(1)(a) of the Companies Act (no 61 of 1973). He then brought an application for the winding up of the company.

The application was referred to a hearing of oral evidence. The parties reached an agreement that Lamprecht was a creditor of the company within the meaning of section 345(1)(a) of the Company's Act, and thus had locus standi to depend on that provision. This agreement was made an order of court.

A provisional order winding up the company was given, but on the return day, the order was discharged on the grounds that Lamprecht had failed to prove his claim of R6m. Lamprecht appealed.

THE DECISION

Lamprecht did not claim the R6m in the winding-up application. All he wanted was to assert or establish his locus standi under section 345(1)(a) of the Act as a creditor owed an amount of no less than R100 which amount was due and payable. The dispute as to what was owed would be settled either by the liquidator after Lamprecht had lodged his claim or by court in the event that the creditor and liquidator were unable to agree on the amount payable.

The parties had in any event, agreed that Lamprecht was a creditor of the company, and had locus standi to bring the application for winding up of the company. This had been made an order of court. There was therefore no reason to discharge the provisional order winding up the company.

The appeal was upheld.

EX PARTE NELL N.O.

A JUDGMENT BY TUCHTEN J
GAUTENG DIVISION, PRETORIA
28 JULY 2014

2014 (6) SA 545 (GP)

An appeal against a liquidation order given against a company which was subject to business rescue and for which a business rescue practitioner had been appointed does not have the effect of re-vesting control of the company in the business rescue practitioner.

THE FACTS

Filapro (Pty) Ltd was placed under business rescue by a resolution filed pursuant to section 129(1) of the Companies Act (no 71 of 2008) and Nell was appointed the company's business rescue practitioner. The following month, two of the company's creditors brought an application to set aside the resolution, on the grounds that the company was not financially distressed. The application succeeded and the applicants obtained an order for the liquidation of the company.

The company and Nell brought an application for leave to appeal. The joint liquidators of the company contended that they could not do so because the company had been placed in liquidation, with the result that control of the company vested in them. Nell contended that the appeal was competent by virtue of the provisions of section 18 of the Superior Courts Act (no 10 of 2013). The section provides that unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

THE DECISION

There is an inconsistency between section 18 of the Superior Courts Act and section 132(2)(a)(i) of the new Companies Act. The section provides that business rescue proceedings end when the court sets aside the resolution or order that began those proceedings.

Nell argued that the unqualified language of section 18 of the Superior Courts Act points to a legislative intention to regulate the whole field of the law, without exception. However, if Nell were to be revested with control of the company, one could legitimately ask what his functions could be. The main duty of a practitioner is to determine whether a company can be rescued and, if so, to develop and propose a business plan or, if not, to take steps to liquidate the company. For a practitioner to propose a business plan in these circumstances would verge on an absurdity. It is hardly conceivable that the creditors of the company which objected to the rescue and sought the company's liquidation would vote in favour of any such plan.

During the appeal process the vesting of control over the company could go from the practitioner to the liquidators and back again. After the order setting aside the section 129(1) resolution and ordering liquidation is granted and a provisional liquidator is appointed, control of the company vests in the liquidator.

This approach would lead to highly undesirable consequences. For more than 100 years a legal policy has been developed and operated in relation to the processes created by the Insolvency Act and the previous Companies Act for the administration of sequestrated estates and companies wound up for inability to pay their debts. Pursuant to that policy, these processes fall to be administered immediately by trustees and liquidators despite pending appeals. If the purpose of section 18 had been to undo all that, one would have expected that measures would have been put in place to deal with or mitigate such consequences and that relevant provisions such as section 339 of the previous Companies Act would either have

been expressly repealed or amended. However, this was not done. Furthermore, the process initiated pursuant to the section 129(1) resolution takes only the interests of the company into account. A section 130 order setting aside the resolution is made after a hearing in court in which the interests of all parties who wished to advance their views have been considered.

For practical reasons it was safer to vest control of a company in the circumstances in the liquidators rather than the practitioner.

Balancing these considerations, I think that the submissions of counsel for the liquidators must prevail. The approach implicit in the propositions of counsel for the practitioner would lead to highly undesirable, indeed remarkable, consequences. For more than 100 years a legal policy has been developed and operated in relation to the processes created by the Insolvency Act and the previous Companies Act for the administration of sequestrated estates and companies wound up for inability to pay their debts. Pursuant to that policy, these processes fall to be administered immediately by trustees and liquidators despite pending appeals. If the purpose of s 18 had been to undo all that, one would have expected that measures would have been put in place to deal with or mitigate such consequences and that s 339 of the previous Companies Act would either have been expressly repealed or amended. None of that was done. Furthermore, the process initiated pursuant to the s 129(1) resolution takes only the interests of the company into account. A s 130 order setting aside the resolution is made after a hearing in court in which the interests of all parties who wished to advance their views have been considered.

PALALA RESOURCES (PTY) LTD v MINISTER OF MINERAL RESOURCES AND ENERGY

A JUDGMENT BY KEIGHTLEY AJ
GAUTENG HIGH COURT, PRETORIA
4 AUGUST 2014

2014 (6) SA 403 (GP)

Companies

The effect of section 73(6A) of the Companies Act (no 71 of 2008) is not to retrospectively revive a prospecting right that had lapsed by operation of section 56(c) of the Mineral and Petroleum Resources Development Act (no 28 of 2002).

THE FACTS

Palala Resources (Pty) Ltd held prospecting rights in terms of the Mineral and Petroleum Resources Development Act (no 28 of 2002). In 2010, Palala was deregistered in terms of section 73 of the Companies Act (no 71 of 2008) as a result of it having failed to lodge annual returns. Hectocorp (Pty) Ltd applied for, and was granted, the prospecting rights over the property.

Palala successfully applied to the Registrar of Companies for the restoration of its registration. The regional manager of the Department of Mineral Affairs refused to accept Palala's application for a renewal of its prospecting rights on the grounds that the effect of section 56(c) of the Minerals Act was that on deregistration Palala had lost its prospecting right, and could not apply for the renewal of the right.

Palala instituted an internal appeal to the acting director-general against the regional manager's decision to refuse to accept its renewal application. The Minister of Mineral Resources and Energy confirmed the regional manager's decision.

Palala brought an application to review the Minister's decision.

THE DECISION

The deeming provision of section 73(6A) of the Companies Act provides that upon restoration of registration, 'the company shall be deemed to have continued in existence as if it had not been deregistered'. Section 56(c) of the Minerals Act provides that any right, permit, permission or licence granted or issued in terms of the Act shall lapse, whenever a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the Minister for the consent in terms of section 11 or such permission has been refused.

The question was whether the deeming provision contained in section 73(6A) has the legal effect of reviving a prospecting right that lapsed by virtue of section 56(c) of the Minerals Act on deregistration of the company.

The effect of section 56(c) is that mining and prospecting rights held by companies which are deregistered will lapse, unless prior to the deregistration, the company applies for the Minister's written consent to cede or otherwise dispose of the right. The fact that section 56(c) expressly provides for an application to act as an exception to a right lapsing on deregistration, coupled with the fact that restoration of registration is not identified as an exception, is a strong indication that the legislature intended that only in the case of such an application, and no other, would a mining or prospecting right be protected from becoming void on deregistration.

There was no merit in Palala's contention that despite the lapsing of a mining or prospecting right on deregistration, the effect of the deeming provision in section 73(6A) was that the right revives by operation of law once a company's registration is restored. The effect of that section was not to retrospectively revive a prospecting right that had lapsed by operation of section 56(c).

WISHART v BLIEDEN NO

Companies

A JUDGMENT BY LEWIS JA
(MAYA JA, SWAIN JA, WILLIS JA
and MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
19 SEPTEMBER 2014

[2014] 4 All SA 334 (SCA)

A lawyer cannot be prevented from acting against a director of a company which earlier instructed him in matters which did not inform him of any confidential information in respect of that director which might have been used against the director.

THE FACTS

Judge Blieden was appointed to preside at an inquiry into the affairs of Avstar Aviation (Pty) Ltd. Upon application made by BHP Billiton Energy Coal South Africa Ltd, Blieden issued a summons against one of the company's former directors, Wishart, to appear at the inquiry and disclose specified documents. Subpoenas were also issued against Wishart and Bhayat, another director.

At the inquiry, Wishart contended that the lawyers representing BHP could not interrogate them because they had earlier acted on behalf of companies in which they had had interests. They contended that in acting against them on behalf of BHP they were placing themselves in a conflict of interests. They argued that they should be treated as clients, and so receive the same protection that they would have been afforded had they been direct clients of the lawyers. They contended that their interests closely converged with the companies in which they had earlier had interests and on whose behalf they had previously instructed the lawyers.

The lawyers had earlier acted on behalf of BHP but had also acted for some of the companies in which Wishart had an interest, where there had been no conflict of interests between BHP and those companies. They had been instructed in the conclusion of settlement agreements between BHP and those companies.

Wishart brought an application for an interdict restraining the lawyers from examining them at the insolvency inquiry.

THE DECISION

The law protects a former client of a lawyer from being prejudiced by having that representative, in whom trust has been reposed, and who is armed with information about that client, act against him or her. This however, was not the issue in this matter. The lawyers' client was BHP, not Wishart..

It was also clear that when they did act for Wishart's companies, their instructions were to reach a settlement with BHP.

The crucial fact was that Wishart was not a client of the lawyers and he had not disclosed any confidential information to the lawyers. There was no possibility, let alone probability, that the lawyers could use their secrets against them. In these circumstances, it was not permissible to extend the rule against a lawyer acting against a former client to prevent a lawyer acting against the director of a former client.

The application was dismissed.

ZHONGJI DEVELOPMENT CONSTRUCTION ENGINEERING COMPANY LTD v KAMOTO COPPER COMPANY SARL

A JUDGMENT BY WILLIS JA (MPATI P, MBHA JA, GORVEN AJA and MATHOPO AJJA concurring)
SUPREME COURT OF APPEAL
1 OCTOBER 2014

[2014] 4 All SA 617 (SCA)

Contract

A party contending that a matter in dispute between it and another party must be submitted to arbitration, should first submit the matter to arbitration before applying for an order declaring that the matter in dispute should be so submitted.

THE FACTS

Zhongji Development Construction Engineering Company Limited, a Chinese company, was invited by Bateman Minerals & Metals (Pty) Limited, acting on behalf of a Congolese company known as DRC Copper and Cobalt Project SARL to tender for the supply and construction of piling and civil works at the DCP's mining site near Kolwezi in the Democratic Republic of Congo. Arising from this invitation, Zhongji was awarded the tender.

In November 2007 Bateman, acting on behalf of DCP, informed Zhongji that, as a result of merger talks, Zhongji should suspend its construction operations for about three to six months. The parties concluded an interim agreement to provide for continuation of various aspects of the construction work and the supply of materials to Zhongji. The agreement contained no arbitration clause.

In August 2008, Zhongji and DCP concluded a written agreement. The agreement provided that disputes between the parties were to be finally settled under the Rules for the Conduct of Arbitrations as published by the Association of Arbitrators (Southern Africa). Any arbitration was to be conducted in South Africa.

On 5 December 2008, Zhongji was given due notice that the construction work by it was no longer to continue. As a result, Zhongji ceased operations and commenced with its demobilisation on 2 January 2009. Zhongji did no further construction work at the site. It issued invoices in respect of work done and delivered these to DCP.

In July 2009, DCP and Kamoto Copper Company SARL concluded a written agreement of merger in Kinshasa in the Congo. Kamoto contended that as the interim agreement was silent on dispute resolution procedures, any claims arising out of that agreement were not susceptible to arbitration. It contended that as it had not been a party to the dispute resolution procedures provided for in the main agreement, and in the light of both parties being peregrini of South Africa, there having been no attachment to confirm or found jurisdiction, the contract having been concluded outside of South Africa, and the performance of the contract having been outside of South Africa, no court in South Africa had jurisdiction to make any order as to whether the dispute was subject to the arbitration clause in the main agreement.

As a result of the non-payment of some of the invoices it had issued, and resulting disputes concerning payment, Zhongji claimed that the arbitration clause of the main agreement should be applied and the disputes submitted to arbitration. It applied for an order declaring that Kamoto had assumed the rights and obligations of DRC Copper and Cobalt Project SARL under the main agreement concluded between the applicant and DRC Copper and Cobalt Project SARL on 20 August 2008, and that it was bound by the arbitral regime provided for in the main agreement.

THE DECISION

The respective definitions of 'arbitration agreement' and 'arbitration proceedings' in the Arbitration Act confer wide powers on an arbitrator. In terms of rule 12.1 of the sixth edition of the Rules of the Arbitration Association the arbitrator may

decide any dispute regarding the existence, validity, or interpretation of the arbitration agreement and, unless otherwise provided therein, may rule on his own jurisdiction to act. Accordingly, once the arbitration tribunal has been duly appointed in terms of the main agreement, the rules of the Arbitration Association would give the tribunal itself jurisdiction to decide the issues which may be raised before it, including those which had been raised by Zhongji.

In the light of an arbitrator's power to determine his or her jurisdiction in an issue that arises from the referral to arbitration itself, there was, therefore, no reason why the dispute about whether or not the claims arising from Zhongji's performance in terms of the interim agreement was indeed arbitrable should not be decided by the arbitration tribunal prior to an application to the High Court. In the event that the arbitration tribunal decided in Zhongji's favour, Zhongji could then apply, in terms of section 31 of the Arbitration Act, for the award to be made an order of court. In terms of section 19(1)(a) of the old Supreme Court Act (no 59 of 1959), the High Court has jurisdiction in relation to all causes arising within, its area of jurisdiction and all other matters of which it may according to law take cognisance. Once the arbitration had commenced, the High Court would therefore have jurisdiction to exercise its powers in terms of the Arbitration Act.

The process of arbitration had therefore to be respected. Zhongji's application to the High Court was accordingly premature. Kamoto came perilously close to infringing Zhongji's right to arbitration under the main agreement. Nevertheless, the relief which Zhongji Construction sought in the High Court related to an abstract or academic question, and application ought to have been dismissed for this reason alone. The arbitration had first to be given the opportunity to have run its course before the court considers any application relating thereto.

In the present matter, the forum selected by Zhongji and DCP is that of a private arbitration. Zhongji cannot be prejudiced if the arbitration tribunal gives effect to the arbitration clause and rules on the issues which it sought to have resolved by the High Court. If the tribunal finds for Zhongji on the second and third defences raised in the application and makes an award in its favour, it can apply to have the award made an order of court. This order then becomes enforceable under the New York convention. If the tribunal rules against it, it has chosen this forum. Kamoto is entitled to raise a question of the jurisdiction of the tribunal to deal with the matter as well as the second and third defences in resisting an award being made by the Tribunal. Section 33 of the Act entitles a party to apply to set aside an award where an arbitration tribunal has exceeded its powers. It has been held that if "an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under s 33(1)(b)". Within the compass of the Rules, a ruling on jurisdiction of an arbitration tribunal can be challenged in court.3 Kamoto therefore has remedies to protect itself in the event that an arbitration tribunal exceeds its powers. This is consistent with recognising that a High Court has jurisdiction but that its powers are circumscribed in deference to the autonomy of the parties to the arbitration clause.

FOURIER APPROACH (PTY) LTD v WEST

Contract

A JUDGMENT BY LEACH JA (NUGENT JA, SHONGWE JA, WILLIS JA AND MEYER AJA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2013

2014 SACLR 20 (SCA)

The phrase 'on sales realised' refers to amounts receivable upon the sale of an asset and does not include amounts receivable as interest on the price.

THE FACTS

Fourier Approach (Pty) Ltd employed West as a sales representative. She earned a commission on sales of Fourier's software to companies. In terms of clause 6.3 of the employment agreement, West was entitled to be paid an amount of 5% on sales realised, payable in two payments, 2½% at the formalisation of the contract and the other 2½% at the final payment on the contract.

West was the effective cause of the sale of a software system to a company known as 'ACMB'. The price payable was R13.3m. It was to be paid in instalments, and outstanding amounts were to attract interest payable to Fourier. The total interest which became payable to Fourier was R3 573 569,50.

West contended that she was entitled to payment of 5% on the interest. She sued for payment thereof.

THE DECISION

The issue rested on the interpretation of the words 'on sales realised' as used in the agreement.

The ordinary meaning of 'realise' is 'sell for' or 'convert into cash'. It follows that an asset is realised when it is sold and paid for. This is what was envisaged by clause 6.3. This was to be compared with interest which, as defined in the Oxford Dictionary represents 'money paid for the use of money lent or for delaying the repayment of a debt' or as defined in the Collins Dictionary of the English Language 'money paid for the use of credit or borrowed money'. In the context of a sale interest therefore represents what is paid by the purchaser for the benefit of being extended credit in respect of the purchase price.

Applying these definitions, interest could not be regarded as being part of a 'sale realised'. It was therefore not something to which the 5% commission could be applied.

VAN DER MOLEN v FAGAN

Contract

A JUDGMENT BY MAYA JA (LEWIS JA, WALLIS JA, PILLAY JA AND SWAIN AJA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2013

2014 SACLR 26 (SCA)

A sale on credit is usually accompanied by an intention that ownership is reserved until payment of the full purchase price. In such circumstances, ownership will not pass to the buyer as the seller does not intend to transfer ownership.

THE FACTS

Fagan sold a Mercedes Benz to Amod for R650 000.00. She handed him the vehicle's registration document and agreed to accept payment at a later date when ownership would pass to Amod. Amod's husband sold the vehicle to Victor Miller Cars CC, a car dealership. Victor Miller registered the vehicle in its name, and eight months later, sold it to Van der Molen.

Amod did not pay Fagan for the vehicle on due date. In consequence, Fagan located the car and sued for its return, basing her claim on her rights as owner. Van der Molen resisted the claim on the grounds that when Fagan sold the car to Amod she intended ownership to pass. Alternatively, Van der Molen contended that Fagan was estopped from asserting ownership of the vehicle because by handing the vehicle's original documents over to Amod she represented that he was then its owner, or entitled to dispose of it, and also negligently failed to report it as stolen timeously. This representation was the proximate cause of his acting to his prejudice.

THE DECISION

The initial sale agreement was a sale on credit because it provided for deferral of payment. The parties could then validly agree that ownership would not pass until the purchase price had been paid. It was inconceivable that Fagan would have released the vehicle to Amod without such a reservation of ownership. Therefore, there was no intention to pass ownership at the initial sale.

As far as estoppel was concerned, Van der Molen argued that Fagan's negligent representation lay in her handing over the vehicle with its registration documents to Amod. However, what Fagan did in relation to Amod was unconnected to any representations made by the car dealership from which Van der Molen purchased the vehicle. It could not be said that Van der Molen took transfer of the vehicle by reason of any representation made by Fagan. Nothing Fagan did could have caused prejudice to him or the car dealership.

Van der Molen was obliged to return the vehicle to Fagan.

THERON N.O. v LOUBSER N.O.

Contract

A JUDGMENT BY PONNAN JA (LEACH JA, MAJIEDT JA, WALLIS JA AND PETSE JA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2013

2014 SACLR 33 (SCA)

When the question of a person's competence to act for a trust is in issue, the party challenging such competence sufficiently establishes locus standi to act by asserting that he is a trustee of the trust. The judge also said that it is not necessary to demonstrate compliance with the procedures necessary to perform valid acts for the trust if the prior question of a party's capacity to act as trustee is brought into question.

THE FACTS

Theron and the second appellant, in their capacities as trustees of various trusts, brought applications against Loubser and the second respondent, in their capacities as trustees of the trusts, and in their personal capacity.

Clause 4.5.1, 4.5.2 and 4.5.3 of the trust deeds provided that two trustees would constitute a quorum. Sufficient notice of a meeting of the trustees and the issues discussed at the meeting will be, were to be given to each trustee. No decision taken at any meeting of trustees would be valid and in force unless the trustees present constituted a quorum, and all voted in favour of the resolution voted.

The High Court granted the relief sought in the first application and rejected the second and third applications. The latter two applications were rejected on the grounds that the Therons lacked locus standi to bring the applications as they had not shown compliance with clauses 4.5.1, 4.5.2 and 4.5.3 of the trust deeds. Theron appealed.

THE DECISION

Theron stated that he brought the applications in his capacity as trustee. In doing so, he established his interest in the applications sufficient to bring them before court.

In demanding compliance with clauses 4.5.1 to 4.5.3 of the trust deed, sight was lost of the fact that the litigation was not being conducted in the name of or on behalf of the trust. The application to court was intended to address that very question, ie who were the trustees of each of the trusts in question? Until that issue was resolved it would remain the subject of dispute between the parties as to who was act as such as contemplated by the trust deeds. In those circumstances any person who had an interest in those trusts, whether as trustee or beneficiary or otherwise, was entitled to approach the court for declaratory relief.

The High Court had therefore incorrectly dismissed the second and third applications.

As the substantive issues between the parties remained unresolved, the applications were remitted to the High Court for further consideration.

MOTOWEST BIKES & ATVS v CALVERN FINANCIAL SERVICES

Contract

A JUDGMENT BY MAJIED TJA (PONNAN JA, BOSIELO JA, VAN DER MERWE AJA AND ZONDI AJA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2013

2014 SACLR 504 (SCA)

A contract of deposit requires that the party taking deposit must return the thing deposited to the owner.

THE FACTS

Calvern Financial Services CC took its vehicle to car wash premises managed and run by Motowest Bikes & ATVS for the purpose of having the vehicle washed and cleaned. The car was left at the premises, and the owner arranged to return later in the day to obtain the car. The car's keys were left in the ignition.

In the office of Motowest, the terms of service were put on a table. They included a provision that any car washed by Motowest was subject to the risk of loss borne by the owner of the car.

While the car was in the possession of Motowest, it was stolen. Calvern claimed damages. It contended that a contract of deposit had been concluded between the parties and that this imposed the obligation on Motowest to ensure that the car was returned to the owner.

THE DECISION

The contract of deposit is an agreement in terms whereof a thing is delivered for safekeeping, returnable on demand. It imposes upon the depositary a legal obligation to exercise reasonable care in respect of the goods deposited with it. In the event of the goods being damaged, lost or destroyed while in its possession, the depositary becomes liable in damages to the owner thereof, unless it can show that the damage, loss or destruction occurred without intention or negligence on its part.

The parties in the present case had concluded a contract of deposit. Once Motowest took possession of the vehicle to be washed and cleaned, it became a depositary. This meant that it accepted a duty of care in respect of the car. It was clear that it had not complied with that duty.

As far as the owner's risk term was concerned, the alleged term had not been shown to be part of the contract concluded between the two parties. The term had not been brought to Calvern's attention.

ENGEN PETROLEUM LTD v GOUDIS CARRIERS (PTY) LTD

A JUDGMENT BY SUTHERLAND J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
20 OCTOBER 2014

[2015] 1 All SA 324 (GJ)

Insolvency

Section 341(2) of the Companies Act (no 61 of 1973) has no application in respect of dispositions made by a company after the date upon which a final winding-up order is granted.

THE FACTS

On 14 September 2012, a creditor of Goudis Carriers (Pty) Ltd filed a winding up application against Goudis, and on 23 October 2012, a final winding-up order was given against it. Engen Petroleum Ltd did not know about either event. Engen continued to supply fuel to Goudis until 30 November 2012, and learnt of the order on 10 December 2012.

A few days before the winding up application was filed, Goudis made a payment to Engen. After the final order was granted, Goudis made two payments to Engen at a time when Engen was as yet unaware of the winding up application, and another three after Engen had become aware of it and informed of the appointment of a liquidator.

Goudis claimed that it was entitled to repayment of the sums paid after the final winding-up order was granted on 23 October 2012.

THE DECISION

Section 341(2) of the Companies Act (no 61 of 1973) provides that every disposition of its property by any company being wound up and unable to pay its debts made after the commencement of the winding up, shall be void unless the court otherwise orders.

The primary purpose of section 341(2) is to address the anomaly that occurs as a result of the retrospective invalidation of dispositions by a company which were initially lawful and valid. It confers a power on a court to intervene in respect of dispositions which a company may lawfully make during the period between the date upon which the application for a winding-up has been presented and the date upon which the final winding-up order is granted. It has no application in respect of dispositions made by a company after the date upon which a final winding-up order is granted because such dispositions cannot be valid as the office bearers of the company have no lawfully authority to make such dispositions.

The court has no power in terms of section 341(2) over dispositions which occur after the winding-up order.

Goudis was entitled to repayment of the sums it had paid.

EX PARTE ERASMUS

A JUDGMENT BY
BERTELSMANN J
GAUTENG HIGH COURT,
PRETORIA
15 OCTOBER 2014

2015 (1) SA 540 (GP)

In sequestration applications, the valuator must confirm under oath that he or she personally inspected the assets that are referred to in the valuation

THE FACTS

Erasmus and his wife to whom he was married in community of property, voluntarily applied for the sequestration of their joint estate. The application was brought on their behalf by their attorney. His costs were included in the administration costs of the estate, as were the auctioneer's commission, the trustee's remuneration and the valuator's fees.

The valuator placed a value upon the estate assets. It appeared from the valuator's report that he presented a valuation of second-hand furniture without ever inspecting the assets. After inquiry, he stated that he confirmed that the valuation was prepared after all relevant information had been obtained from the applicant for purposes of the valuation, which information included a list of assets, condition of the assets, age and photographs thereof. The assets were not inspected physically.

THE DECISION

It was self-evident that the valuation was completely unacceptable. It lacked any semblance of an independent confirmation that the assets did in fact exist. No professional assessment of the assets' alleged value had taken place. A valuator's contribution to an application for voluntary surrender depends for its admissibility as opinion evidence upon the indisputable independence of the expert. However, in the present case, whatever information the so-called 'expert' valuator used to perform his function was neither obtained nor assessed or analysed by the witness. The applicant who purportedly provided the list of the assets and other information was no expert and unable to provide information regarding the age and condition of the assets for purposes of valuation thereof. There was also no affidavit by the applicant to confirm or to explain his role in this 'valuation'.

A valuator must personally inspect assets to be valued. It was now a formal rule of practice that a valuator in applications of this nature must confirm under oath that he or she personally inspected the assets that are referred to in the valuation.

The application was dismissed.

EX PARTE KROESE

A JUDGMENT BY LANDMAN J
NORTH WEST DIVISION,
MAHIKENG
18 APRIL 2013

2015 (1) SA 405 (NWM)

An applicant for voluntary surrender of an estate may not waive his rights as provided for in section 82(6) of the Insolvency Act (no 24 of 1936).

THE FACTS

Kroese brought an application for the voluntary surrender of his joint estate with his wife to whom he was married in community of property. The movable assets of the estate, consisting of household items, were valued at R68 000.00. The liabilities of the estate were valued at R175 951,79.

Kroese stated that he was aware that some of the items listed in the movable property valuation might be viewed as part of basic household necessities in terms of section 82(6) of the Insolvency Act (no 24 of 1936). He affirmed that he surrendered all assets listed into the hands of the trustee to be appointed, thereby waiving the protection afforded by the Insolvency Act pertaining to these assets.

Section 82(6) provides that from the sale of the movable property shall be excepted the wearing apparel and bedding of the insolvent and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors, or the Master, may determine and the insolvent shall be allowed to retain, for his own use any property so excepted from the sale.

THE DECISION

The purpose of section 82(6) is to preserve the right to life and the dignity of an insolvent and his or her or their dependants and to place them in a position to rebuild their lives. The question was whether an insolvent person could waive the rights given in that sub-section, given that the right to dignity is at least one of the human rights that is inalienable.

It is not possible to waive a right to basic necessities before the assets, including the assets constituting basic necessities, have been surrendered. The effect of this is that the advantage to creditors could not lawfully be increased by the action contemplated by Kroese. It followed that whatever factors might be raised to show that Kroese, because of external circumstances, would not be rendered destitute, were irrelevant, because the waiver could not lawfully be made before the application for surrender of the estate had been accepted.

Taking into account the vital importance of the inalienable right to human dignity and whatever dependants they might have and the right to work or trade, as well as the purpose of excepting basic necessities, the Kroeses could not waive their entitlement.

The application was dismissed.

FRIEND v SENDAL

A JUDGMENT BY LEGODI J
(FABRICIUS J AND KUBUSHI J concurring)
GAUTENG DIVISION, PRETORIA
3 AUGUST 2012

2015 (1) SA 395 (GP)

Credit Transactions

A single loan by one person to another does not oblige the lender to register as a credit provider in terms of the National Credit Act (no 34 of 2005).

THE FACTS

In December 2006, Friend acknowledged that he was indebted to Sendal in the sum of R1 225 000. He undertook to pay this in full by 1 December 2007. He also undertook to pay interest on the debt calculated at the prime rate charged by Standard Bank from time to time on unsecured overdraft facilities.

By 1 December 2007, Friend had paid a portion of the capital amount, but failed to make payment of the remainder of the capital amount, leaving a capital amount outstanding of R620 000.

Sendal brought an application against Friend for the payment of R620 000 plus interest. Friend opposed the application on the grounds that since the acknowledgment of debt was a credit agreement as envisaged in the National Credit Act (no 34 of 2005), Sendal was not entitled to bring the application without having given notice in terms of section 129 of the Act. Friend also argued that because the acknowledgment of debt amounted to a credit agreement, the agreement was null and void as Sendal was not registered as a credit provider.

THE DECISION

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

The acknowledgment of debt deferred payment of the sum of R1 225 000 to 1 December 2007. It also provided for payment of interest. The acknowledgment of debt was therefore a credit agreement as envisaged in section 8(4)(f). Although this meant that Sendal could be considered a credit provider as defined in section 40 of the Act, the question was whether or not he was obliged to have registered as such under the Act.

Section 40 requires registration as a credit provider when the number of credit transactions concluded exceed a certain point It does not.refer to a single principal debt exceeding the threshold or to a single credit agreement in respect of which the amount exceeds the threshold of R500 000. The provisions of section 40(1)(b) should be interpreted as they read. It is 'the total principal debt . . . under all outstanding credit agreements' that bring on an obligation to register as a credit provider. It was Sendal's frequency of providing credits under section 40(1)(b) that was envisaged.

The National Credit Act did not assist Friend. The application succeeded.

STANDARD BANK OF SOUTH AFRICA LTD v RENICO CONSTRUCTION (PTY) LTD

A JUDGMENT BY SUTHERLAND J
GAUTENG HIGH COURT,
JOHANNESBURG
20 SEPTEMBER 2012

2015 (2) SA 89 (GJ)

Set off may not be applied in respect of a debt which is not liquidated, such as a damages claim.

THE FACTS

Standard Bank of South Africa Ltd factored invoices issued by Roofcrafters (Pty) Ltd. The accounts of Roofcrafters recorded Renico Construction (Pty) Ltd as indebted to Roofcrafters in a sum of R2 441 791,67.

The bank claimed from Renico the sum of R953 599,91. This was composed of R811 501,13 for factored debts owed by Renico to Roofcrafters and R151 424,72 for an overdraft facility.

Renico alleged that Roofcrafters breached a lease agreement, and owed it R601 215,72 in arrear rental, as well as damages amounting to R2 092 612,30. It contended that it was entitled to set off these amounts against the amount the bank alleged it owed Roofcrafters.

THE DECISION

Set off can be asserted only if both debts are due to and owed by the same pair of persons, both debts are liquidated, and both debts are due and payable. As far as the damages claim was concerned, this was not a liquidated claim. Until a court had determined the amount owing, it was not a sum that could be said to be owing.

Renico had therefore not shown that it had liquidated claim that could be set off against Roofcrafters' claim against it.

The bank was entitled to payment of R811 501,13.

The fatal flaw in the respondent's case is that its true measure of damages in respect of the breached lease is not the simplistic totting-up of the gross revenue that would have flowed in under the Roofcrafters' lease, less the gross revenue that will flow in under the successor lease over the next several years.
The correct computation of contractual damages can never, in principle, be mere arithmetic. A value judgment is an element of the computation of the quantum, which computation embraces the effects of a reasonable effort to mitigate the damages. The figure of damages cannot under such circumstances be determined until that debate is exhausted, as a rule, before a court.

LEPOGO CONSTRUCTION (PTY) LTD v GOVAN MBEKI MUNICIPALITY

A JUDGMENT BY PONNAN JA (PILLAY JA, SHONGWE JA, FOURIE AJA and MATHOPO AJA concurring)
SUPREME COURT OF APPEAL
29 SEPTEMBER 2014

[2015] 1 All SA 153 (SCA)

Contract

In order to show that a binding contract has been concluded between a contractor and a municipality which has set out the terms of contracting in its invitation to tender, the contractor must show that offer and acceptance as stipulated in those terms has taken place.

THE FACTS

In November 2008, the Bid Evaluation Committee of the Govan Mbeki Municipality recommended that Lepogo Construction be appointed for the construction of a 10ML reservoir for the municipality. On 20 January 2009 a memorandum was despatched by the chairperson of that committee to the chairperson of the BEC, and was copied to the municipal manager reading 'Kindly be advised that the Bid Adjudication Committee at its meeting held on 15 January 2009 has resolved as follows: that, Lepogo Construction be appointed on offer for the above mentioned Bid for an amount of R12 859 264.00 on condition the department provide this committee with vote numbers as proof that the amount of R12 859 264.00 is budgeted for this project.'

The Municipal Manager added in manuscript at the foot of the memorandum:
'Approved. The department (TES) (Department of Technical and Engineering Services) to handle the issue of the budget with the CFO.' The memorandum was then signed by the Municipal Manager and dated 21 January 2009.

On 26 January 2009, and without being authorised to do so, the chairperson of the BEC faxed the memorandum to the consulting engineer, Bigen Africa Services (Pty) Ltd. It then informed Lepogo that on behalf of its client, the municipality, Lepogo was appointed for the construction of the reservoir.

In April 2009, Bigen withdrew the award of the bid on behalf of the municipality. Lepogo took the view that the municipality was not entitled to withdraw the award of the bid, as acceptance of the municipality's offer had taken place in terms of the provisions contained in the Contract Document which had been incorporated in the invitation to tender.

The Contract Document provided that acceptance of the tender offer would take place only if the tenderer complied with the legal requirements, if any, stated in the tender data. It would notify the successful tenderer of the employer's acceptance of his tender offer by completing and returning one copy of the form of offer and acceptance before the expiry of the validity period stated in the tender data. Provided that the form of offer and acceptance did not contain any qualifying statements, it would constitute the formation of a contract between the employer and the successful tenderer as described in the form of offer and acceptance. It would then prepare and issue the final draft of the contract documents to the successful tenderer for acceptance as soon as possible after the date of the employer's signing of the form of offer and acceptance.

THE DECISION

The form of offer and acceptance had not been completed by the parties. It is the completion of that form that would constitute the formation of a contract between the municipality and the successful tenderer. The agreement only came into effect on the date when the tenderer received a fully completed version of the contract document. Even then, a contractor had five days after the signing and issuance of the final version of the contract document by the municipality to notify the municipality of its non-acceptance of the contents of the agreement. Only thereafter, did a 'binding contract' come into existence between the parties.

The implication of this was that no contract had been concluded between the parties. Lepogo however, argued that the words employed in the contract document were obscure and lacked clarity. But, the contract did not admit of any doubt. The manner in which the contract was to be concluded was clearly prescribed in the municipality's invitation to tender. Thus, whatever was done prior thereto was simply preliminary to the conclusion of and did not give rise to a binding agreement between the parties. It followed that in relying on the letter of appointment from the consulting engineer as having given rise to a contract between it and the municipality, Lepogo misconceived the position, because there was in truth no decision on the part of the municipality to approve or accept its tender.

The claim failed.

It is undisputed that the form of offer and acceptance had not been completed by the parties. It is the completion of that form, according to clause 3.13, that constitutes the formation of a contract between the Municipality and the successful tenderer. And, in terms of clause 3.16, the agreement only comes into effect on the date when the tenderer receives a fully completed version of the contract document. Even then, according to clause 3.16, a contractor has five days after the signing and issuance of the final version of the contract document by the Municipality to notify the Municipality of his non-acceptance of the contents of the agreement. Only thereafter, in the words of clause 3.16, does a "binding contract" come into existence between the parties. Thus, what clause 3.13 does is to stipulate the procedure to be followed for the conclusion of an agreement and clause 3.16 goes further in stipulating when a binding contract comes into existence.

SPRING FOREST TRADING CC v WILBERRY (PTY) LTD

Contract

A JUDGMENT BY CACHALIA JA (LEWIS JA, BOSIELO JA, SWAIN JA and MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
21 NOVEMBER 2014

2015 (2) SA 118 (SCA)

An advanced electronic signature referred to in the Electronic Communications and Transactions Act (no 25 of 2002) is not applicable to signatures to private agreements. An electronic signature referred to in the Act is applicable to such agreements. Whether or not such a signature has been given should be determined in accordance with the practical and non-formalistic way the courts have treated the signature requirement at common law.

THE FACTS

Wilberry (Pty) Ltd appointed Spring Forest Trading CC as its operating agent. This gave Spring Forest the right to promote, operate and rent out Wilberry's Mobile Dispensing Unites to third parties. The agreement contained a non-variation clause providing that no variation or consensual cancellation would be effective unless reduced to writing and signed by both parties. The parties also concluded four subsidiary rental agreements, all of which were subject to Wilberry's standard terms of business as set out in the master agreement. They also contained non-variation clauses.

Because Spring Forest experienced difficulty in meeting its obligations under the agreements, the parties met to discuss a settlement. Following the meeting, Spring Forest sent an email message to Wilberry in which it stated that four options were given to it, one of which was to cancel the agreements and walk away, in which case there would be no further claim or legal action from either side. In a replying email message, Wilberry confirmed this to be the case, subject to all arrear rentals due at the date of handover would remain owing. Spring Forest then confirmed acceptance of the option to cancel.

Spring Forest paid Wilberry the arrear rentals.

Wilberry later contended that the agreement had not been cancelled as the exchange of email messages constituted negotiations between the parties which had not culminated in an agreement. Wilberry also contended that in any event, the effect of the non-variation clause was to prevent any cancellation without a signature, and no signature had been given as provided for in the Electronic Communications and Transactions Act (no 25 of 2002).

THE DECISION

The contention that the email messages merely recorded a negotiation and did not amount to an agreement to cancel was without merit. The email messages said unambiguously that once Spring Forest settled the arrear rental and returned Wilberry's equipment it could 'walk away' without any further legal obligation. This could only mean that the parties considered that all agreements between them would be cancelled once Spring Forest had satisfied two obligations: payment of the arrear rental and return of the equipment. The obligations were met and the agreements therefore did show a consensual cancellation.

Section 13(1) of the Act provides that where the signature of a person is required by law and such law does not specify the type of signature, that requirement in relation to a data message is met only if an advanced electronic signature is used. Section 13(3) provides that where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if (a) a method is used to identify the person and to indicate the person's approval of the information communicated, and (b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.

Section 13(1) did not apply to the facts of the case. A signature to the agreements was not required by law, and in any event an advanced electronic signature is

not applicable to private agreements between parties.

The effect of the non-variation clause was to require a signature by both parties in order to bring about a cancellation of the agreements. An electronic signature is defined in the Act as 'data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature'. So long as the 'data' in an email message is intended by the user to serve as a signature and is logically connected with other data in the email message, the requirement for an electronic signature is satisfied. This is consistent with the practical and non-formalistic way the courts have treated the signature requirement at common law.

The typewritten names of the parties at the foot of the email messages, which were used to identify the users, constituted 'data' that was logically associated with the data in the body of the email messages, as envisaged in the definition of an 'electronic signature'. They therefore satisfied the requirement of a signature and had the effect of authenticating the information contained in the email messages.

Wilberry's contentions were rejected.

The respondent's contention that the emails merely record a negotiation and do not amount to an agreement to cancel is utterly without merit. The emails say emphatically and unambiguously that once the appellant settles the arrear rental and returns the respondent's equipment it may 'walk away' without any further legal obligation. This can only mean — and did mean — that the parties considered that all agreements between them (the master and subsidiary rental agreements) would be cancelled once the appellant had satisfied two obligations: payment of the arrear rental and return of the equipment. The obligations were met and the agreements therefore do evince a consensual cancellation. Whether this cancellation by email fulfilled the requirements of the non-variation clauses to be in writing and signed by both parties requires a consideration of the relevant provisions of the Act.

WRIGHT v WRIGHT

A JUDGMENT BY MAJIEDT JA (MAYA JA, SHONGWE JA, SALDULKER JA and GORVEN AJA concurring)
SUPREME COURT OF APPEAL
22 SEPTEMBER 2014

2015 (1) SA 262 (SCA)

A referee's report given in terms of section 19bis of the Supreme Court Act (no 59 of 1959) can only be rejected on the narrow grounds that the referee did not exercise the judgment of a reasonable man, ie his judgment was exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result. Evidence to contest a referee's report must be supported by confirmation of the facts on which the contest rests.

THE FACTS

The appellant and respondent were brothers who conducted a metal business in partnership. The relationship between them broke down. A court order was obtained dissolving the partnership, and ordering the appellant to provide an accounting of the partnership business, debatement of the account and payment of any amount found to be due to the respondent. The court ordered that a referee be appointed in terms of section 19bis of the Supreme Court Act (no 59 of 1959). The section provides for the appointment of a referee to enquire and report upon, inter alia, a matter which relates wholly or in part to accounts.

A referee was appointed. The referee evaluated the files, documents and reports of the parties' expert witnesses. Both parties engaged the services of chartered accountants to evaluate the referee's work. Based on his evaluation of the experts' submissions and supporting documentation, the referee concluded that the appellant owed the sum of R1 085 000 and interest to the respondent as his share of the partnership's profits. The appellant's chartered accountant challenged the referee's findings in various respects, and concluded that the total profit due was only R156 106.

After the referee had submitted the account, the appellant contested the accuracy of the report and contended that the court should not adopt the referee's report as there was a dispute of fact concerning its findings.

THE DECISION

The position of a referee under s 19bis is similar to that of an expert valuator who only makes factual findings. It is dissimilar to that of an arbitrator who fulfils a quasi-judicial function. A valuation can be rectified if the valuer does not exercise the judgment of a reasonable man, ie his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result. This was the position in respect of the referee's report — it could only be impugned on those narrow grounds.

In order to position its attack within these conditions, the appellant had to present first hand, primary evidence to underpin the factual disputes. Until it was properly impugned on this basis, the referee's report stood as the court's factual findings upon adoption without modification. It was not for the respondent to persuade the high court that the referee's report and factual findings were correct. That would subvert the purpose of the section.

The appellant's accountant prepared his report and reached his conclusions solely on the basis of the books of account and other source documentation provided by the appellant. The appellant did not submit confirmation of the accuracy of the books of account by the person who had written them up. The absence of such confirmation of the material given to the appellant's accountant to enable him to prepare his report was fatal, because without that confirmation, his report constituted inadmissible hearsay evidence.

In any event, no substantiation for the challenges was provided by the accountant. None of the challenges contained any motivation in support of each challenge.

The court therefore correctly adopted the referee's report.

MITCHELL v CITY OF TSHWANE METROPOLITAN MUNICIPAL COUNCIL

A JUDGMENT BY FOURIE J
GAUTENG DIVISION, PRETORIA
8 SEPTEMBER 2014

2015 (1) SA 82 (GP)

Property

A municipality may not assert its rights in terms of section 118(3) of the Local Government: Municipal Systems Act (no 32 of 2000) if a property has been sold in execution and the transferee has taken transfer after obtaining a certificate indicating that the outstanding municipal debt for the two years preceding the date of application therefor has been paid.

THE FACTS

Mitchell purchased erf 296, Wonderboom Township, Gauteng, at a sale in execution. The property was situated within the municipal boundaries of the City of Tshwane Metropolitan Municipal Council.

The council issued a certificate indicating that the total historical municipal debt, including municipal debts older than two years, was R232 828,25. A dispute with regard to the validity of this certificate then ensued, and then the council issued a new certificate indicating that the outstanding municipal debt for the two years preceding the date of application for the certificate amounted to R126 608,50. After payment of this amount Mitchell took transfer of the property. The outstanding balance of R106 219,75, representing historical debts older than two years, remained unpaid.

Mitchell sold the property to Prinsloo. When Prinsloo applied to the council for an account for the provision of services to the property, the council refused to do so on the grounds that the historical debt remained unpaid. It asserted its right under section 118(3) of the Local Government: Municipal Systems Act (no 32 of 2000). The sub-section provides that an amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

Mitchell contended that this right could be enforced over the proceeds of the property and/or against the previous owner only. He applied for an order declaring that the council's statutory hypothec was extinguished by the sale in execution and transfer of the property into his name.

THE DECISION

To determine whether the council's right of security was still effective after transfer of the property, one had to ask what the nature of this right was. Section 118(3) creates a real right of security in favour of a municipality.

In terms of the common law, when mortgaged properties have been sold and delivered pursuant to a sale in execution, the real right of security, or hypothec, was extinguished and the new owner would be granted a clean title. Under the circumstances of this case - when the council did not exercise its right of preference over the proceeds of the sale - the council's statutory hypothec was extinguished by the sale in execution and subsequent transfer of the property into the name of Mitchell. He then obtained a clean title to the property.

The historical debts older than two years which were incurred prior to the sale in execution remained unaffected by the subsequent transfer of the property into the name of Mitchell. However, Mitchell and his successors in title were not liable for the payment of this debt. It was incurred by his predecessor in title. Accordingly, the council had no right to refuse the supply of municipal services to Mitchell or his successor in title with regard to this property only because of the outstanding principal debt.

The application succeeded.

PICKARD v STEIN

A JUDGMENT BY DODSON AJ
GAUTENG HIGH COURT,
JOHANNESBURG
20 JUNE 2014

2015 (1) SA 439 (GJ)

If a property owner grants another a right which is necessarily and naturally obstructive of a servitude held in its favour, it thereby abandons the servitude.

THE FACTS

Pickard and Stein were neighbours. A praedial servitude was registered in favour of Stein's property against the title deeds of both properties. In terms of the servitude, the owner of Pickard's property was precluded from erecting in a strip of land 17,32 m long and 6,3 m wide along part of their common boundary any structures, or planting any vegetation exceeding 0,91 m in height, or fence on the servitude area other than a diamond mesh wire fence not exceeding 1,22 m in height. Stein grew vegetation on his property exceeding the height referred to in the servitude, and also constructed a wall along the boundary.

Pickard subdivided his property and sold the new portion to a certain Mr Beira. When Beira commenced building operations on this portion, Stein expressed concern that a double-storey house was to be constructed. Beira assured him that this would not happen, and agreed to increase the height of the boundary wall and remove the vegetation. Beira did so. At a later stage, he increased the height of the boundary wall further, at Stein's request.

At a later stage, Stein contended that the new building encroached on the servitude, and demanded that it be removed.

Pickard applied for an order declaring the servitude abandoned and deleting it from the title deeds.

THE DECISION

It is possible to infer from the principle that a servitude is not validly created unless it provides a distinct benefit or advantage to the dominant tenement, that if the utility a praedial servitude previously provided to the dominant tenement has permanently ceased, the servitude itself will become extinguished.

Pickard argued that the utility of the servitude was the provision of light so that when fruit orchards were cultivated in the area, this could take place without hindrance. However, there was no evidence that while this might have fallen away, the modern need for security in the form of high walls had extinguished the utility of the servitude.

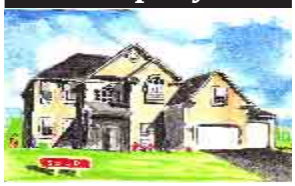
It remained true that a servitude could be cancelled by abandonment. Stein's conduct in allowing the vegetation to grow to the density and height that they did was not consistent with an intention strictly to enforce the servitude. However, this took place on his property. Applying *Margate Estates Ltd v Urtel (Pty) Ltd* 1965 (1) SA 279 (N), it was not a case of the servient tenement-holder, Pickard, having conducted himself in breach of the servitude registered over his property. Furthermore, one could not infer, merely from allowing the vegetation on the property to grow, the grant by Stein to Pickard of some right inconsistent with the servitude over his property.

As far as the wall was concerned, one had to ask whether Stein granted to Pickard a right that was 'necessarily and naturally obstructive of the servitude'. The evidence showed that the erection of the solid wall from ground level upwards on Pickard's property must have impacted dramatically on the flow of light into Stein's property. The wall necessarily and naturally obstructed the servitude in all its components. The erection of the wall also came about as a result of a request from Stein and was agreed to by Pickard and Beira. The result was that Stein abandoned her servitudinal rights.

The application succeeded.

STIELER PROPERTIES CC v SHAIK PROP HOLDINGS (PTY) LTD

Property



A JUDGMENT BY
MOSIKATSANA AJ
GAUTENG HIGH COURT,
JOHANNESBURG
1 OCTOBER 2014

[2015] 1 All SA 513 (GJ)

A sale of fixed property is not rendered void because the property as described in it does not exist at the time the sale is concluded as such property may come into existence at a later stage. An arbitration agreement incorporated in such an agreement must be followed if either party contests matters arising from the agreement.

THE FACTS

Stieler Properties CC purchased immovable property, described as 'Section 1 Erf 1282 Parkrand Ext 3 situated at 7A Crystal Crescent, Golden Crest Country Estate, Parkrand Ext 3' from Shaik Prop Holdings (Pty) Ltd, for R3 040 000. Clause 16.1 provided that if any dispute arose between the parties, such dispute was to be resolved by way of arbitration before a single arbitrator. Stieler paid the full purchase price and took possession of the property.

The parties concluded an addendum to the sale agreement in which the property, was described differently, ie as 'Portion Erf 1282 Parkrand Ext 3, Registration Division I.R, the province of Gauteng, in extent . . . square metres.'

When there was a delay in effecting transfer of the property, Stieler demanded that transfer take place. The conveyancers attending to transfer advised that the homeowners' association had declined to give consent to sectionalisation, but would permit Shaik to sub-divide. They proposed transferring the entire property to Stieler, and later effecting the subdivision.

Stieler alleged that Shaik was in breach of contract and brought an application for an order declaring that the sale agreement was void due to the non-existence of the property described in the sale agreement, alternatively due to impossibility of performance, occasioned by Shaik's inability to sectionalise and effect transfer. In the alternative, it claimed the contract had been cancelled as a result of breach of contract by Shaik.

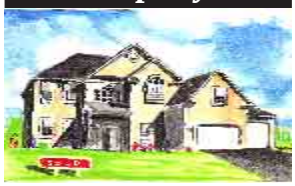
THE DECISION

The contention that the contract was void due to non-existence of the property as described in it could not be accepted. There was in existence a valid contract whose terms were partly that land bearing the legal description in the contract was the subject of a contract of sale between the parties. Such land, bearing the legal description in the contract, though physically in existence, was still to be registered.

As far as impossibility of performance was concerned, the alleged impossibility was not absolute, but relative: given enough time, Shaik might successfully negotiate and obtain the homeowners' association's consent and effect transfer of the property. This did not render the contract void ab initio, but possibly voidable.

As far as breach of contract was concerned, the delay in effecting registration of transfer, could not be construed as a repudiation of the contract by Shaik, because when it became apparent that there was delay in obtaining consent of the homeowners' association, Shaik proposed that the entire property be transferred into Stiler's name. The ensuing delay was not unreasonable.

In any event, Stieler's proper recourse was to follow the provisions of clause 16.1 and seek arbitration. Due to the binding nature of the arbitration clause, neither party to the dispute could initiate court proceedings. Unless it is specifically provided in the contract, neither party to an arbitration contract may terminate the contract without



the consent of the other parties to the contract. However, the court on application and on good cause shown, as to why the matter should not be referred to arbitration in accordance with the contract, may hear it. No argument had been made to show good cause, why the dispute should not be referred to arbitration, in accordance with the parties' choice, to resolve their disputes privately.

The application failed.

When parties, exercising their contractual autonomy, make provision as, in the present dispute, for the private resolution of their disputes, the courts are enjoined to respect the parties' choice of method for resolving their disputes. The courts' deference, to the parties' choice to arbitrate their disputes, does not amount to an abdication of jurisdiction. Arbitration clauses do not oust the courts' jurisdiction. Under the Act, the courts retain the powers to assist, supervise and intervene in the dispute and the arbitration before, during and after the arbitration.
Due to the binding nature of the arbitration clause, neither party to this dispute, may, unilaterally initiate court proceedings. The Act, stipulates that, if either party, unilaterally, initiates court proceedings, as the applicant (purchaser) has done, the other party, in the position of first respondent (seller), may apply to court for an order, staying proceedings.

MOTALA v MASTER OF THE HIGH COURT

A JUDGMENT BY WALLIS JA (BRAND JA, TSHIQI JA, WILLIS JA AND VAN DER MERWE AJA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2013

2014 SACLR 51 (SCA)

Companies

In applying section 420 of the Companies Act (no 61 of 1973) a court may exercise its discretion against declaring the dissolution of a company void where the applicant fails to show the reason for a mistaken dissolution and fails to show that the effect of such a declaration will be to secure an asset to the advantage of creditors.

THE FACTS

In February 2005, Motala and the other liquidators of liquidator of Cement Board Industries (Pty) Ltd (CBI) instituted an action against Boake Inc and a Mr K Wiles. The action related to events which took place in 1999.

In the course of the liquidation, a final liquidation and distribution account was prepared, advertised and lodged with the Master. All four liquidators signed affidavits saying that this account was a true and correct account of their administration, that 'all assets and liabilities are reflected herein' and that all claims had been investigated. The account did not refer to two parties which were later affirmed to have claims of some R9.5m and R4.7m against Boake Inc and Wiles.

In February 2006, at the request of a person working for the liquidators, the Master of the High Court issued a certificate of dissolution of CBI in terms of section 419 of the Companies Act (no 61 of 1973).

When in 2010, it became apparent to the defendants that CBI had been dissolved, Motala and the other liquidators brought an application for a declaration that the dissolution was void. The purpose of the application was to enable the litigation to resume from where it left off.

Neither of the two claimants proved claims in the liquidation of CBI, and neither indicated that they supported the application or were aware of the litigation.

THE DECISION

The application was brought in terms of section 420. The section provides that when a company has been dissolved, the court may at any time on application make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

The application was defended on the grounds that declaring the dissolution void would not have the effect of reviving the litigation and that the court should appropriately exercise its discretion against allowing the application. The former ground was not without difficulty but in the circumstances of the case, could not form the basis of a decision to dismiss the application. The proper basis was the second ground, the acceptability or otherwise of the exercise of the court's discretion.

Given the way in which the liquidators had proceeded, the proper exercise of the court's discretion was to dismiss the application. They had not explained the reason for the mistake in seeking the dissolution of the company. They had motivated the application on the basis that it would secure an asset whose very existence was in dispute. The claimants themselves had expressed no interest in it. The liquidators other than Motala had not affirmed their support for the application. There was manifest prejudice to the defendants in reviving litigation which had commenced five years earlier arising from events which took place six years before that. There was no explanation as to how the company came to be dissolved at a time when the action was still ongoing.

In these circumstances, the application was to be dismissed.

PIONEER FOODS (PTY) LIMITED v BOTHAVILLE MILLING (PTY) LIMITED

A JUDGMENT BY WALLIS JA (NAVSA JA, WILLIS JA, SWAIN AJA AND MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
12 MARCH 2014

2014 SACLR 61 (SCA)

Competition

In proving that there has been passing off of one product for another, it is necessary to show that consumers would be confused into thinking that the product alleged to be that of the other was that product or associated with it.

THE FACTS

Pioneer Foods (Pty) Ltd sold maize meal products under the name 'White Star', a title which appeared in green on the packaging containing its products, against the background of a red star. At its base, the strapline 'The Clever Choice' appeared. Pioneer's product was introduced in the market in 1999. By March 2001, its product had become established in the marketplace, Pioneer having spent some R3.5m on marketing of the product. By that date, Pioneer's product had gained a reputation in the marketplace.

In 2000, Bothaville Milling (Pty) Ltd entered the market for the sale of maize meal products. It began selling those products in packaging reflecting the name 'Star' in red, beneath a red star of a different shape from that of the White Star product. In 2003, it added to the base of its product the strapline 'The Peoples Choice'.

Pioneer claimed that Bothaville was passing off its Star product as the White Star product. It led evidence of six consumers who had been shown the Star product and who had stated that they thought it was associated with the White Star product because of the prominence of the red star and the similar colours on each product. Pioneer brought interdict proceedings against Bothaville.

THE DECISION

Since it was accepted that Pioneer had established a reputation in its White Star product, the question was whether it had also established the second and third requirements in proving passing off, misrepresentation and damage. It had to show that there was a reasonable likelihood that members of the public might be confused by the get-up used by Bothaville for its Star product by thinking that it was the White Star product or related to it.

The six consumers had not stated that they thought the Star product was the White Star product but that it was associated with the White Star product. Apart from this evidence, one could compare the two products. In this regard, there were four alleged similarities: the use of the same three colours, the use of the red star symbol, the use of the word Star, and the use of the similar straplines.

On any basis, the get-up of the Star product was markedly different from the get-up of the White Star product. Futhermore, the absence of the word 'White' in Bothaville's product would be significant for a consumer purchasing the maize meal products. Although there was some similarity between the two products, any consumer looking at them side by side would see that they were different and there would be no likelihood of confusion between the two.

The application for an interdict was refused.

NATIONAL ASSOCIATION OF BROADCASTERS v SOUTH AFRICAN MUSIC PERFORMANCE RIGHTS ASSOCIATION

A JUDGMENT BY NAVSA JA (SHONGWE JA, SWAIN JA, LEGODI AJA AND MATHOPO AJA concurring)
SUPREME COURT OF APPEAL
14 MARCH 2013

2014 SACLR 77 (SCA)

Copyright

The correct determination of the formula to be used to calculate the amount payable in royalties by radio stations broadcasting copyrighted sound recordings is 3 percent of a proportion of net broadcasting revenue received by the radio stations, the proportion being determined by the ratio of time broadcasting the sound recordings to time broadcasting editorial content.

THE FACTS

The National Association of Broadcasters (NAB) is a non-profit organisation represented active participants in the South African Broadcasting Industry. Its members include all television broadcasters, most commercial and public radio stations, community radio stations and signal distributors. Some of its members are commercial and public radio stations which broadcast sound recordings in which the copyright is held by persons represented by the South African Music Performance Rights Association (SAMPRA).

In terms of the Copyright Act (no 98 of 1978) and the regulations promulgated thereunder, SAMPRA is an accredited collecting society of royalties for sound recordings on behalf of its only member, the Recording Industry of South Africa.

The parties differed on the correct formula to be used when determining the royalties to be paid by the NAB to SAMPRA for the broadcast by radio stations of sound recordings. SAMPRA contended that NAB should pay ten percent of a proportion of net broadcasting revenue received by the radio stations, the proportion being determined by the ratio of time broadcasting the sound recordings to time broadcasting editorial content. NAB contended that the formula should apply more restrictive definitions of broadcasting time in relation to the broadcasting of sound recordings and broader definitions of editorial content, and should factor in the industry average net profit percentage, the radio station's audience for the period and the total radio audience for the period. NAB's formula included the application of a 'time channel' which was a fixed period within the 24 hour cycle, according to which audience was measured, and therefore related to advertising costs.

The effect of SAMPRA's formula was that a broadcaster that chose to use sound recordings for 100 per cent of its broadcast editorial content time should pay a royalty equal to ten per cent of the revenue that it derives from airtime. NAB proposed the more complex determination of the relevant percentage based on a wider definition of editorial content and audience-reach, and the determination of actual revenue taking into account discounts as reflected in a radio station's financial statements.

THE DECISION

Taking into account all of the evidence presented by the parties, the rate which NAB should pay was properly set at three percent and not the ten percent proposed by SAMPRA. Furthermore, the only justifiable exclusion from SAMPRA's definition of editorial time was the broadcast of advertising. Revenue should be that which is reflected in a radio station's financial statements. Profitability or audience-reach should not be included in a formula to arrive at the royalty rate. NAB's proposal that revenue should be calculated per time channel within a total broadcast period was not justified.

It followed that the correct formula to be applied was an amended version of that proposed by SAMPRA, properly expressed as:

$$B \times \frac{A}{C} \times 3{,}0$$

Where:
A = the amount of time used by a radio station in any period to broadcast the sound recordings administered by SAMPRA;

Copyright

B = the total amount of time used by a radio station in that period to broadcast editorial content, and

C = a radio station's net broadcasting revenue based on what is certified by its accountants and confirmed in its financial statements.

"editorial content" is defined as content, including the repertoire, broadcast for entertainment, information or interest of members of the public and shall not include broadcast time allocated to advertisements.

BETTERBRIDGE (PTY) LTD v MASILO N.O.

A JUDGMENT BY
UNTERHALTER AJ
GAUTENG DIVISION, PRETORIA
17 OCTOBER 2014

2015 (2) SA 396 (GP)

Prescription

For the purposes of section 13(1)(g) of the Prescription Act (no 68 of 1969), a claim may be understood to have been filed against a company in liquidation when the presiding officer at one of the meetings of creditors admits the claim for purposes of proof in the sense of allowing the claim to go forward to the meeting of creditors so as to determine whether the claim should be admitted or rejected.

THE FACTS

Betterbridge (Pty) Ltd lent R5m to Crystal Lakes Vaal Private Eco Estate (Pty) Ltd. The loan was repayable on 31 October 2007. In April 2008, Crystal Lakes was placed in liquidation. Betterbridge submitted claim documentation for the purpose of proving its claim at a meeting of creditors. The claim documentation was filed by Betterbridge with the intention of proving its claim at the meeting of creditors held on 5 October 2010. The claim documentation was served and filed at the Master's Office on 4 October 2010. Betterbridge's claim was withdrawn on 5 October 2010 without proof of claim.

By 26 September 2011, Betterbridge had brought an action for repayment of the loan against the liquidators, Masilo and the other defendants.

In a special plea, Masilo defended the action on the grounds that as the loan was repayable on or before 31 October 2007 prescription commenced to run by no later than this date, and that the plaintiff's claim was extinguished on 30 October 2010.

Betterbridge contended that prescription of the claim was delayed by virtue of section 13(1)(g) of the Prescription Act (no 68 of 1969). The subsection provides that if a debt is the object of a claim filed against the estate of an insolvent debtor, the relevant period of prescription would, but for the provisions of the subsection, be completed within one year after, the date on which the relevant impediment has ceased to exist, the period of prescription shall not be completed before a year has elapsed after that date.

THE DECISION

The words 'the debt is the object of a claim filed' must refer to a claim already filed against a company in liquidation and the impediment commences when the creditor files its claim. The question was what was meant by the filing of a claim against a company in liquidation. Betterbridge contended that filing meant lodgement of the claim, in the sense of delivery of the affidavit and supporting documents to the office of the presiding officer, alternatively by the claim being admitted to proof. Masilo contended that filing meant a decision by the officer presiding to admit the claim.

In accordance with the judgment in *Thrupp Investment Holdings (Pty) Ltd v Goldrick* 2008 (2) SA 253 (W), a claim may be considered to have been filed against a company in liquidation when the presiding officer at one of the meetings of creditors admits the claim for purposes of proof in the sense of allowing the claim to go forward to the meeting of creditors so as to determine whether the claim should be admitted or rejected.

In the present case, the claim made by Betterbridge was admitted for this purpose in contemplation of the meeting of creditors held on 5 October 2010. Filing does not require proof of the claim but rather the admission of the claim to proof. If this has happened, then the claim must be taken to have been filed.

Betterbridge was therefore entitled to rely on section 13(1)(g). The special plea was dismissed.

B BRAUN MEDICAL (PTY) LTD v AMBASAAM CC

A JUDGMENT BY SWAIN JA (PONNAN JA, SHONGWE JA, MATHOPO AJA and MEYER AJA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2014

2015 (3) SA 22 (SCA)

Contract

The correct enquiry as to whether or not there has been a repudiation of obligations under a contract is to determine how a reasonable person would have perceived the alleged repudiation. Whether or not a person perceived that proper performance of the agreement would not be forthcoming is not the test: the correct test is not subjective, but objective.

THE FACTS

B Braun Medical (Pty) Ltd and Ambasaam CC concluded a contract of carriage. Clause 9.2 of the contract provided for seven days' written notice to a party in default, to rectify the breach. If the breach were not rectified within that period, the aggrieved party was entitled to cancel the agreement and claim damages. Any decision to cancel would have to be conveyed to the party in default for it to take effect.

On 9 March 2011, Braun's attorney addressed a demand to Ambasaam in which he state that Braun would proceed to cancel the agreement without further notice to Ambasaam and claim damages from Ambasaam, in the event that Ambasaam did not timeously adhere to its demands.

Ambasaam's attorney replied to these letters stating that the allegations levelled against its client objectively led a reasonable person to the conclusion that Braun did not intend to honour the terms of the agreement. Its client regarded this as a repudiation by Braun, of the agreement. The attorney added that his client would afford Braun up to and including 1 April 2011 to withdraw unconditionally, all the allegations and demands made in the two letters. Should Braun not avail himself of this opportunity, Ambasaam would accept the repudiation and regard the contract as cancelled.

Braun's attorney stated that it did not intend to withdraw any allegation and/or demand made by it and that under the prevailing circumstances Braun confirmed that the agreement had been cancelled with effect from 2 April 2011.

In an action brought by Ambasaam, Ambasaam alleged that Braun breached the agreement by levelling, inter alia, false allegations and accusations against Ambasaam, and repudiated the agreement. Braun asserted that Ambasaam had cancelled the agreement in circumstances where it was not entitled to do so.

The single issue for determination was whether or not Braun had repudiated the agreement.

THE DECISION

The demand for performance by Braun constituted compliance with the notice requirements of clause 9.2 of the contract.

The correct enquiry was how a reasonable person in the position of Ambasaam would have perceived the letters written by Braun's attorney. Whether or not Ambasaam justifiably perceived that proper performance of the agreement by Braun would not be forthcoming was not the test: the correct test is not subjective, but objective.

The perception of a reasonable person placed in the position of Ambasaam could never be that proper performance by Braun of its obligations in terms of the contract would not be forthcoming. The letters demanded performance from Ambasaam of its obligations. Nowhere in those letters was there an intimation by Braun that it was unwilling to perform its own contractual obligations. A reasonable person having received the letters of demand from Braun's attorney would not have thought that they amounted to a deliberate and unequivocal intention on the part of Braun not to be bound by the agreement. Even if the demands made by Braun were unjustified, this could never have led to the objective conclusion that Braun did not intend to perform its obligations. In those circumstances, the letters could not have constituted a repudiation.

There was no basis for the contention that the terms of the demands meant that if Ambasaam did not comply, the

contract should be regarded as having been cancelled. That Ambasaam never understood the demand to convey an automatic cancellation of the agreement in the event of its failure to comply with the demands, was indicated by Ambasaam's reply. Braun was invited by Ambasaam to withdraw the demands, failing which Braun's conduct would be regarded as a repudiation of the agreement.

Braun had therefore not repudiated the agreement, and consequently Ambasaam had no grounds for cancelling it.

SPENMAC (PTY) LTD v TATRIM CC

A JUDGMENT BY MTHIYANE DP (LEWIS JA, SHONGWE JA, PETSE JA and MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
1 APRIL 2014

2015 (3) SA 46 (SCA)

An innocent misrepresentation which resulted in a reasonable and material mistake as to what the thing sold was renders the sale void ab intio.

THE FACTS

Tatrim CC bought from Spenmac (Pty) Ltd a unit in a multistorey building for R10.5m. The agreement contained an exemption clause which provided that the property was sold voetstoots and that the purchaser had acknowledged that he had not been induced to enter into the agreement by any express or implied information, statement, advertisement or representations made by any other person on behalf of the seller.

In terms of rule 27 of the scheme rules applicable to the building, it would not be possible for the owner of unit 2 to subdivide it without the consent of the owner of unit 1. At the time of the conclusion of the sale, Spenmac had previously consented to the subdivision of unit 2.

The question of subdivision had been discussed by the parties prior to the sale. Spenmac had affirmed that no consent had been given to the owner of unit 2 for subdivision. Consent for subdivision had however been granted, and Spenmac's representative had forgotten that this had taken place.

Tatrim sought an order setting aside the agreement of sale on the grounds that the sale was void for lack of consensus between the parties, a fundamental mistake having been made as a result of the misrepresentation concerning subdivision made by Spenmac.

THE DECISION

The correct enquiry was whether the error concerning subdivision precluded the parties from reaching consensus ad idem and whether it was reasonable for the resiling party to labour under the misapprehension.

Both parties were under the mistaken belief that the unit in the building was one of only two. Tatrim's mistake was induced by the misrepresentation that there were only two units in the building and that the owner of unit 1 could veto the right of unit 2 to subdivide it. In these circumstances the parties were mutually mistaken as to the true nature of the thing sold. It could not be said that the parties achieved consensus as to the subject-matter of the sale. The fact that Spenmac's representative had forgotten about the approval of the subdivision of unit 2 made no difference. The only difference it made was that it showed the misrepresentation was not fraudulent, but innocent.

Tatrim was misled by the misrepresentation that the sectional title scheme comprised only two units, and the non-disclosure that the approval of the subdivision of unit 2 had been granted prior to the conclusion of the sale. The misrepresentation resulted in a reasonable and material mistake as to what the thing sold was. The sale was void ab intio.

COCHRANE STEEL PRODUCTS (PTY) LTD v M-SYSTEMS GROUP (PTY) LTD

A JUDGMENT BY NICHOLLS J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
19 OCTOBER 2014

[2015] 2 All SA 162 (GJ)

Competition

A search by an internet user using a key word which a competitor has bid for under the Google AdWords system resulting in a number of different advertisements not all of which relate to another party's product does not necessarily result in confusion on the part of the user that all such advertisements are those of that party.

THE FACTS

Cochrane Steel Products (Pty) Ltd sold a type of fencing under the brand name 'ClearVu'. M-Systems Group (Pty) Ltd began the manufacture and sale of a similar product under the name 'M-Secure'.

M-Systems bid on the word 'ClearVu' on the Google AdWords system. Cochrane alleged that the effect of this was that a search by an internet user for 'ClearVu' would result in M-System's advertisement being displayed because it had selected 'ClearVu' as a keyword. It contended that whenever an internet user searched via Google for 'ClearVu' it was because the internet user would be looking for its product. However, M-Systems advertisement for its M-Secure product would appear, and be prominent in relation to the search results.

Cochrane sought a final interdict restraining M-Systems from using the word 'ClearVu' as a keyword in the Google AdWords system, or as a metatag. Since there was no trade mark registered over 'ClearVu' it based its claim on the common law of unlawful competition.

THE DECISION

Cochrane contended that M-Systems' action amounted to 'leaning on' as defined in the textbook *Unlawful Competition* by Van Heerden and Neethling, ie 'when one entrepreneur, in order to advertise his performance, and in this way promote and expand his goodwill, uses the advertising mark of another entrepreneur. In other words, he misappropriates or utilises the advertising value which, for example, the trade name, trade mark or service mark of the other entrepreneur has in connection with the latter's own undertaking goods or services. Thus he leans on the reputation or good name of the others performance for his own profit and financial gain.'

The concept of 'leaning on' was however, not part of the common law, and there were also no grounds for developing the common law so as to include it.

Cochrane's alternative contention was that M-Systems' action amounted to passing off. The use of keyword advertising would only be prohibited if it caused confusion. In the present case, a person who searched for 'ClearVu' would be confronted with a multiplicity of suppliers. No reasonable consumer could possibly be under the impression that all of them related directly to Cochrane. It was highly unlikely that the reasonably observant consumer would be confused and deceived into thinking they were all the advertisements by Cochrane. AdWords were a familiar feature of the internet and consumers were used to distinguishing them from natural search results. This was particularly so where the keyword was used to trigger the advertisement of M-Systems but the advertisement and sponsored link made no reference, or use of, Cochrane's mark. In such circumstances, there could be no confusion that M-Systems' link related to its product, not to 'ClearVu'.

Cochrane had failed to establish one of the fundamental pre-requisites for passing off, that of confusion and deception. The application was dismissed.

COMBINED DEVELOPERS v ARUN HOLDINGS

A JUDGMENT BY DAVIS J
5 AUGUST 2013
WESTERN CAPE HIGH COURT

2015 (3) SA 215 (WCC)

Credit Transactions

A provision entitling a lender to full repayment of a loan in the event of default by the borrower cannot be applied against a lender which is in minor default if this would be contrary to public policy.

THE FACTS

Combined Developers lent money to Arun Holdings. Clause 7.2 of the agreement provided that if Arun failed to pay to Combined any amount including any interest payment when due and failed to pay the amount together with mora interest at the floating interest rate to Combined within three business days after receipt of deemed, then an event of default would be deemed to have occurred and Combined would be entitled forthwith and on written notice to Arun to claim and recover all amounts owing under the agreement which would become immediately due and payable upon despatch by Combined of the aforesaid notice.

An instalment of R42 133,15 was due and payable on 31 March 2003. Arun failed to pay this on due date. On 28 March 2003, Combined submitted a statement to Arun reflecting this amount and its calculation of amounts payable. On 3 April 2013, Combined sent an email to the Arun stating: 'Please see below and note that we have not yet received payment. Will you please rectify, or if payment has already been made, send us proof thereof?' An earlier email message sent internally to the sender had asked till which date Arun should be afforded an indulgence to pay.

Arun paid the amount of R42 133,15 on 3 April 2013 but did not pay mora interest of R86.57 at the same time.

Combined took the view that an event of default in terms of clause 7.2 had occurred and despatched a notice by way of letter of 15 April 2013 claiming an amount of R7 665 040,14 together with interest.

Arun defended an action for payment on the grounds that the email message of 3 April 2013 did not constitute a demand entitling Combined to apply clause 7.2.

THE DECISION

Given the message sent earlier to the sender of the message of 3 April 2013, it was not unreasonable to conclude that the sender was awaiting a response from Arun as to when it would pay, and thereafter to assess the situation. This qualification had to be read as having placed in the minds Arun the idea that it could reply stating when it would pay. Clause 7.2 had draconian implications; hence it was the least that could be expected for a proper demand to be made, which would inform respondents of the entire amount owing. The fact that the sum of R86,57 was not paid due to some miscalculation should have been met with some communication to remind Arun that it remained in arrears, albeit by so small a sum.

The question was whether, if clause 7.2 was read as a demand, as contended for by Combined, and the R86,57 was not paid, this latter failure entitled Combined to claim R7.6m or more. Would this interpretation of clause 7.2 be in accordance with public policy? This concerned questions of a constitutional nature.

There was no relevant rule of common law invoked in the dispute which was unconstitutional. There was nothing in the content of clause 7.2 which would trigger the kind of concern which might justify the application of section 39(2) of the Constitution. However, the interpretation of the clause contended for by Combined could run counter to public policy. The question arose as to whether, if this interpretation was correct, such a clause, interpreted as such, would breach public policy.

In some measure, public policy embraces the concept of good faith and reasonableness. The implementation of clause 7.2 as contended for by Combined was

so draconian and startlingly unfair that this particular construction of that clause had to be in breach of public policy. Some form of communication to pay the small sum of R86,57 immediately following payment of the large principal sum should surely have been required. It was inconsistent with public policy that a demand, in an ambiguous form could first be met with silence because R86,57 had not been paid, and then a week later the full weight of the clause 7.2 applied by Combined to gain commercial advantage, to the significant disadvantage of Arun.

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA v PHATO FARMS (PTY) LTD

A JUDGMENT BY MOLOPA-SETHOSA J
GAUTENG DIVISION, PRETORIA
13 AUGUST 2014

2015 (3) SA 100 (GP)

A general notarial bond does not confer a real right on the bondholder over the property, as in the case of a mortgage bond. Without conferring such a right, a notarial bond does not fall within the definition of a deed or instrument by which a right of mortgage is created upon registration at the deeds registry

THE FACTS

In October 2010, the Land and Agricultural Development Bank of South Africa brought an action against Phato Farms (Pty) Ltd for payment of R3 372 119,82. The cause of action was based on a short-term loan agreement signed in September 2003, and it was secured by a general notarial bond registered on 13 October 2003 over Phato's movables. The other defendants were sureties, and the claim against them was for payment of R2 460 000.

The full amount in terms of the loan agreement became due and payable on 1 April 2004.

Phato and the other defendants raised the special pleas that the bank's claims had prescribed, and as the bank had failed to comply with the provisions of a breach clause contained in the loan agreement, the bank's claim based on the principal debt and on the accessory obligations were premature. The breach clause provided that in the event of a material default had occurred, the bank was to grant a reasonable remedy period and if such default has not yet been remedied within that remedy period the bank was entitled to enforce its rights of repayment. Clause 8 of the notarial bond provided that all amounts secured in terms thereof would immediately become payable in the discretion of the bank without the bank being required to give notice thereof and the bank would be entitled to institute legal action for the recovery of all such amounts.

The bank contended that the notarial bond was a mortgage bond as defined in the Prescription Act (no 68 of 1969) and that in consequence, a period of 30 years applied to the prescription of the debt arising from it.

THE DECISION

The first question to be determined was whether the words 'mortgage bond' referred to in section 11(a)(i) of the Prescription Act also included reference to a general notarial bond. The test to be applied in considering whether a general notarial bond is a mortgage bond is whether the notarial deed is an instrument, the registration of which brings about the right of mortgage, ie does the deed bring

about a real right of security in the asset of another which is created by registration in the deeds registry?

It is clear that a general notarial bond does not confer a real right on the bondholder over the property, as in the case of a mortgage bond. Without conferring such a right, a notarial bond does not fall within the definition of a deed or instrument by which a right of mortgage is created upon registration at the deeds registry. A general notarial bond cannot be said to be a mortgage bond as envisaged in section 11(a)(i) of the Prescription Act.

As far as the defence based on the breach clause was concerned, on a proper reading of the loan agreement and the notarial bond, clause 8 could not override the peremptory provisions of the breach clause. The bank was not entitled to claim on the suretyships in the absence of compliance with the breach clause of the loan agreement.

The special pleas were upheld.

From the abovementioned authorities it is clear that a general notarial bond does not, and did not at the time the Prescription Act was enacted, confer a real right on the bondholder over the property, as in the case of a mortgage bond.

Without conferring such a right, a notarial bond cannot meet the definition of a deed or instrument by which a right of mortgage is created upon registration at the deeds registry.

From the reading and analysis of the abovementioned authorities, a general notarial bond thus cannot be said to be a mortgage bond as envisaged in s 11(a)(i) of the Prescription Act.

DE MONTLEHU v MAYO N.O.

A JUDGMENT BY KATHREE-SETILOANE J
GAUTENG LOCAL DIVISION, JOHANNESBURG
30 APRIL 2014

2015 (3) SA 253 (GJ)

Insolvency

Once an account is lodged, claims proved after that date are excluded from the distribution under such account, and a date fixed for proof of claims in terms of section 366(2) of the Companies Act (no 61 of 1973) cannot be extended to enable late claims to be proved. The proviso to section 44(1) of the Insolvency Act (no 24 of 1936), and not section 366(2) applies to the late proof of claims in the winding up of a company

THE FACTS

Chevreau Construction (Pty) Ltd was voluntarily wound up on 2 September 2011 by way of a special resolution.

On 11 May 2012, the second meeting of creditors of Chevreau Construction took place. Five months later, a special general meeting was held. At this meeting, a claim by Starspan Investments (Pty) Ltd for payment of R1 577 432,70 was proved.

De Montlehu, the sole shareholder, member and director of Chevreau Construction, contended that because Starspan did not seek leave from the Master to prove its claim late, as required by section 44(1) of the Insolvency Act (no 24 of 1936), the admission of the claim by the Master should be reviewed and set aside.

Section 44(1) provides that any person who has a liquidated claim against an insolvent estate may, at any time before the final distribution of that estate, prove that claim, provided that no claim shall be proved against an estate after the expiration of a period of three months as from the conclusion of the second meeting of creditors of the estate, except with leave of the court or the Master.

Montlehu applied for an order to reviewing and setting aside the Master's admission of Starspan's claim.

THE DECISION

The liquidators contended that section 366(2) of the Companies Act (no 61 of 1973) applied. It provides that the Master may, on the application of the liquidator, fix a time within which creditors of the company are to prove their claims or otherwise be excluded from the benefit of any distribution under any account lodged with the Master before those debts are proved.

This section did not assist the liquidators.Once an account is lodged, claims proved after that date are excluded from the distribution under such account, and a date fixed for proof of claims in terms of section 366(2) cannot be extended to enable late claims to be proved. The proviso to section 44(1) of the Insolvency Act, and not section 366(2) of the Companies Act, applies to the late proof of claims in the winding up of a company. Starspan was obliged, under the proviso to section 44(1) of the Insolvency Act, to seek leave of the court or the Master to prove its claim, and pay such sum of money as directed by the court or Master to cover the costs occasioned by the late proof of the claim.

Section 44(1) is a peremptory requirement and demands exact compliance before the Master admits a claim to proof three months after the conclusion of the second meeting of creditors. It cannot be said that, in spite of the Master's non-compliance with the statutory requirement in the proviso to section 44(1) of the Insolvency Act, the object of the provision - to ensure the expeditious administration of the insolvent estate - has been achieved.

The Master's decision to admit the claim had to be set aside.

ABSA BANK LTD v AFRICA'S BEST MINERALS 146 LTD

Insolvency

A JUDGMENT BY VALLY J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
5 DECEMBER 2014

[2015] 2 All SA 8 (GJ)

A party applying for leave to intervene in a winding-up application must show that it has a direct and substantial interest in the application to wind up.

THE FACTS

ABSA Bank Ltd lent R9 550 000 to African Best Minerals Ltd. This was to be repaid by ABM over a period of 83 months at the rate of R170 998,42 per month. The parties later concluded an addendum to the loan agreement in terms of which an outstanding amount of R7 014 491,54 was payable over a period of 76 months at a rate of R131 486,37 per month.

ABM defaulted by failing to make payment as provided for in the agreement. ABSA then brought an application for the winding up of ABM.

An intervening application was then brought by King Sekhukhune. In it, he asserted that leaders and representatives of beneficiaries may represent any corporation or entity established to secure the intended constitutional restitution or protection of the beneficiaries they represent. He contended that he was entitled to protect the interests of those communities which had an interest in the amount of R24 million in ABM.

The King alleged ABSA had engaged in unlawful conduct of ABSA because it was in breach of its duties to communities entitled to constitutional restitution and redress, in terms of the Financial Sector Charter.

The court considered the application for leave to intervene.

THE DECISION

In order to succeed in the quest to intervene King Sekhukhune had to satisfy the court that he, or the community he represented, had a direct and substantial interest in the application to wind up ABM, which could be prejudiced should the court issue an order winding-up it up. He had to satisfy the court that the application was not brought frivolously and that the facts or allegations it wishes to draw the attention of the court to would affect the course of the judgment and any order that followed in a material respect.

The allegation made was that ABSA owed a duty to communities entitled to constitutional restitution and not to ABM. There was no claim that ABSA owed ABM any duty. But even if ABSA owed these communities a duty, and assuming that ABSA was in breach of such a duty, it would then be open to these communities to sue ABSA for its breach. The existence of such a duty borne, and its breach, by ABSA did not give cause to the King to intervene in the winding-up application of ABM. The interest of King Sekhukhune as the representative of these communities was not to be found in the winding-up application of ABM but was located in a different and separate matter not related to the winding-up application. The winding-up of ABM did not affect, let alone destroy, any cause of action the communities might be able to establish against ABSA. Furthermore, whatever rights the communities had over ABSA did not have any bearing on the application to wind-up ABM: those rights could not affect the outcome of the matter.

It followed that the communities had not established that they had any interest in the matter which required protection, and had not established that the protection of such interest would affect the outcome of the winding-up application.

The application for leave to intervene was dismissed.

EB STEAM CO (PTY) LTD v ESKOM HOLDINGS SOC LTD

A JUDGMENT BY WALLIS JA (MTHIYANE AP, CACHALIA JA, PILLAY JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
27 NOVEMBER 2013

2015 (2) SA 526 (SCA)

Compliance with section 346(4A)(a)(ii)(aa) of the Companies Act (no 61 of 1973) may be achieved by serving an application for liquidation of a company in such a way that the application would be reasonably likely to be accessible to the employees concerned.

THE FACTS

Applications for winding-up were served on various companies which were subsidiaries of EB Steam Co (Pty) Ltd at their registered office. Each application cited the employees of that company as a 'third party'.

The sheriff purported to serve the applications on the employees of each company by affixing a copy of the application for winding-up in relation to that company to the front door of the registered office. In his return of service, this wasdescribed as being 'the 3rd party's place of employment'.

The companies argued that this form of service was defective on two grounds. The first was that the sheriff had obtained access to the registered office, because he had served the applications on the companies at that office upon an employee apparently over the age of 16 years and in charge of the premises. In the absence of any explanation that it was not possible for him to do so, section 346(4A)(a)(ii)(aa) of the Companies Act (no 61 of 1973) required service to be effected by affixing the application papers to a notice board to which the employees had access within the premises. The section provides that when an application is presented to the court in terms of the section, the applicant must furnish a copy of the application (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company, and (ii) to the employees themselves by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company.

The second ground was that it was obvious from the names of the companies and the nature of their business that they operated at locations throughout the country and that in those circumstances the court should not accept the correctness of the sheriff's return.

The companies argued that compliance with section 346(4A) was peremptory and accordingly that non-compliance was fatal to the applications.

THE DECISION

When a court is satisfied that the method adopted by an applicant to furnish the application papers to the employees is satisfactory and reasonably likely to make them accessible to the employees, there is no reason to refuse a winding-up order merely because they were not furnished to the employees in one of the ways indicated in s 346(4A)(a)(ii). Furthermore, the court should not refuse an order merely because it is not satisfied that the application papers have come to the attention of all employees.

If the court hearing the application is not satisfied that the method adopted to furnish the application papers to the employees is appropriate to achieve the statutory purpose, even if it complies with one of the methods specified in s 346(4A)(a)(ii), then it should require a different and more effective method to be adopted.

The requirement that the application papers be furnished to the persons specified in section 346(4A) is peremptory. However, it is not peremptory that this be done in any of the ways specified in s 346(4A)(a)(ii). If those modes of service are impossible or ineffectual another mode of service that is reasonably likely to make them accessible to the employees will satisfy the requirements of the section.

In the present case, the different companies operated in a number of different locations around South Africa. There was no indication in the sheriff's return of service that he made any enquiries as to the existence of employees of the companies or their place of work. In those circumstances, a court should not have been satisfied that there had been compliance with the requirements of s 346(4A) insofar as the employees were concerned. For that reason it was inappropriate to grant final winding-up orders in relation to these companies.

In order to achieve that result, the applicants were directed by no later than five weeks to furnish to the employees of the company in each application a copy of the application papers in that application and within one week thereafter to deliver an affidavit setting out details of when and in what manner they have complied with this order.

PILOT FREIGHT (PTY) LTD v VON LANDSBERG TRADING (PTY) LTD

A JUDGMENT BY KAIRINOS AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
25 JULY 2015

2015 (2) SA 550 (GJ)

An affidavit in compliance with section 346(4A)(b) of the Companies Act (no 61 of 1973) must set out precisely what the person who furnished the affidavit did when he came to the place of employment of the employees, what circumstances that person found there, what steps were taken to bring the application to the notice of the employees and what steps were taken to ascertain whether the employees belonged to any trade union.

THE FACTS

Pilot Freight (Pty) Ltd applied for an order winding up Von Landsberg Trading (Pty) Ltd, a company which had four employees.

The application was served by the acting sheriff, whose return of service stated that he affixed the application papers to the main entrance of an address, 'being the place of employment of the employees of Von Landsberg Trading (Pty) Ltd'. The return of service also stated that no employee could be found to ascertain if they were members of any trade union. There was no indication in the founding affidavit or the service affidavit, that the address was the main place of business of up Von Landsberg Trading (Pty) Ltd, and no indication that the address was the principal place of business of that company, where one would expect its employees to be found.

The court raised the question whether or not there had been compliance with section 346(4A) of the Companies Act (no 61 of 1973). The section provides that when an application is presented to the court, the applicant must furnish a copy of the application (i) to every registered trade union that, as far as the applicant can reasonably ascertain, represents any of the employees of the company, and (ii) to the employees themselves by affixing a copy of the application to any notice board to which the applicant and the employees have access inside the premises of the company, or if there is no access to the premises by the applicant and the employees, by affixing a copy of the application to the front gate of the premises, where applicable, failing which to the front door of the premises from which the company conducted any business at the time of the application.

THE DECISION

The service affidavit failed to comply with section 436(4A). It failed to indicate on oath what the principal place of business of the respondent company was, whether the premises were open or closed and whether anybody was present at the premises, whether employees or otherwise, such as a director. The affidavit therefore failed to satisfy the court that Pilot had achieved the statutory purpose of so far as reasonably possible bringing the application to the attention of the employees.

The requirement that the application for liquidation be furnished to the employees is to enable the employees to protect their interests. The provisions of s 346(4A) should therefore be construed taking into account this purpose. Interpreting the section with this purpose in mind and bearing in mind that a court may give directions if it is not satisfied with service on the employees, the court would require something more detailed than the usual cryptic return of service from a sheriff. An affidavit in compliance with section 346(4A)(b) would have to set out precisely what the person who furnished the affidavit did when he came to the place of employment of the employees, what circumstances that person found there, what steps were taken to bring the application to the notice of the employees and what steps were taken to ascertain whether the employees belonged to any trade union. The only person who would have personal knowledge of these facts would be the person who physically attended upon the premises.

If an applicant does nothing further to attempt to comply with the provisions of s 346(4A)(b), a court cannot grant an order winding up a company, if it is not satisfied that the purpose of s 346(4A) has been met, namely to, as far as reasonable, inform the employees and/or trade unions of the application.

The application could therefore not be granted.

STRATFORD v INVESTEC BANK LTD

A JUDGMENT BY LEEUW AJ (MOGOENG CJ, MOSENEKE DCJ, CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, NKABINDE J, VAN DER WESTHUIZEN J and ZONDO J concurring)
CONSTITUTIONAL COURT
19 DECEMBER 2014

2015 (3) SA 1 (CC)

Section 9(4A) of the Insolvency Act (no 24 of 1936) requires that a sequestration application be served on employees of the debtor, both business employees and domestic employees. There will be substantive compliance with this section when the application is made available in a manner reasonably likely to make them accessible to the employees.

THE FACTS

Investec brought sequestration proceedings against Stratford and his wife. It alleged that the Stratford owed it over R240m, plus interest. A candidate attorney, employed by the attorneys representing Investec, gave a copy of the notice of motion and the founding affidavit to Stratford. She also enquired from Stratford whether he had a domestic employee. He informed her that he had a domestic worker, but did not disclose that he also had two other domestic employees in his employ. The candidate attorney then left a copy of the petition on the kitchen table for the identified domestic worker, Mr Ngoma, without directing that Stratford bring it to the attention of the domestic worker.

A provisional order of sequestration was given against them. The domestic employees and Stratford brought a counter-application seeking an order declaring that section 9(4A) of the Insolvency Act (no 24 of 1936) was unconstitutional in that it indirectly discriminated against domestic employees, and failure to notify them of the sequestration proceedings amounted to a breach of their constitutional right to fair labour practices and the right of access to courts. They submitted that, had they been given prior notice of the provisional sequestration proceedings, they would have sought legal assistance and opposed the application.

Section 9(4A) provides that a copy of a sequestration application must be furnished to

employees of the insolvent debtor before an order for provisional sequestration may be granted. The Supreme Court of Appeal in *Gungudoo v Hannover Reinsurance Group Africa (Pty) Ltd* 2012 (6) SA 537 (SCA) interpreted this to apply only to employees of the insolvent's business, to the exclusion of domestic employees. Stratford contended that this interpretation was wrong and that domestic employees should be included in the term 'employees' in section 9(4A).

The court considered the applicability of this section.

THE DECISION

Section 38(1) of the Insolvency Act refers to 'employees', and there envisages all employees, including domestic employees. The section suspends the employment contracts of all employees upon a provisional sequestration order being granted. The interpretation contended for by Investec would mean that the contracts of domestic employees would be effectively suspended without notice while their business counterparts who could conceivably be doing the same kind of work in the insolvent employer's business would receive notice. Notice prevents a situation where employees would show up at work and suddenly find out that they can no longer render their services or receive remuneration. Notice at an earlier stage, before a provisional sequestration order, will not only warn an employee of the tumultuous financial state of the employer, but also meaningfully enable employees to find alternative jobs or make alternative arrangements. These are the virtues of being informed of the possibility of a sequestration. Notice, ultimately, signifies respect for the human dignity of employees.

Given the ordinary meaning of 'employees', the interpretation of various provisions in the Labour Relations Act and constitutional considerations, 'employees' in section 9(4A) includes all employees, ie also domestic employees.

The fact that 'furnish' is used in s 9(4A) and the word 'serve' is used in section 11(2A) of the Insolvency Act indicates that the legislation envisaged a lower threshold for notifying the employees than service in respect of the latter section. 'furnish' requires that petitions 'must be made available in a manner reasonably likely to make them accessible to the employees'.

In the present case the candidate attorney made the petition available in a manner that was reasonably likely to become accessible to the employees. Given the enquiries she made, and the answers she got, it was reasonable of her to assume that Stratford would pass on the information to the employees. She could not have been aware that there were other employees because of Stratfords failure to disclose that fact to her. Stratford, as the employer, had a duty to bring the application to the attention of the employees in terms of s 197B of the Labour Relations Act. The candidate attorney's effort to furnish the petition on the employees was sufficient to meet the standard set by *EB Steam Co (Pty) Ltd v Eskom Holdings Soc Ltd* 2015 (2) SA 526 (SCA).

Failure to furnish the employees with the petition may not be relied upon by the debtor for opposing sequestration when the question to be decided is whether sequestration is to the advantage of creditors. In *EB Steam* the Supreme Court of Appeal correctly stated that the purpose is not to provide a 'technical defence to the employer, invoked to avoid or postpone the evil hour when a winding-up or sequestration order is made'.

MURGATROYD v VAN DEN HEEVER

A JUDGMENT BY MEYER J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
29 JULY 2014

2015 (2) SA 514 (GJ)

The test for a business rescue practitioner's entitlement to reimbursement for expenses and disbursements is whether they were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.

THE FACTS

On 29 May 2012 Sanyati Civil Engineering and Construction (Pty) Ltd voluntarily commenced business rescue proceedings pursuant to a resolution of its board. On 6 June 2012 Murgatroyd was appointed as business rescue practitioner of Sanyati.

Murgatroyd appointed three parties to assist him in carrying out his duties as business rescue practitioner, and to facilitate the conduct of Sanyati's business rescue proceedings. They were Nimble Risk Services, Rudolf Bernstein & Associates Inc, and Accountants at Law (Pty) Ltd. They rendered their services and invoiced Murgatroyd. Nimble and Accountants rendered services in connection with the preparation of a business rescue plan, and in the provision of advisory services.

On 4 July 2012, Murgatroyd concluded that there was no reasonable prospect that Sanyati could be rescued. An application to court for an order discontinuing the business rescue proceedings and placing Sanyati into liquidation was lodged, and an order was issued on 11 July 2012. Van den Heever and the other respondents were appointed as the liquidators of Sanyati.

At the time the liquidation order was granted, the amounts owing to the three parties had not been paid. Murgatroyd claimed against the insolvent estate for expenses incurred by him in relation to the three parties. The claim in respect of Rudolph Bernstein's account was proved and admitted at the first meeting of creditors. In respect of the claim by the other two parties, the liquidators raised issues of principle against them. The contended that these were not expenses incurred by him to the extent reasonably necessary to carry out his functions as practitioner and facilitate the conduct of Sanyati's business rescue proceedings as contemplated in regulation 128(3) promulgated under the Companies Act (no 71 of 2008) and that he should not have delegated the tasks to these parties but should have executed them himself.

The regulation provides that a practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the practitioner, or expenses incurred by the practitioner to the extent reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings.

THE DECISION

The appointment, in appropriate circumstances, of auditors or other professionals or persons to assist a practitioner in the carrying out of his functions and in facilitating the conduct of the company's business rescue proceedings involves no delegation of the practitioner's powers, but such power merely follows from the powers given to him.

The test for a business rescue practitioner's entitlement to reimbursement for expenses and disbursements is whether they were reasonably necessary to carry out the practitioner's functions and facilitate the conduct of the company's business rescue proceedings. The question is a factual one which must be assessed on the facts and circumstances of each case, with reference to factors such as the size of the company, the functionality of its management, the accuracy and currency of its

financial and accounting data, the complexities involved and the scope of the work required to be undertaken by the business rescue practitioner.

On this basis, Murgatroyd had been entitled to employ the services of Nimble and Accountants. To the extent that Nimble rendered services in connection with the preparation of a business rescue plan after it had been concluded that there was no reasonable prospect for Sanyati to be rescued however, a claim in respect of this could not be sustained as those expenses did not necessarily meet the requirement of regulation 128(3).

Subject to this, Murgatroyd was therefore entitled to full recovery from the estate of Sanyati of such moneys owing by him to the three parties, in respect of business rescue support, legal and advisory services rendered by them before the claims of all other secured and unsecured creditors.

The appointment, in appropriate circumstances, of auditors or other professionals or persons to assist a practitioner in the carrying out of his functions and in facilitating the conduct of the company's business rescue proceedings involves no delegation of the practitioner's powers, but such power merely follows from the powers given to him under ch VI.

OMAR v INHOUSE VENUE TECHNICAL MANAGEMENT (PTY) LIMITED

A JUDGMENT BY GAMBLE J
WESTERN CAPE HIGH COURT
6 FEBRUARY 2015

[2015] 2 All SA 39 (WCC)

Companies

In the absence of evidence stating the value of shareholding in a company in respect of which a shareholder seeks relief in terms of sections 75 and 163 of the Companies Act (no 71 of 2008), the court may order the appointment of an accountant to determine such value for the purposes of buying out the shareholding in question.

THE FACTS

In 2003, Inhouse Venue Technical Management (Pty) Limited acquired a business owned by Omar, AV Network, for R822 435. Omar thereafter held 50% of the shares in Inhouse and was employed by Inhouse.

Thereafter, Omar held 45% of the shares in Inhouse. Gearhouse SA (Pty) Ltd held 50% of the shares. The remaining 5% were held by the third respondent, Govender. The fourth and fifth respondents, Lapid and Abbas, effectively controlled Gearhouse SA. Lapid, Abbas, Omar, Govender and three others were the directors of Inhouse.

The business of Inhouse was the provision of a wide range of equipment to a variety of clients for the staging of corporate and public events. Equipment such as public address systems, audio-visual equipment, lighting, rigging were provided at various venues for conferences, product launches and music events.

In due course, Omar became dissatisfied with the manner in which the business of Inhouse was being run. Its business was conducted as subsidiary to the business of Gearhouse, and in some respects to the prejudice of Inhouse in favour of Gearhouse. The rental paid by Inhouse had increased and it had become subject to the imposition of 'group charges' imposed by Gearhouse.

In May 2014 Gearhouse notified Omar of its intention to purchase Omar's entire shareholding for R2m. Omar stated that he was willing to negotiate, upon receipt of certain requested information. Omar sought relief under sections 75 and 163 of the Companies Act (no 71 of 2008). He applied for an order that Lapid and Abbas had acted in breach of section 75 and an order that the financial statements of Inhouse be revised and a determination of the value of the shares in it be made by an independent accountant.

THE DECISION

Section 75 does not contain any provisions entitling a company, its shareholders or directors, a right of recovery or other cause of action for losses occasioned by the breach by an errant director of the provisions of that section. However, upon a proper reading of section 75(7) non-compliance with the provisions of section 75(5) by Abbas and Lapid rendered the particular transaction or agreement approved of invalid unless there had been ratification or validation by the court. No attempt was made to ratify any of the impugned transactions or agreements at board level, nor was there any application for a declaration of validity by the court under section 75(8). A proper case had been made out for the relief sought under that section.

Section 163 provides that a shareholder or a director of a company may apply to a court for relief 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, or (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 exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant. The section had to be implemented .

Accordingly, the second and third respondents were to acquire Omar's 45% shareholding for the fair market value thereof. A chartered accountant was to be appointed to determine the fair market value of Omar's shareholding in Inhouse.

SALOOJEE v KHAMMISSA N.O.

A JUDGMENT BY
BORUCHOWITZ J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
12 OCTOBER 2014

[2015] 2 All SA 99 (GJ)

A person summoned in terms of section 417(3) of the Companies Act (no 61 of 1973) are obliged to produce books or papers, however confidential or incriminating they may be. Any objection to their use on the ground that they infringe or threaten the constitutional right against self-incrimination may only be raised in criminal proceedings against the person concerned.

THE FACTS

Saloojee and the second applicant were summonsed to appear, testify and produce documents at an enquiry established in terms of section 417, read with section 418 of the Companies Act (no 61 of 1973). The purpose of the enquiry was to investigate the affairs of Duro Pressings (Pty) Ltd which was is in the process of being wound up.

The summonses issued against the applicants were intended to elicit information which might reveal criminal conduct that would implicate them. Saloojee contended that the summonses should be set aside as they would elicit potentially incriminating information in contravention of their constitutional right against self-incrimination.

Saloojee applied for an order setting aside the summonses.

THE DECISION

Section 417(2)(c) provides that an incriminating answer or information directly obtained, or incriminating evidence directly derived from, an examination in terms of the section shall not be admissible as evidence in criminal proceedings in a court of law against the person concerned, except in certain defined circumstances. Saloojee contended that while section 417(2)(c) contains a use immunity in respect of testimony which is compelled at a section 417 enquiry, such immunity does not extend to the documents compelled pursuant to section 417(3). The absence of such use immunity compelled Saloojee to produce documents in circumstances where those documents might be used against her at criminal proceedings in due course and would threaten her constitutional right against self-incrimination.

The essential question to be decided was whether documents which individuals are forced to produce under section 417(3) are also subject to a use immunity at any subsequent criminal proceedings against those individuals.

The broad structure of section 417 as well as the wording of subsection 417(2)(c) indicated that the use immunity does not extend to documents produced in terms of section 417(3). It was clear that only incriminating evidence that is 'directly obtained or derived from an examination' in terms of the section would be inadmissible in criminal proceedings. The mere production of books or papers in compliance with a summons is not evidence which is directly obtained or derived from an examination in terms of section 417(2). However, answers given in relation to the documents produced during the course of an examination will, if incriminating, be subject to the use immunity as they will have been obtained or derived from an examination in terms of the section. The section does not include a document use immunity.

The effect of there being no use immunity is that persons summoned in terms of section 417(3) are obliged to produce books or papers, however confidential or incriminating they may be. Any objection to their use on the ground that they infringe or threaten the constitutional right against self-incrimination may only be raised in criminal proceedings against the person concerned.

The application was dismissed.

DURBANVILLE COMMUNITY FORUM v MINISTER FOR ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

A JUDGMENT BY DAVIS J
WESTERN CAPE HIGH COURT
24 DECEMBER 2014

[2015] 2 All SA 187 (WCC)

Property

A court will not replace a decision taken by an official in respect of a property development application when it is clear that the official has properly considered evidence relevant to the application.

THE FACTS

The AFM Louw Familie Trust owned certain land situated in Durbanville. The trust wished to develop the property for residential purposes and a school campus.

For the Trust to develop land, it required certain approvals. These were an environmental authorisation, the amendment of the Cape Town Spatial Development Framework in terms of section 34(b) of the Local Government: Municipal Systems Act (no 32 of 2000) to permit the change in description of the land from "high potential and unique agricultural land" to "urban development", as well as the amendment of the urban edge to incorporate the proposed development, the rezoning of the land in terms of section 16 of the Land Use Planning Ordinance (no 15 of 1985) from agricultural zone to a Sub Divisional area, the subdivision of the land to provide for 646 residential opportunities, a school, a nature reserve, private open spaces, private roads, public roads and a commercial entity to accommodate the estate facilities, the rezoning of the existing tourism related buildings on the property to General Business in terms of section 16 of the Ordinance to accommodate the existing tourism related facilities, and the conditional use of the property in terms of the transitional arrangements in the new Cape Town Zoning Scheme permits a place of instruction for the school.

The Minister for Environmental Affairs approved the first, and the City of Cape Town approved the others.

The Durbanville Community Forum brought an application to review and set aside these approvals on the grounds that there was a conflict of the development proposal with the existing planning documents in that the land was outside the urban edge, that the alleged agricultural potential of the land had not been properly taken into account, and the effect of the development on an adjoining wetland.

THE DECISION

In respect of the first ground, the Forum contended that as the land fell outside the urban edge, the approvals were inconsistent with planning policies, which do not permit the extension of the urban edge. It contended that the Minister's decision to grant environmental approval for the proposed development was inconsistent with the clear terms of the Spatial Development Framework (SDF) which is a component of the City's integrated development plan. It contended that the Minister was not authorised by the National Environmental Management Act (no 107 of 1998) to grant environmental approvals contrary to the terms of the City's SDF and accordingly his decision was reviewable in terms of section 6(2)(a)(i) of the Promotion of Administrative Justice Act (no 3 of 2000).

The Minister considered this issue. It was his view that, notwithstanding that the property fell outside the urban edge, as reflected in certain planning policy documents, he thoroughly considered the question of the urban edge. His decision was therefore not a bold one, and not one that was unsupported by the evidence. He explained the reasons for his decision to grant the environmental authorisation, notwithstanding that the property fell outside the urban edge.

To accede to the Forum's attack on this decision would be to blur the distinction between a decision taken under National Environmental Management Act and a decision which fell within the province of a municipality. The court could not take over the decision making process, and be the ultimate environmental decision maker.

RICHTER v WATERFALL EQUESTRIAN ESTATE WUQF (PTY) LTD

A JUDGMENT BY MOSHIDI J
GAUTENG LOCAL DIVISION, JOHANNESBURG
5 DECEMBER 2014

[2015] 1 All SA 695 (GJ)

A property owner subject to a home owners' association which requires a party to approve building plans within the association's jurisdiction must proceed under the Promotion of Administrative Justice Act should it wish to attack the approval of building plans given by that party.

THE FACTS

Richter held the rights to a stand within the Waterfall Equestrian Estate in terms of a 99-year lease. The Estate was owned by Waterfall Equestrian Estate WUQF (Pty) Ltd. The developer was the second respondent and the Waterfall Equestrian Estate Home Owners' Association, which managed the Estate, was the fourth respondent.

Richter alleged that a neighbour, the third respondent, Baker, had, as a result of breaches by Waterfall and other respondents, constructed a substantial retaining wall and structures, approximately 2 metres from the boundary wall between his property and Baker's property. Richter alleged that the retaining structure encroached substantially over the applicable building lines, and allowed Baker to raise the natural ground level along his boundary by more than 2 metres higher than the 1,7m boundary wall between his property and Baker's property, and the construction thereon of a tennis court with a high fence and floodlights. The building plans had been approved by the fourth respondent.

After the completion of the building works, Richter claimed that the alleged unlawful structures were erected in breach of Baker's lease, the fourth respondent's Handbook for Residents and Conduct Rules, the building guidelines, the Articles of Association, and the applicable legislation and regulations. He alleged that the structures were unsightly and objectionable and had caused substantial derogation in the value of his property.

Richter applied for an interdict setting aside any approvals granted for the erection of the structures on Baker's property. He also sought an order directing the first to the fourth respondents to comply with their contractual obligations, and for them to take all reasonable steps to demolish the structures and ensure that Baker complied with the Handbook for Residents and Conduct Rules of the equestrian estate.

Waterfall contended that Richter was not entitled to attempt to force it to comply with the provisions of Baker's lease when it was not a party to the lease, and that the improvements erected on Baker's sub-division did not constitute a breach of Richter's lease.

The developer noted that Richter sought the review and setting aside of its approval which may have been granted in respect of the alleged unlawful structures on Baker's property. Such approval constituted

administrative action as envisaged in the Promotion of Administrative Justice Act (PAJA), and a review of its decision in terms of that Act should have been brought against it by Richter.

THE DECISION

The approval of building plans by a juristic entity such as the manager of the Estate would constitute administrative action as contemplated in PAJA, and that the requirements necessary to render the approval are present.

The approval of building plans by a juristic entity such as the fourth respondent would constitute administrative action as contemplated in PAJA. The requirements necessary to render the approval were present. The powers of the fourth respondent when approving building plans and other activity within the Estate, were similar in nature to those exercised by the municipality when it approved building plans in terms of the Building Standards Act. The powers of the fourth respondent were therefore, in essence, pertaining to the approval of plans, public in nature. Its Articles of Association, read with the rules by the directors, equate to an empowering provision for the purposes of PAJA, and the rights of all lessees in the Estate were directly and legally affected. Richter was then obliged to bring a review application without any delay, and had to do so before Baker had proceeded and incurred the expense of completing the alleged unlawful structures.

As far as the first respondent was concerned, it had no obligation owing to Richter to enforce the terms of Baker's lease. As owner, it was not involved in the day-to-day operation of the Estate. It was also not involved in the approval of building plans, and disputes that arise between various lessees.

The application was dismissed.

ARUN PROPERTY DEVELOPMENT (PTY) LTD v CAPE TOWN CITY

A JUDGMENT BY MOSENEKE DCJ (CAMERON J, FRONEMAN J, JAFTA J, KHAMPEPE J, LEEUW A J, MADLANGA J, NKABINDE J, VAN DER WESTHUIZEN J and ZONDO J concurring)
CONSTITUTIONAL COURT
15 DECEMBER 2014

2015 (2) SA 584 (CC)

To the extent that section 28 of the Land Use Planning Ordinance (no 15 of 1985) vests public places and streets beyond the normal need arising from a particular subdivision, the owner of the land may claim for compensation.

THE FACTS

Arun Property Development (Pty) Ltd, a property developer, acquired from the University of Stellenbosch a property located in Durbanville, Western Cape with a view to undertaking a substantial township development.

After it had acquired the property, Arun was told by municipal officials that no application for rezoning and subdivision of the property for a township development would be approved unless the layout plans of the proposed development made due allowance for a planned future road infrastructure. This meant that the approval for the rezoning and subdivision depended on whether the development accorded with existing planning protocols. One of these was a structure plan. In 1988 the Western Cape provincial authorities approved the structure plan in terms of section 4(6) of Land Use Planning Ordinance (no 15 of 1985). It envisioned primary roads which would run over the property.

Section 28 of the Ordinance provides that the ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision shall, after the confirmation of such subdivision

or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time.

Arun applied to the City for permission to subdivide the property in order to undertake a residential development. The application was drawn up taking into account the local authority's envisaged road infrastructure. Subdivisions were granted in terms of section 25 of the Ordinance. The City did this on three different occasions for the three phases of the residential development. In each case the approval took effect on the date of transfer to the purchaser of the first erf in a phase. It included confirmation of the rezoning of specified portions of the property to 'public streets' as well as conditions for the design of the road infrastructure within a phase.

The City's approvals were subject to the requirement that all public roads be transferred to it, prior to the utilisation of the property for general residential purposes, the transfer of any newly created erven, the redevelopment of the property or the approval of building and sectional title plans, whichever occurred first.

Arun instituted action claiming compensation from the City. Arun pleaded that its approved subdivision plans had to provide for portions of the higher-order roads (excess land) which were meant to cut across the property. However, the need to provide for the excess land did not arise out of the normal needs of the residential development of the property. The excess land vested in the City and it was a substantial tract of valuable property. It contended that the City had to pay compensation for it.

THE DECISION

The purpose of the Ordinance is to facilitate planned and orderly land use and development. Its mission is best disclosed by the general purpose of a structure plan. The plan must set guidelines for future spatial development that envisages urban renewal, urban design and development plans that effectively advance the order and welfare of the community concerned. The provision is emphatic that a structure plan 'shall not confer or take away any right in respect of land'. Section 28, in particular, aims to vest roads and public spaces based on normal needs of the development in the local authority concerned.

With the rezoning of land use and subdivision of land in order to develop it into a township come public streets and places, new homes, new communities and their general welfare. The public streets and places properly vest in the public authority without compensation because they are integral to the development. They are the developer's 'give' for the value-add a subdivision approval brings.

The section also vests ownership of a developer's excess land, if any, in a local authority. That vesting of ownership beyond the reasonable, normal needs of a subdivisional development must rank as a legislative acquisition of the developer's land without compensation. It occurs by operation of law after confirmation of the subdivision or a part thereof. The compulsory taking-away of the excess land without compensation is not properly related to the purpose of developing a township with adequate public roads and spaces. However, The vesting of excess land in the local authority in the course of a township development may be beneficial to regional roads and other public needs. But that is not an adequate or compelling public consideration why the City may acquire the excess land from the developer for no compensation.

To the extent that section 28 vested public places and streets beyond the normal need arising from a particular subdivision, the owner of the land may claim for compensation. Arun was entitled to compensation in respect of this excess land.

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

A JUDGMENT BY DAMBUZA AJA (MPATI P, LEACH JA, MHLANTLA JA and SCHOEMAN AJA concurring)
SUPREME COURT OF APPEAL
20 MAY 2015

[2015] 3 All SA 10 (SCA)

Companies

A binding offer made in terms of section 153(1)(b)(ii) of the Companies Act (no 71 of 2008) does not compel acceptance of the offer by a creditor. To comply with the provisions of this section, an offer must supply updated information regarding the company's financial position.

THE FACTS

On 31 January 2012, the shareholders of Kariba Furniture Manufacturers (Pty) Ltd resolved that Kariba voluntarily begin business rescue proceedings in terms of section 129 of the Companies Act (no 71 of 2008). The second respondent, Mr JP Jordaan, was appointed as the business rescue practitioner.

On 17 February 2012, at the first statutory meeting of creditors of Kariba, the bank's credit manager, raised the concern that there were no recently audited financial statements relating to Kariba. This and other concerns were not resolved at the meeting, but Jordaan undertook to email Kariba's audited financial statements for the 2005 financial year to the bank's attorneys.

On 26 March 2012, the second meeting of creditors was held. Jordaan inquired if any party wished to vote for amendment of the rescue plan as provided for in terms of section 152(1)(d) of the Act. When none of the affected parties showed interest in doing so, the practitioner called for a vote by the creditors for preliminary approval of the plan. In terms of the plan, the bank held a voting interest of 63%, while ABSA Bank Limited held 2%, the North West Development Corporation (NWDC), another creditor, held 1%, the Municipality of Hammanskraal held 1%, and the shareholders held the balance. The bank and NWDC rejected the plan. The shareholders indicated that they wished to make a binding offer on behalf of the shareholders, to purchase the bank's voting interest in terms of section 153(1)(b)(ii) of the Act. Jordaan immediately ruled that it was not open to the bank to respond to the offer; that the offer was binding on the bank and that the bank's voting interests had to be transferred to the shareholders. He proceeded to amend the plan to reflect the bank as holding 0% interest and the shareholders 95%. The representatives of the bank and the NWDC left the meeting. Thereafter, a vote on the proposed business rescue plan was undertaken by the reconstituted creditors excluding the bank. They voted in favour of preliminary approval of the plan.

The bank then applied for an order that the 'binding offer', made at the second meeting of creditors, on behalf of the shareholders to purchase its voting interest was not binding on it. It also applied for an order that the approval of the proposed business rescue plan be set aside, and that the resolution taken by the Board of Kariba on 31 January 2012 to voluntarily begin business rescue proceedings and to place the company under supervision be set side.

THE DECISION

The issue was whether a binding offer, as provided for in section 153(1)(b)(ii) of the Act, is binding on the offeree once it is made. A further issue was whether reasonable prospects of a successful business rescue existed.

The section provides that any affected person or a combination of affected persons, may make a binding offer to purchase the voting interests of one or more 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 section should not be interpreted so as to compel a

creditor into acceptance of a binding offer, but rather to compel the offeror to not to withdraw from the offer. Although a binding offer may have been made during consideration of the rescue plan, finalisation of the aspects relating thereto, including transfer of the voting interest, is not necessarily immediate. This is consistent with the established meaning of an offer. Once a binding offer is made to purchase a voting interest, the holder thereof is not summarily divested of its voting interest. The holder of the voting interest in question is not divested of its interest without any determination of affordability on the part of the offeror.

In the present case, the offer fell short of providing the information required in terms of section 150 of the Act. There was a failure to provide updated financial statements. The true state of Kariba's affairs as at January 2012 and its anticipated operations could not be established without an update of the books of account, conducted on sound accounting principles, proper valuation of the company assets, and substantiated prospective income and expenditure. No cogent case was made to support an opinion of reasonable prospects of rescue. Consequently, the resolution to commence business rescue was taken without a proper basis and was to be set aside.

The reality was that the rescue plan fell woefully short of providing the information required in terms of section 150(2) and (3) of the Act and of providing information on which an assessment of reasonable prospects could be made. The R5 million settlement amount that was to be part of the capitalisation of the rescue process did not appear anywhere on the business rescue plan. In fact, the practitioner indicated that the amount had hardly been sufficient to even cover the costs of litigation with African Bank. But, despite repeated inquiries by the bank, the practitioner could not produce any document relating to the said legal costs. On the other hand, there was no indication of what had happened to the money. Inquiries by the bank as to ability and willingness of shareholders to provide the R450 000 loan went unanswered.

GRANCY PROPERTY LTD v MANALA

A JUDGMENT BY PETSE JA (MTHIYANE DP, NUGENT JA, LEWIS JA and TSHIQI JA concurring)
SUPREME COURT OF APPEAL
10 MAY 2013

2015 (3) SA 313 (SCA)

Allegations of misconduct by the directors of a company that the directors have misappropriated funds owing to their company for themselves which remain unanswered justify the grant of an order appointing objective and independent directors to the company in terms of section 163(2)(f)(i) of the Companies Act (no 71 of 2008).

THE FACTS

Manala and the third respondent, Gihwala, were the majority shareholders and directors of Seena Marena Investments (Pty) Ltd. Grancy Property Ltd was a minority shareholder in the company.

Grancy alleged that Manala and Gihwala abused their powers as directors and shareholders of SMI, consistently acted in a manner that was oppressive and unfairly prejudicial to Grancy, and made decisions and acted as directors and shareholders of SMI with a complete and unfair disregard for the interests of Grancy and SMI, serving exclusively their own interests. Grancy made specific allegations of instances when Manala and Gihwala had misappropriated money owing to SMI for their own benefit, alleging that they had transferred funds out of SMI to themselves when these funds should have been transferred, by way of dividends, to the three shareholders. Grancy contended that the cumulative effect of these factors warranted the court's intervention to appoint independent and objective directors to oversee SMI's financial and corporate affairs, and to investigate such affairs so as to expose the extent of the malfeasance.

Grancy brought an application for an order in terms of section 163(2)(f)(i) of the Companies Act (no 71 of 2008) for the appointment of objective and independent directors for SMI, the one director to be appointed by the chairperson of the Cape Bar Council from the ranks of senior advocates practising in the field of corporate law, the other director, a senior chartered accountant and registered auditor, to be appointed by the chief executive officer of the Independent Regulatory Board for Auditors. The order was sought as an interim order pending the final adjudication of the matter in a trial.

Manala and Gihwala opposed the application on the grounds that it failed to comply with section 163(1) of the Act. The section sets out the grounds on which the relief sought could be granted. Those grounds are (a) that 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, or (b) that 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) that 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.

THE DECISION

Manala and Gihwala disputed Grancy's entitlement to any relief. However, it was manifest that neither the payments made by them to themselves, which Grancy claimed constituted a diversion of moneys destined for SMI, nor the irregularities reported on by SMI's internal auditors were in dispute. Accordingly, Grancy's assertions against Manala and Gihwala had to be accepted as correct.

Manala and Gihwala's evidence was untenable, and its shortcomings were exacerbated by the absence of a cogent explanation as to why such payments were made in the first

place. It was also clear that the legitimacy of the payments that Manala and Gihwala made to themselves had always been contested by Grancy. Yet there had been no demonstrable attempt by Manala and Gihwala to meaningfully address Grancy's protestations concerning those contested payments.

Consequently, those undisputed facts as had emerged warranted an in-depth investigation by objective and independent directors. Those contentious payments in themselves justified the grant of the relief sought by Grancy.

The application was granted.

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

A JUDGMENT BY BRAND JA (LEWIS JA, PILLAY JA, DAMBUZA AJA and MAYAT AJA concurring)
SUPREME COURT OF APPEAL
20 MARCH 2015

2015 (4) SA 34 (SCA)

Section 82(4) and 83(4) of the Companies Act (no 71 of 2008) should be interpreted to the effect that administrative reinstatement of a company's registration retrospectively re-establishes its corporate personality and title to its property, and also validates 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.

Reinstatement of a company revestS it with its property and also validates its corporate activity. Retrospective validation of the corporate activities of a company during its period of deregistration as a matter of course holds the inherent risk of prejudice to third parties. Revesting the company with its property can have a detrimental effect on third parties who have in the meantime acquired rights to that property. More significantly, refusal to validate the corporate activities of a company during its period of demise can be equally devastating to the interests of bona fide third parties who were unaware of the deregistration. Unlike a deceased person, a deregistered company often carries on with its business as if the deregistration never occurred and with third parties having no knowledge of its disability.

For this reason, partial retrospectivity is untenable. The wording of section 82(4) leaves no room for this construction. Once 'reinstatement' in section 82(4) is construed as indicating retrospective operation, there is no justification for construing it to mean that retrospective operation must stop halfway, in the sense that it pertains to revestment of the company's property only. The only meaning is that section 82(4) has automatic retrospective effect, not only in revesting the company with its property but also in validating its corporate activities during the period of its deregistration.

It followed that the arbitration proceedings and related court proceedings during the period of deregistration, together with the awards and orders made in those proceedings, were automatically validated by the reinstatement of Newlands under section 82(4).

Once it is accepted that in principle revestment under s 82(4) operates retrospectively, the question arises — is there any basis for going only halfway? In other words, is there any basis for the interpretation of s 82(4) which found favour with the court a quo that reinstatement of a company serves to revest it with its property but does not validate its corporate activity?

NEWTON GLOBAL TRADING (PTY) LTD v DE CORTE

Companies

A JUDGMENT BY FOURIE J
GAUTENG DIVISION, PRETORIA
22 AUGUST 2014

2015 (3) SA 466 (GP)

A failure to comply with the provisions of section 129 of the Companies Act (no 71 of 2008) places the position of the business rescue practitioner into question. In the absence of proof that there has been compliance, the status of the company would no longer be that of a company under business rescue, and the authority of the business rescue practitioner to represent the company would be without any legal foundation.

THE FACTS

In an application brought by Newton Global Trading (Pty) Ltd, it sought an interim interdict prohibiting De Corte from entering certain chrome-processing premises and removing mineral-related material from the premises. Newton alleged that on 31 May 2013 it passed a resolution to begin business rescue proceedings and place the company under supervision. It alleged that the deponent to the application papers was appointed as the business rescue practitioner of the company. The resolution was delivered to the Companies Commission on 5 June 2013.

The application annexed a copy of the notice of the appointment of a business rescue practitioner. This document showed that Newton commenced business rescue proceedings on 5 June 2013 and the deponent had been appointed as the business rescue practitioner. This notice was dated 11 June 2013 and was also delivered to the commission on the same date.

De Corte opposed the application on the grounds that the business rescue proceedings had failed to comply with section 129 of the Companies Act (no 71 of 2008), and Newton had no locus standi to bring the application.

THE DECISION

Sections 129(4)(a) and (b) of the Act provide that, after appointing a practitioner, the company must file a notice of the appointment within two business days after making the appointment and publish a copy thereof to each affected person within five business days after the notice was filed. The verb 'file' means to deliver a document to the commission in the prescribed manner and form. Subsection (5) provides that if a company fails to comply with any provision of subsection (4) 'its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity'.

Newton failed to comply with the provisions of subsection (4)(a), as the notice of appointment was not filed within two business days after 5 June 2013. Newton argued that there was nevertheless substantial compliance with its requirements. This could not be accepted. First, the provisions of subsections 129(4)(a) and (b), read with subsection (5)(a), appear to be peremptory. Second, the sanction for non-compliance is serious, ie nullity. Third, having regard to the period of only two business days as referred to in subsection (4)(a), and only five business days as referred to in subsection (4)(b), it seems that the legislature intended that time should be of the essence. This is to prevent an abuse of this process and to protect the interests of affected persons. Therefore, in my view substantial compliance is not compatible with the wording of these subsections or with the way in which section 129 has been formulated.

The result of this was that the resolution to begin business rescue proceedings had lapsed and was a nullity.

If there had been no compliance with the provisions of subsection 129(4), the status of Newton would no longer be that of a company under business rescue, and the authority of the business rescue practitioner to represent the company would be without any legal foundation. Once that authorisation has been placed in dispute, the onus to establish that the business rescue practitioner was duly authorised to represent the company rested upon Newton. Newton had failed to discharge this onus.

GROUP FIVE CONSTRUCTION (PTY) LIMITED v MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC TRANSPORT, ROADS AND WORKS

A JUDGMENT BY SATCHWELL J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
13 FEBRUARY 2015

[2015] 2 All SA 716 (GJ)

Suretyship

A construction guarantee requiring the issue of a first demand on the guarantor cannot be enforced if a first demand has been withdrawn and followed by a second demand. Notice of cancellation by artificial means at a later stage may be construed as fraud, the effect of which will be to deny the efficacy of the guarantee.

THE FACTS

The Member of the Executive Council for Public Transport, Roads and Works concluded a construction contract for the construction of a hospital with a joint venture, a partnership of the third, fourth, fifth and sixth respondents. The contract required the joint venture to provide a variable construction guarantee in favour of the MEC. This was provided by a certain Mr Lombard, the second respondent. Group Five Construction (Pty) Ltd provided an indemnity to Lombard.

Clause 5 of the issued guarantee provided: 'Subject to the guarantors maximum liability . . . the Guarantor undertakes to pay the Employer the Guaranteed sum of the full outstanding balance upon receipt of a first written demand from the Employer to the Guarantor at the Guarantor's domicilium citandi et executandi calling up this Construction Guarantee stating that: 5.1 the agreement has been cancelled due to the Contractors default and that the Construction Guarantee is called up in terms of 5.0. The demand shall enclose a copy of the notice of cancellation."

The partnership was dissolved. The MEC concluded a new contract with one of the partners, and then sent a letter of demand to Lombard. This demand was withdrawn, and another demand was later made. The demand stated "Kindly take note that the guarantee issued by you in terms of the construction guarantee number C05/21102 ('the guarantee') is hereby called up in terms of paragraph 5.0 of the guarantee. The Agreement (as defined in the guarantee) has been cancelled due to the Contractor's default. The notice of cancellation is contained in the summons in case number 31971/09, a copy of which is annexed hereto." A notice of cancellation was not annexed to the demand, nor was a summons. A summons was delivered to Lombard some two weeks later.

Group Five contended that as the guarantee specifically provided only for a "first written demand" this precluded any subsequent demand.

THE DECISION

It was questionable whether the notice of cancellation was confirmed in or consisted in the delivered summons. The guarantee required a written notice of cancellation since it stated the letter of demand "shall enclose a copy" thereof. A "tacit acceptance" by the contractor could not constitute a written notice of cancellation.

The trigger to compliance of the guarantee had to be a written document. Lombard could not be expected to investigate conduct to see whether or not there was an oral cancellation or whether or not something else which constituted cancellation had taken place.

The summons and particulars of claim did not meet the requirements for a "clear and unequivocal" notice of intention to cancel or notice of termination. The first demand was a 'futile, still-born communication' and the second demand was the same.

It followed that the proposition that the summons and particulars of claim contained within themselves or constituted a notice of cancellation or confirmation of cancellation in respect of the building contract which is the subject-matter of this guarantee was an artificial construct long after the event. Such a situation clearly accorded with fraud as understood in English law in the context of

letters-of-credit and guarantees. It was, in this case, seriously arguable, that 'on the material available, the only realistic inference is that . . . [the beneficiary] could not honestly have believed in the validity of its demands on the performance bonds'. Absence of good faith provided a ground for declining enforcement.

The guarantee was therefore of no force or effect and the second demand did not comply with it.

It is clear that the guarantee requires a written notice of cancellation since the letter of demand "shall enclose a copy" thereof. I fail to see how and where a "tacit acceptance" can constitute a written notice of cancellation. The trigger to compliance of the guarantee must be a written document. Lombard cannot be expected to investigate conduct to see whether or not there was an oral cancellation or whether or not something else which constituted cancellation.

...

The summons indicates no more than a tacit acceptance of repudiation on 4 August 2008 when the second contract was concluded. Since paragraph 19 does not apply to the first JV contract, it cannot contain within itself a confirmation of cancellation. In any event, this summons could hardly constitute cancellation of a contract which no longer exists. Indeed, the summons could not constitute confirmation of an historical event because the guarantee requires the notice of cancellation itself.10 Finally, this summons was withdrawn11 – the entire action then being withdrawn – pending mediation and therefore could not constitute a notice of cancellation at time of the letter of demand in September 2009.

The summons and particulars of claim do not meet the requirements for a "clear and unequivocal" notice of intention to cancel or notice of termination. The first demand was indeed "a futile, still-born communication" and the second demand "must share the same fate"

It follows that I cannot accept that the summons and particulars of claim contains within itself or constitutes a notice of cancellation or confirmation of cancellation in respect of the 2006 JV building contract which is the subject-matter of this guarantee.

HANSA SILVER (PTY) LTD v OBIFON (PTY) LTD

A JUDGMENT BY VAN DER MERWE AJA
(NAVSA ADP, SHONGWE JA, SALDULKER JA and D MEYER AJA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2015

2015 (4) SA 17 (SCA)

Contract

Regulations of an auction requiring written authority to bid on behalf of another do not apply to vendor bids when the identity and location of the auctioneer is clear. Vendor bidding is not a ground for cancellation of a sale resulting from an auction when the failure to disclose such bidding does not constitute a material misrepresentation inducing such a sale.

THE FACTS

On 28 August 2011, the owners of Thaba Phuti Safari Lodge gave a written mandate to Obifon (Pty) Ltd, trading as an auctioneer under the name High Street Auction Co to sell the lodge by public auction or private treaty. In terms of the mandate, the sellers appointed High Street to bid on their behalf at a public auction, up to a reserve price of R25m.

Advertisements for the auction, and the rules of the auction itself, stated that High Street and the Auctioneer were entitled to bid on behalf of the seller up to the reserve price.

A certain Mr Ichikowitz on behalf of Hansa Silver (Pty) Ltd, registered as a buyer at the auction. In doing so, he acknowledged that Hansa was bound by the terms and conditions of the auction rules.

During the auction, High Street bid on behalf of the sellers. The auction culminated in the sale of the lodge to Mr Ichikowitz for R20m. Thereafter, three written agreements of sale were entered into. In terms of these agreements each of the sellers sold its respective portion of the assets comprising the lodge to Mr Ichikowitz on behalf of a company to be formed. The total purchase price in terms of the three agreements was R20m. Each agreement provided that the purchaser was liable for payment of commission to High Street.

The sale agreements were later amended. Hansa and the other purchasers took the view that they were not bound by the initial sales agreements, and claimed they were entitled to a refund of the commission paid to High Street. The purchasers brought an application in terms of which they sought an order that they were not bound by the sale agreements and also claimed repayment of the commission paid to High Street.

The grounds on which the purchasers brought the application was that the sale agreements and the first addenda were invalid because of non-compliance with the regulations, in that the auctioneer was not permitted to bid at the auction at all, and in that the auctioneer was obliged to identify his bids on behalf of the sellers, but failed to do so. The purchasers relied on regulations 26(3) and (4) which provide:

'(3) The auctioneer must ensure that a person who intends to bid on behalf of another, produces a letter of authority expressly authorising him or her to bid on behalf of that person, and both that person and the person bidding on his or her behalf must meet the requirements of subregulation (2).

(4) The auctioneer must ensure that if a person will be bidding on behalf of a company, the letter of authority contemplated in subregulation (3) must appear on the letterhead of the company and must be accompanied by a certified copy of the resolution authorising him or her to do so.'

Regulation 21(2)(b) provided that the rules of an auction must contain the full names, physical address and contact details of the auctioneer and, where applicable, of the auction house.

The bidder's record indicated that vendor bidding had been registered for purposes of but the auctioneer did not produce any document referred to in these regulations.

THE DECISION

The ordinary meaning of the regulations was clear: the auctioneer was to ensure compliance by prospective

bidders. Their purpose was to identify bidders in order to enable communication with successful bidders for purposes of matters such as delivery of the goods and securing payment of the purchase price. Participants at an auction know or could easily ascertain the identity and location of the auctioneer and the auction house. So much was also clear from regulation 21(2)(b).

Therefore, regulations 26(3) and 26(4) were not applicable to an auctioneer who intends to bid on behalf of a seller.

It is common knowledge that the auctioneer is the agent of the seller and that the purpose of the auction is to obtain the best possible price for the benefit of the seller. Vendor bidding is only permitted in case of prior notice thereof. The enquiry should therefore centre on whether the non-disclosure of a vendor bid in any given case constituted a misrepresentation. In the present case, there was no indication that vendor bidding had constituted a material misrepresentation inducing the sale agreements.

Hansa had therefor been bound by the initial sales agreements. Its application was dismissed.

It is common knowledge that the auctioneer is the agent of the seller and that the purpose of the auction is to obtain the best possible price for the benefit of the seller. It is not intended to provide the public with the opportunity to obtain bargains. Vendor bidding is only permitted in case of prior notice thereof. No person is compelled to bid at such auction nor to bid higher than what the bidder is willing to spend. A vendor bid up to the reserve price does not deprive a bidder of a sale below the reserve price. That is the result of the reserve price itself. And the acceptance of a bid below the reserve price is, in any event, within the control and province of the seller.
In my view the enquiry should centre on whether the non-disclosure of a vendor bid in any given case constituted a misrepresentation.

KWA SANI MUNICIPALITY v UNDERBERG/ HIMEVILLE COMMUNITY WATCH ASSOCIATION

Contract

A JUDGMENT BY GORVEN AJA (MPATI P, LEWIS JA, MBHA JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
20 MARCH 2015

[2015] 2 All SA 657 (SCA)

A municipality which considers an agreement it has concluded as being invalid for failure to comply with the Local Government: Municipal Finance Management Act (no 56 of 2003) must take steps to have the agreement declared invalid. Failure to prepare and implement a supply chain management policy is not necessarily a ground for invalidity of an agreement.

THE FACTS

Kwa Sani Municipality and the Underberg/himeville Community Watch Association concluded an agreement in terms of which the association provided disaster management services in the municipality. The contract period was for three years with effect from 1 July 2008, with an extension for a further three years unless terminated earlier than that date. Thereafter, the contract was to be terminable on six months' notice by either party. Neither party terminated it prior to 1 July 2011, with the result that the contract was renewed.

The second three year period was to elapse on 30 June 2014. On 23 May 2012, the council of the municipality resolved to terminate the agreement. The municipal manager then wrote to the association giving it notice of termination.

The association stated that the purported termination amounted to a repudiation of the agreement, that the association did not accept the repudiation and that it elected to abide by the agreement. The association continued to provide the services under the agreement. The municipality refused to pay the association for any services beyond June 2012.

After arbitration proceedings had begun, the municipality contended that the agreement was invalid for want of compliance with section 217 of the Constitution, and the provisions of the Local Government: Municipal Finance Management Act (no 56 of 2003) and the regulations promulgated under that Act.

It sought an order confirming that the agreement was invalid.

THE DECISION

The first ground on which the municipality based its application was that because it failed to prepare and implement a supply chain management policy as it was obliged to do under the Act, the agreement was invalid.

At the time the agreement was concluded, no supply chain management policy was in place. Section 111 of the Act provides that each municipality and each municipal entity must have and implement a supply chain management policy which gives effect to the provisions of this Part.

There was no indication that any failure on the part of a municipality to comply with this section would result in invalidity of the agreements which would otherwise fall within the ambit of such a policy. The touchstone of validity remains section 217 of the Constitution and compliance with the provisions of the Act and regulations. This failure did not, in and of itself, render the agreement invalid.

The second ground was that the conclusion of the agreement did not meet the requirements of section 217 of the Constitution. The municipality contended that the effect of this section was that a public bidding process had been necessary. Section 217 provides that when an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Unlike the provision of routine services, the association provided a unique service with multi-faceted aspects to it. In the circumstances, there was no failure to comply with the section.

The third ground was that section 116 of the Act was not complied with. This requires agreements to be reduced to writing and, if an agreement

endures for longer than three years, it must be subject to review at least once every three years.

The first aspect was satisfied. As far as the need to review the agreement was concerned, either party was entitled to terminate it after the initial three year period. Despite this provision, the municipality failed to do so. It was silent as to whether it in fact reviewed the agreement but the mechanism for this was clear and available to it.

There was therefor no failure to comply with section 116 of the Act.

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

A JUDGMENT BY LEWIS JA (PILLAY JA, WILLIS JA, GORVEN AJA and SCHOEMAN AJA concurring)
SUPREME COURT OF APPEAL
22 MAY 2015

[2015] 3 All SA 42 (SCA)

Although a loan agreement may be invalid for failure to comply with the provisions of a statute, a mortgage bond securing the loan may provide a basis for enforcing repayment of the loan on the basis of an enrichment action.

THE FACTS

The Land and Agricultural Development Bank of South Africa agreed to lend money to Panamo Properties 103 (Pty) Ltd for the purchase of two properties and the development of a township thereon. A mortgage bond secured the loan. Pursuant to the agreement, Panamo borrowed R18 500 000 from the bank.

Clause 2.1 of the bond provided that it constituted a continuing covering security for in general, for any existing or future debt that Panamo owed or might owe to the bank. Clause 8 provided that the bank could declare the secured property executable should Panamo fail to pay to the bank any sum which the bank could lawfully claim. Clause 15 hypothecated the property for money recoverable in terms of the bond or which might at any time become owing or payable to the bank from whatsoever cause.

Some months later, the bank wrote to Panamo contending that the contract for the loan to it was invalid in that it was contrary to section 23(2) of the Act. Section 23(2) provides that the bank may not, without the prior written approval of the Minister responsible for agriculture, invest money in an unlisted company, trust or other equivalent legal entity, business undertaking or venture. It brought an action against Panamo, claiming a declaration that the contract was invalid. The bank contended that the agreement of loan was unauthorised and void in that it did not comply with section 3 of the Land and Agricultural Development Bank Act (no 15 of 2002). It contended that the loan fell outside the scope of the Act and did not comply with the Public Finance Management Act (no 1 of 1999) and was therefore

void. Sections 66 and 68 of that Act provide that where a public institution, such as the bank, enters into a transaction that is not authorised by legislation governing the institution, it will not be bound by the transaction.

Panamo contended that on a construction of the agreement and section 3, the bank was empowered to enter into the agreement.

THE DECISION

The bank was obliged and empowered to use its funds only for the purposes set out in section 3. Other transactions were not within its powers. As a public entity the bank could do only those things that the Act authorised. The loan to Panamo for the purpose of acquiring land for the establishment of a township was clearly not authorised by the Act. The loan agreement was therefore in contravention of the Act, and was invalid. In terms of section 66 and 68 of the Public Finance Management Act, it could not be enforced.

On this basis, the bank may have been able to enforce an enrichment claim against Panamo. An enrichment claim gives rise to indebtedness. There was no reason why a mortgage bond could not secure a debt arising from an enrichment claim. The question was whether the terms of the mortgage bond provided a basis for the enforcement thereof.

The three clauses of the bond cited above gave the security under the bond to indebtedness other than that arising from an agreement and the bond. They would clearly cover a debt arising from an enrichment claim. Reading these together with the preamble, clear wording would be required to exclude recovery of a claim under an enrichment action. No such wording appeared.

There being no basis for limiting the broad, all-encompassing language contained in the preamble, clause 2.1, clause 8 and clause 15, the bond afforded security for a claim for moneys due under an enrichment action.

Section 26(3) provides that ministerial authority is required for investing money (as well as for other acts referred to in the subsections I have not quoted). But written approval of the Minister is not required for section 26(2)(m). Panamo thus argued that the loan transaction fell under that subsection: the Bank made an advance to it which reasonably formed part of or was generally associated with agricultural or developmental financial services. This argument must also fail. One cannot read section 26(2) apart from section 26(1). The latter qualifies the acts and transactions referred to in section 26(2): they must all be in furtherance of the objects of the Bank set out is section 3.

The Bank is thus obliged and empowered to use its funds only for the purposes set out in section 3: other transactions are not within its powers. Its powers are conferred by the Act and it has no others. As a public entity the Bank may do only those things that the Act authorises. The loan to Panamo for the purpose of acquiring land for the establishment of a township is clearly not authorised by the Act. The loan agreement is thus in contravention of the Act, and, as the Bank contended, is invalid

HARDENBERG v NEDBANK LTD

A JUDGMENT BY ROGERS J
(ERASMUS J and MANTAME J
concurring)
WESTERN CAPE DIVSION, CAPE
TOWN
12 FEBRUARY 2015

2015 (3) SA 470 (WCC)

Credit Transactions

A credit provider may terminate a debt review in terms of section 86(10) of the National Credit Act (no 34 of 2005) even if the debtor was not in default at the time the application for debt review was made.

THE FACTS

Nedbank Ltd lent R673 431 to Hardenberg and his wife, to whom he was married in community of property.

Some two years later, the Hardenbergs applied to a debt counsellor in terms of section 86(1) of the National Credit Act (no 34 of 2005) to be declared overindebted. They did so at a time when they were not in default of their obligations to Nedbank. The counsellor gave notice of the application to the defendants' credit providers, including Nedbank. The counsellor then circulated several proposals to the credit providers, and brought an application in the magistrates' court for a rearrangement of the defendants' obligations, including their obligations to Nedbank.

At a time when the rearrangement application was pending, Nedbank gave notice that it was terminating the debt review in terms of section 86(10) of the Act. The section provides that if a consumer is in default under a credit agreement that is being reviewed, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner. The bank then issued summons for repayment of the loan.

The Hardenbergs appealed against the grant of summary judgment in favour of Nedbank. Their ground of appeal was that they had not been in arrears at the time they applied for debt review, and because of the decision in *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 (SCA), Nedbank had not been entitled to terminate the debt review.

THE DECISION

The question in *Collett v FirstRand Bank Ltd* was whether the right to terminate in terms of section 86(10) could be exercised while an application for a rearrangement order was pending in the magistrates' court. The judgment held that a pending rearrangement application did not bar termination in terms of section 86(10).

The Hardenbergs argued that the judgment was authority for the proposition that a credit provider may not terminate a debt review if the debtor is not in default at the time the debt review application is made because of these statements in the judgment: 'It is only when the consumer is in default that the credit provider has this right. If he is not, the debt review continues without the credit provider being entitled to terminate it. ... If the consumer applies for debt review before he is in default the credit provider may not terminate the process.'

Section 86(10) does not suggest that the default must exist at the time the consumer applied to be declared overindebted. The present tense is used in relation to the default, indicating that the requirement is that the default should exist when the credit provider terminates the debt review. The judgment in *Collett* did not intend to hold that the default must exist at the time the consumer applies for debt review in order for the credit provider to be entitled to exercise the right of termination conferred by section 86(10). The judgment did not examine the language of section 86(10) with this question in mind. Had this question been before the court, the restriction the judgment places on the credit provider would have been qualified by the proviso that if the consumer subsequently fell into default, the restriction would no longer apply.

Nedbank had been entitled to terminate the debt review.

JILI v FIRSTRAND BANK LTD

A JUDGMENT BY WILLIS JA (MAYA JA, SHONGWE JA and MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2014

2015 (3) SA 586 (SCA)

If a debtor has breached a debt rescheduling agreement, the credit provider is entitle to proceed to enforce its rights by action against the debtor, and may obtain summary judgment against the debtor if the debtor fails to show any defence to the action brought against it.

THE FACTS

Firstrand Bank Ltd lent money to Jili to enable her to buy a 2007 Volkswagen Jetta 1.6 Trendline motor vehicle. She fell into arrears in making repayment, and so approached a debt counsellor for assistance. The debt counsellor notified all Jili's credit providers as well as every registered credit bureau thereupon, in terms of section 84(6) of the National Credit Act (no 34 of 2005), The debt counsellor found that Jili was overindebted and forwarded a proposal to all of Jili's creditors, including the bank, for the rescheduling of the repayment of her debt. The debt counsellor proposed that Jili's repayments in terms of her agreement with the bank be reduced to R1714,44 per month. The bank accepted the proposal.

In October 2011 the debt counsellor brought an application, on behalf of Jili, in the magistrates' court for an order that she was over-indebted and rescheduling her debt to various credit providers in terms of ss 86(8) and 87(1)(b)(ii) of the NCA. The magistrate granted the order on 4 November 2011.

In March and April 2012 Jili fell into arrears in respect of her rescheduled repayments to the bank. In May 2012, the bank instituted an action against the appellant for the return of the vehicle and recovery of the debt. Jili proposed a settlement in which she would pay in full the arrears owing to the bank, and defended the action. On 24 August 2012 the bank applied for summary judgment.

Jili appealed the grant of summary judgment.

THE DECISION

The issues were: (a) could the bank rely on Jili's default in March and April 2012, without first obtaining an order setting aside the magistrate's order rearranging the repayment of the appellant's debt, (b) if the bank could so rely upon Jili's default, did the court have a discretion not to grant judgment in favour of the bank, and (c) in the event that the court had this kind of discretion, did the court exercise it in a judicial manner, having regard to all the circumstances of the case?

In *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC) it was held that an original credit agreement is enforceable without further notice if the relevant debt-restructuring order is breached. This provided the answer to the first question.

As far as the second question was concerned, it was relevant that Jili in fact produced no defence to the bank's action, only a plea ad misericordiam. Summary judgment should not be refused in such circumstances as the court has no discretion to refuse it in such circumstancs.

The appeal was refused.

LODHI 5 PROPERTIES INVESTMENTS CC v FIRSTRAND BANK LTD

A JUDGMENT BY MAYA JA (MAJIEDT JA, MBHA JA, PILLAY JA and SCHOEMAN AJA concurring)
SUPREME COURT OF APPEAL
22 MAY 2015

[2015] 3 All SA 32 (SCA)

Mora interest due in terms of section 1(2) of the Prescribed Rate of Interest Act (no 55 of 1975) is payable whether or not parties to a loan agreement have agreed that interest shall not be payable on the loan.

THE FACTS

In June 2008 Firstrand Bank Ltd lent to Lodhi R9,6m repayable in 120 monthly instalments of R88 000. The loan was stated to be without interest, and was for the purchase of two properties. Two parties executed a suretyship bond in the bank's favour securing the indebtedness of Lodhi . Lodhi 5 and the second appellant registered a covering mortgage bond and a suretyship bond in the bank's favour.

In 2011, the bank sent a statutory demand to Lodhi 5 in terms of section 69 of the Close Corporations Act (no 69 of 1984) and a statutory demand to the second appellant in terms of section 345 of the Companies Act (no 61 of 1973). They stated that if payment of the sums claimed was not made within 21 days of receipt thereof, they would be deemed unable to pay their debts. There was no response to the letters of demands.

The bank then brought an application to have Lodhi 5 and the second appellant placed under final winding up and the surety ordered to pay the outstanding amount on the loan. The bank relied on the written, interest free loan agreement . The bank also relied on a written 'Agency and Administration Services Agreement' in terms of which, the bank, acting as Lodhi 5's exclusive agent, would purchase the property on its behalf. An administration fee for those services was payable by Lodhi 5 to the bank in a sum of R7 600 560 plus VAT, payable in 120 equal monthly instalments. The bank alleged that Lodhi 5 had fallen into arrears in terms of both agreements and that sums of R3 609 331,52 and R6 773 242,73 remained owing as capital in terms of the loan agreement and the balance of administration fees in terms of the agency agreement, respectively.

On appeal, the issues were whether: (a) Lodhi 5 and the second appellant were correctly placed under winding up, (b) the amount due should be reduced by R2 642 006,98 this being the amount admitted by the surety as being outstanding, and (c) Lodhi was liable to pay interest on such amount and if so, from which date.

THE DECISION

Clause 18.2 of the loan agreement gave the bank the right in the event of a breach of its terms, by written notice, to 'declare all or any part of the Capital Outstandings to be immediately due and payable whereupon the Capital Outstandings shall become immediately due and payable; and/or enforce any or all of its rights under the Security Documents'. The bank invoked these provisions in its letters of demand.

The two entities were therefore commercially insolvent and they were correctly placed under final winding-up.

Regarding Mr Lodhi's liability as Lodhi 5's surety, it was conceded by the bank that the amount in the order granted by the court below against him should be reduced to the admitted outstanding capital sum.

As regards the liability to pay interest, this was not based on the enforcement of a contractual undertaking but rather on Lodhi 5's default. A party which has been deprived of the use of its capital for a period of time has suffered a loss which, in the normal course of events, will be compensated by an award of mora interest, ie default interest. This constitutes the damages that

flow naturally from the contract itself by reason of a debtor having failed to perform a contractual obligation within the agreed time. Lodhi 5 unlawfully delayed payment of its outstanding debt to the bank. It was therefore liable to compensate the bank for its failure to perform on the due date at the legal rate as prescribed by section 1(2) of the Prescribed Rate of Interest Act (no 55 of 1975). This obligation, which arose when the bank claimed restitution, has nothing to do with and is not affected by the Shari'ah law's prohibition against payment of interest on a loan debt.

The contention that the bank did not invoke the acceleration clause under the loan agreement may be dealt with shortly. Clause 18.2 of the loan agreement gave the bank the right in the event of a breach of its terms, by written notice, to "declare all or any part of the Capital Outstandings to be immediately due and payable whereupon the Capital Outstandings shall become immediately due and payable; and/or enforce any or all of its rights under the Security Documents."6 The bank expressly invoked these provisions in its letter of demand of 18 April 2011 which stated that "[i]n light of the aforesaid breach, [the bank] has instructed us to declare all the Capital Outstandings of the Loan Agreement . . . to be immediately due and payable."

LEHANE N.O. v LAGOON BEACH HOTEL (PTY) LTD

A JUDGMENT BY YEKISO J
WESTERN CAPE DIVISION, CAPE TOWN
23 JANUARY 2015

2015 (4) SA 72 (WCC)

Insolvency

Recognition may be granted to a trustee appointed by a court within whose jurisdiction the insolvent was not domiciled under exceptional circumstances and by reason of exceptional consideration of convenience.

THE FACTS

Mr Dunne was a shareholder of a company registered in Ireland which held the entire shareholding in Lagoon Beach Hotel (Pty) Ltd. On 29 July 2013 Lehane was appointed as the official assignee of the bankrupt estate of Dunne by the Dublin High Court, Bankruptcy.

In the course of the investigation of the affairs of Mr Dunne Lehane ascertained that Lagoon Beach Hotel (Pty) Ltd was in the process of disposing of its immovable property, or that its shareholder was in the process of disposing of its shares and, possibly, its loan account therein. The purchase consideration in respect of the disposition of its immovable property and shares was alleged to be in an amount of R260m.

On 1 September 2014 the High Court, Bankruptcy, in Ireland, issued letters of request at the instance of Lehane, asking the High Court of South Africa to recognise Lehane as the trustee of Mr Dunne's bankrupt estate. The High Court in Ireland further authorised Lehane, in the event of recognition being accorded to him by the South African High Court, to apply for an anti-dissipation order in respect of the sale of the Lagoon Beach Hotel and to pursue any related proceedings in South Africa.

On 2 September 2014 Lehane applied for an order restraining Lagoon Beach Hotel (Pty) Ltd from disposing of the proceeds of the sale of its assets, a hotel business, and the assets comprising that, pending the outcome of legal proceedings then contemplated to be instituted in the Republic of Ireland.

Lagoon Beach opposed the grant of the order.

THE DECISION

Lagoon Beach challenged Lehane's locus standi on the grounds that until such time as he had been recognised by the South African court as Dunne's official assignee, he did not have the legal right to institute the proceedings. It contended that a foreign trustee of an insolvent estate will be recognised by the court only in those instances where the bankrupt is domiciled in the state where the declaration of bankruptcy was issued. The declaration of bankruptcy is issued at the time the bankrupt is domiciled in the state in which the declaration of bankruptcy is issued. In the present case, Lehane had not established that Dunne was domiciled in Ireland at the time he was declared bankrupt by the High Court, Dublin.

The Irish Bankruptcy Court had, in the proceedings before it, determined that Dunne was domiciled in Ireland at the time of his declaration of bankruptcy. Furthermore, domicile is not an absolute requirement for the recognition of a foreign trustee. In *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) it was held that recognition could be granted to a trustee appointed by a court within whose jurisdiction the insolvent was not domiciled under exceptional circumstances and by reason of exceptional consideration of convenience. It could therefore be concluded that Lehane had established that Dunne was domiciled in Ireland when he was declared bankrupt by the High Court, Dublin, and that, in a subsequent application by Mr Dunne to have his declaration of bankruptcy set aside, the High Court, Dublin, determined that Mr Dunne was domiciled in Ireland at the time of the declaration of his bankruptcy.

Given that the restoration of Dunne's indirect loan and shareholding in Lagoon Beach would be valueless because of the disposal by Lagoon Beach Hotel of its assets and that efforts to trace the flow of the proceeds from its disposition of its assets would be nigh impossible given the ease with which funds can be transferred internationally, and the privacy of banking transactions, Lehane was entitled to an order restraining the company from disposing of its assets.

The US Bankruptcy Code is a US domestic piece of legislation. It is not customary international law. Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. No matter what the US Bankruptcy Code provides as regards its extraterritorial application, that in itself is no basis for a conclusion that it has a binding force in the Republic. To conclude otherwise would countenance the violation of the territorial sovereignty of the Republic of South Africa. The principle of sovereignty has consistently been recognised by our courts in the context of insolvency matters.

LEVENSON v FLUXMANS INC

A JUDGMENT BY WINDELL J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
27 MARCH 2015

2015 (3) SA 361 (GJ)

Prescription

The legal invalidity of an agreement is a fact, and not a legal conclusion, and may therefore be a fact of which a debtor must have knowledge if prescription is to run in respect of a debt arising from such an agreement.

THE FACTS

On 6 February 2006, Levenson instructed Fluxmans Inc to bring a damages claim on his behalf against the Road Accident Fund. Fluxmans accepted the instruction on the basis that it would charge Levenson a contingency fee of 22,5% plus VAT of the amount recovered from the Fund.

On 13 May 2008 the action was settled. The Fund agreed to pay R4 862 561,40, and gave an undertaking in respect of future medical and hospital expenses and party and party costs. Levenosn received a statement of account from Fluxmans, advising that he would be paid R3 290 138,90. This was made up of R3 103 449,39 in respect of the capital and R186 689,51 being costs recovered from the Fund. Fluxman's fees were R1 109 101,02, inclusive of VAT.

On 9 April 2014, following media reports on a Constitutional Court judgment, Levenson addressed a letter to Fluxmans in which he challenged the reasonableness of Fluxman's fees. In *Ronald Bobroff & Partners Inc v De la Guerre* 2014 (3) SA 134 (CC), the Constitutional Court declared common-law contingency agreements invalid. Levenson also contended that the contingency fee arrangement was contrary to the provisions of the Contingency Fees Act (no 66 of 1997) as it did not specify the limitation on contingency fees, nor did Fluxmans bring those limitations to his attention. Levenson requested Fluxmans to review the fees it had charged. Fluxmans rejected the request and took the view that any claim Levenson might have would have prescribed.

Levenson brought an application for an order declaring the contingency fee agreement concluded between the parties invalid, void ab initio and of no force and effect.

THE FACTS

The agreement clearly did not comply with the formalities of the Act. It was accordingly invalid.

Applying section 12(3) of the Prescription Act (no 68 of 1969), the question was whether Levenson had 'knowledge' of the facts from which 'the debt' arose at the time he received the account from Fluxmans. Section 12(3) provides that a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts giving rise to such debt, provided that a creditor who could have acquired the knowledge by exercising reasonable care is deemed to have such knowledge.

Leveonson only became aware of the legal position with regard to contingency fee agreements in April 2014.The invalidity of a common-law contingency fee agreement is a fact, and not a legal conclusion. Levenson was not aware that an Act prohibiting the agreement existed and that he was overcharged. He might have been suspicious that the fees represented an overcharge, but suspicion is insufficient to amount to knowledge of the facts. Levenson only acquired knowledge of the facts from which the debt arose when the Constitutional Court's judgment on contingency fee agreements was delivered in 2014.

Fluxmans was therefore not entitled to raise prescription as a defence.

MULLANE v SMITH

A JUDGMENT BY SPILG J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
20 APRIL 2015

[2015] 3 All SA 230 (GJ)

Competition

A company is entitled to an interdict to prevent a competitor taking advantage of it, if it shows that there has been a disregard for its rights and a clear attempt to take unfair and wrongful advantage of inside knowledge.

THE FACTS

Smith was a 24% shareholder in the second applicant, Coleman Tunnelling Africa (Pty) Ltd which conducted business as a pipe jacking and specialist tunnelling contractor. Bothar Boring and Tunnelling (Pty) Ltd, the third respondent, was a competitor of Coleman.

Smith had introduced Bothar to Coleman as a potential purchaser of its business. As a result, Bothar was given access to Coleman's confidential information for purposes of a due diligence exercise. Bothar was obliged to sign a confidentiality agreement. Bothar sought more information but had not yet signed the confidentiality agreement. On 2 April 2014, the applicant informed the third respondent that it was prepared to hand over the information requested and have the confidentiality agreement signed.

Bothar indicated its interest in acquiring Coleman's business. Coleman terminated Smith's employment on a number of grounds which alleged a serious undermining of the company's business by him and a failure to carry out his director's duties.

The second respondent was employed by Coleman Tunnelling. After resigning from that company, he became employed by Bothar.

Coleman sought an interdict against the respondents not to unlawfully utilise, communicate and/or publicise any of its confidential information and/or trade secrets, not to approach any of its clients in order to unlawfully compete with it, not to offer employment to and/or entice any of its employees to become employed by Bothar, and not to take advantage of any relationship involving the use of Coleman's confidential information.

The respondents contended that they were entitled to make use of the information derived while with Coleman.

THE DECISION

Coleman had to demonstrate that there was a wrongful act of competition, or one which was impending, and which was infringing or threatening to infringe its business goodwill and that no other suitable remedy is available. It had to show the infringement or threatened infringement of a clear right to the goodwill of its business.

Coleman had not shown that it held a protectable interest, but it had shown that the respondents had wrongfully appropriated its confidential information. The respondents contended that knowledge of Coleman's customers and potential customers would be readily available within the industry, but the customer lists contained private contact details of the relevant persons at the customer company. That information was acquired while Smith was employed by Coleman and it was confidential to it, whether or not it was obtained from his memory. The good memory of an employee cannot render otherwise confidential information no longer protectable.

Many contracts obtained by Coleman were as sub-contractors to main bidding companies that successfully acquired tenders. There would also have been negotiations in progress between Coleman and potential customers to which Smith and the second respondent would have been privy. That information and the nature of the negotiations for contracts were confidential to Coleman. Any competitor would gain a head start and an unfair

advantage by being able to undercut or otherwise use such knowledge that was internal to the second applicant. Coleman was entitled to be protected in that regard. The conduct of each of the respondents demonstrated a disregard for Coleman's rights and a clear attempt to take unfair and wrongful advantage of inside knowledge. Such protection could be extended in the present situation to issues of unfair competition.

An appropriate interdict was granted.

ABSA BANK LTD v GOLDEN DIVIDEND 339 (PTY) LTD

A JUDGMENT BY LAZARUS AJ
GAUTENG DIVISION, PRETORIA
17 DECEMBER 2014

2015 (5) SA 272 (GP)

Companies

If the holder of a majority of the creditors' voting interests agrees to an extension of time for the presentation of a revised business plan, then section 150(5)(b) of the Companies Act (no 71 of 2008) is complied with.

THE FACTS

Absa Bank Ltd despatched a letter to Golden Dividend 339 (Pty) Ltd in terms of section 345 of the Companies Act (no 61 of 1973). The company failed to pay or secure or compound the amount owing by it. Its board of directors then passed a resolution placing the company in voluntary business rescue proceedings on the basis that the company was financially distressed. A certain Mr Naude was appointed as business rescue practitioner for the company.

Naude published a business rescue plan. With the consent of the holder of a majority of the creditors' voting interests, this was followed by a revised plan which he put before a resumed meeting of creditors.

The bank contended that the business rescue plan was unlawful and invalid because it was not published within the time period stipulated in terms of section 150(2), (4) or (5) of the Companies Act (no 71 of 2008) and was therefore unlawful and invalid. It contended that the resolution taken by the board of directors placing the company under supervision and in business rescue should be set aside, and the company placed in liquidation.

THE DECISION

Section 150(5)(b) provides that the business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by the holders of a majority of the creditors' voting interests. Since the holder of a majority of the creditors' voting interests had agreed to an extension of time for the presentation of a revised plan, this section was complied with and the business plan properly presented.

In terms of section 150(2) of the Act, the business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan. Having regard to the plan actually presented, there had not been substantial compliance with the requirements of this section.

Having regard to the revised business plan, even if the projected income estimates were accepted, there would be insufficient income to make much progress in paying off the debts of the company over the next 10 years. This, together with the significant substantive shortcomings of the plan, did not inspire any confidence that business in the future would be conducted differently from how it was in the past and, accordingly, that there was a reasonable prospect of rescuing the company.

The bank's application was granted.

RICHTER v ABSA BANK LTD

A JUDGMENT BY DAMBUZA AJA (MHLANTLA JA, LEACH JA, PILLAY JA and FOURIE AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2015

2015 (5) SA 57 (SCA)

It is 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 the business rescue application could be brought in view of the final liquidation order.

THE DECISION

Subsection 131(1) of the Companies Act (no 71 of 2008) provides that unless a company has adopted a resolution to begin business rescue proceedings, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings. Subsection 6 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 definition of 'liquidation proceedings' as envisaged in section 131(6) was therefore crucial to the decision of this case.

Upon a final order of liquidation being granted a company continues to exist, but control of its affairs is transferred from the directors to the liquidator who exercises its authority on behalf of the company. There is therefore no justification for distinguishing between pre- and post-final liquidation in circumstances where the prospects of success of business rescue exist.

On a proper interpretation of 'liquidation proceedings' as used in section 131(6) of the Act includes proceedings that occur after a winding-up order has been given, up to deregistration of the company.

ONE STOP FINANCIAL SERVICES (PTY) LTD v NEFFENSAAN ONTWIKKELINGS (PTY) LTD

A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
17 JUNE 2015

2015 (4) SA 623 (WCC)

In order for section 20(7) of the Companies Act (no 71 of 2008) to apply a third party must establish that he was dealing with someone who had actual or ostensible authority to bind the company.

THE FACTS

Neffensaan Ontwikkelings (Pty) Ltd signed a suretyship agreement and two loan agreements in favour of One Stop Financial Services (Pty) Ltd. The documents were executed by a director of Neffensaan on its behalf.

At the time, an agreement known as the subscription agreement had been concluded between the shareholders of Neffensaan. In terms of that agreement, none of the directors, shareholders, officers or employees of Neffensaan had authority to bind Neffensaan to resolutions or transactions of a certain kind, and the directors and shareholders were prohibited from taking steps to propose, authorise or permit the company to become bound by any such resolution or transaction unless it has received the unanimous prior written approval of all the shareholders. Among the matters defined as being of that kind were 'the incurring of long-term debts, other than loan finance to execute the development of the property', and the issuing of guarantees or suretyships 'of any unusual nature'.

Alleging that Neffensaan had defaulted in its obligations, One Stop brought an application for the liquidation of Neffensaan. One of the shareholders, the CRL trust, had been unaware of the conclusion of the suretyship and loan agreements. It intervened in the application and opposed it on the grounds that the directors who signed the documents were not authorised to do so. It alleged that they were not considered at any meeting of the directors and no resolution was signed by all three directors authorising the transactions. The transactions were not approved by Neffensaan's shareholders.

One Stop contended that Neffensaan was barred, by virtue of the Turquand rule and section 20(7) of the Companies Act (no 71 of 2008), from relying on the alleged lack of authority.

THE DECISION

The Act only came into force later than when the suretyship was executed. Consequently, section 20(7) would only be of potential application to the two loan agreements. The validity of the suretyship had to be determined by the law as it stood prior to the coming into force of the new Act.

In order to bind a principal, an agent's representation founding the ostensible authority must proceed from the principal, not the purported agent. It would not matter that Neffensaan's articles stated that two directors would constitute a quorum for meetings of the board. If the articles followed the subscription agreement, one of those two directors would have had to be a CRL appointee. In any event, a company is not bound by the act of a lesser number of directors than the full board merely because they would have constituted a quorum. This was a sufficient basis for concluding that One Stop had failed to show on a balance of probability that the director had ostensible authority to sign the suretyship on Neffensaan's behalf.

As far as the loan agreements were concerned, section 20(7) provides that a person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural

requirements in terms of the Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

In order for section 20(7) to apply the third party must establish that he was dealing with someone who had actual or ostensible authority to bind the company, because only in those circumstances can he say that he was dealing with the company.

Neffensaan would only be bound by the loan agreements if the directors who signed them, who lacked actual authority, had ostensible authority to bind the company to the agreements. There was no evidence that they were held out as persons authorised to manage the company's affairs.

No claim had therefore been established against the company. The application for its liquidation was dismissed.

Section 20(7) has been regarded by some as a codification of the Turquand rule (Davis et al Companies and Other Business Structures in South Africa 2006 at 42). Other writers have pointed out that the abolition in general of the principle of constructive notice has made the retention of the Turquand rule largely unnecessary, because the rule was only ever an amelioration of the ramifications of constructive notice (Katz 'Governance under the Companies Act' 2010 Acta Juridica 248 at 252 – 253; and Delport 'Companies Act 71 of 2008 and the ''Turquand'' Rule' 2011 THRHR at 135 – 138). Katz suggests that the Turquand rule has been retained in s 20(7) to deal with constructive notice in relation to RF companies. Delport points out that the retention of the Turquand rule may also come to the aid of a third party who has actual notice of a non-RF company's articles. Delport also mentions possible differences in the scope of the Turquand rule and its supposed codification in s 20(7).

[52] If s 20(7) is a codification of Turquand, s 20(8) might be thought to be a puzzling provision. However, I do not think that its existence justifies a strained interpretation of s 20(7). It is more likely, in my view, that the lawmaker was concerned that its attempts to formulate the Turquand rule in s 20(7) might not cover the whole ground. Section 20(8) was thus added to foreclose an argument that s 20(7) had I inadvertently repealed any part of the Turquand rule.

FIRSTRAND BANK LTD v KONA

A JUDGMENT BY MEYER AJA (MPATI P, CACHALIA JA, MBHA JA and VAN DER MERWE AJA concurring)
13 MARCH 2015
SUPREME COURT OF APPEAL

2015 (5) SA 237 (SCA)

Credit Transactions

The nature and effect of a debt rearrangement order is such that it is a moratorium which may be lifted by operation of law, and accordingly without the need to have the debt rearrangement order set aside, once the consumer is in default of the relevant credit agreement and is in default of the debt rearrangement order.

THE FACTS

Firstrand Bank Ltd was the Konas' creditor, having advanced a loan to them and secured it with a mortgage bond.

The magistrates' court issued an order declaring them to be overindebted and rearranging their obligations in accordance with a debt re-arrangement proposed by a debt counsellor. Kona failed to effect proper and punctual payment to the bank of the reduced monthly instalments due to it in terms of the debt re-arrangement order.

The bank sued for repayment, and then brought an application for the sequestration of Konas' joint estate. It relied on the outstanding indebtedness, and contended that section 88(3) of the National Credit Act (no 34 of 2005) applied. The section 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 either an event contemplated in subsection (1)(a) through (c) had occurred, the consumer defaults on any obligation in terms of a rearrangement agreed between the consumer and credit providers, or ordered by a court or the Tribunal.

In the High Court, the application failed. The High Court held that, until set aside, a debt rearrangement order constitutes a bar to the compulsory sequestration of a consumer's estate.

The bank appealed.

THE DECISION

A debt rearrangement order does not constitute a bar to the compulsory sequestration of a consumer's estate, unless set aside by a competent court. An application for sequestration does not seek to enforce the credit agreement. The nature and effect of a debt rearrangement order is such that it is a moratorium which may be lifted by operation of law, and accordingly without the need to have the debt rearrangement order set aside, once the consumer is in default of the relevant credit agreement and is in default of the debt rearrangement order.

An application by a credit provider for the sequestration of a consumer's estate, in which it relies on its claim in terms of a credit agreement to qualify as a creditor for the purpose of instituting sequestration proceedings, does not constitute 'litigation or other judicial process' by which the credit provider exercises or enforces any right or security under the credit agreement within the meaning of section 88(3) of the Act. An application for the sequestration of a consumer's estate is thus not precluded by the prohibition on the institution of proceedings envisaged in section 88(3).

This implies that the existence or validity of a debt rearrangement order is immaterial to an application for sequestration of the consumer's estate, unless the debt rearrangement order is raised as a circumstance for the court to exercise its discretion in favour of the debtor.

Because the formal and substantive requisites for a final sequestration order had been established, there were no circumstances warranting the exercise of a court's discretion in favour of Kona. The appeal succeeded.

ORESTISOLVE (PTY) LTD v NDFT INVESTMENT HOLDINGS (PTY) LTD

A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT
28 MAY 2015

2015 (4) SA 449 (WCC)

Insolvency

Proof that a company has failed to respond to a demand made in terms of section 345(1)(a) of the Companies Act (no 61 of 1973) creates a rebuttable presumption that the company is insolvent. The company may rebut the presumption by proving its commercial or factual solvency even if its grounds for disputing the claim made against it are not reasonable.

THE FACTS

Orestisolve (Pty) Ltd's attorneys sent a demand to NDFT Investment Holdings (Pty) Ltd in terms of section 345(1)(a) of the Companies Act (no 61 of 1973). The claim of R750 000 was for payment of a commission which Orestisolve alleged was due to it as a result of it having secured funding for the company.

NDFT refused to make payment because it considered that the commission had not been earned and this had been conveyed to Orestisolve.

Orestisolve then brought an application for NDFT's provisional liquidation. A provisional order was granted. NDFT's shareholder and creditor intervened in the application and opposed the grant of a final order.

NDFT was an investment company. Apart from its indebtedness on loan account to the Trust, NDFT appeared not to incur any significant operational debts on a routine basis. There was no evidence that NDFT had ever defaulted in the payment of its debts to any other creditors.

NDFT's financial state of affairs was placed before the court. This included its audited financial statements for the year ended 28 February 2013 and its management accounts of January 2015. As at 28 February 2013 NDFT had current assets of R30 323 570 (including cash of R21 209 428) and investment assets of R53 321 534, totalling R83 645 104. The company's sole liability was its indebtedness to the Trust on loan account in an amount of R81 441 745, in regard to which no capital payments were anticipated within the next 12 months. The company had no current liabilities. Assuming an overdraft facility was in place, there was no overdrawn balance at year's end. Overall, the company's assets exceeded its liabilities by R2 203 359. The income statement reflected that NDFT's investment operations ran at a loss for the year of R2 157 149. There would have been a profit but for interest of R5 834 568 on the Trust's loan account.

The audited financial statements for the year ended 28 February 2014 were not available because certain companies in which NDFT held shares had not yet completed their audits. As at 28 February 2014 the Trust's loan claim stood at R81 069 802, R10 million of which the Trust agreed to subordinate so as to enable the claims of other creditors to be paid in full.

The management accounts as at 31 January 2015 reflected that the company had current assets of R1 446 844 (including cash of R1 293 462) and fixed assets of R80 342 804, totalling R81 789 648. The company's sole liabilities were its indebtedness to the Trust on loan account in an amount of R85 374 953 and a PAYE indebtedness to Sars of R9010. The overdraft, which was about R15,4 million in April 2014. Overall, the company's liabilities exceeded its assets by R3 594 316 before taking the subordination of R10 million into account. The income statement reflected that NDFT's investment operations ran at a loss for the year, of R941 311, including interest of R426 151 paid to the overdraft creditor and management fees of R842 854.

Orestisolve relied on the presumption provided for in section 345(1)(a), and disputed that the financial statements showed that NDFT was actually or commercially solvent. It applied for a final order liquidating NDFT.

THE DECISION

Even if NDFT's grounds for disputing the claim were not reasonable, there would have been a 'neglect' to pay within the meaning of section 345(1)(a). However, this provision creates only a rebuttable presumption, and it would be necessary to investigate whether the presumption has been rebutted by evidence that NDFT was not commercially insolvent. Alternatively, the question would be whether, despite the deemed inability to pay debts, the court's discretion should nevertheless be exercised against granting a final order.

As at 28 February 2013 NDFT was neither factually nor commercially insolvent. The fact that its investment operations ran at a loss did not mean that it was commercially insolvent. Provided a company has resources from which to meet current demands, it is irrelevant, when one is considering solvency, whether its operations in any particular year are or are not profitable.

If in due course it were established that NDFT was obliged to pay Orestisolve R750 000, the company would have the liquid resources to pay it. There were no other creditors competing for NDFT's liquid resources. It had substantial investments which could, if necessary, be realised in part to yield further cash. NDFT had received substantial financial support from the Trust. It was most unlikely that the Trust would put NDFT's survival at risk by not providing any funds which the company might need to discharge Orestisolve's claim. It was unrealistic in these circumstances to say that NDFT was commercially insolvent.

NDFT's commercial solvency, coupled with the fact that the company's largest shareholder opposed liquidation, provided a sufficient basis for exercising a discretion against a final order of liquidation.

The provisional order was discharged.

In my view NDFT is not commercially insolvent. If in due course it were established that NDFT is obliged to pay Essa R750 000 (or perhaps R350 000, if Van der Merwe abandons in favour of NDFT his claim to a referral fee, or R325 000, if — as Oosthuizen claims — the company has already paid Essa R25 000), the company would, on the information available to me, have the liquid resources to pay it. There are no other creditors competing for NDFT's liquid resources. It has substantial investments which could, if necessary, be realised in part to yield further cash. NDFT has hitherto received substantial financial support from the Trust. It was this very support which in the event led to NDFT's not taking up the Absa overdraft. It is most unlikely that the Trust would put NDFT's survival at risk by not providing any funds which the company might need to discharge such claim as Essa proves. It seems to me completely unrealistic in these circumstances to say that NDFT is commercially insolvent.

PICK 'N PAY RETAILERS (PTY) LTD v LIBERTY GROUP LTD

A JUDGMENT BY FOURIE J
GAUTENG DIVISION, PRETORIA
5 JUNE 2014

2015 (4) SA 241 (GP)

Property

A tenant may interdict a party which proceeds with actions it knows are contrary to that tenant's rights as recorded in the lease agreement.

THE FACTS

Pick 'n Pay Retailers (Pty) Ltd concluded a lease agreement with Liberty Group Ltd entitling Pick n Pay to occupy certain premises at the Midlands Mall, Pietermaritzburg, and conduct the business of a supermarket there. Clause 11 provided that save for the supermarket, Liberty would not permit at the mall, the conduct of a hypermarket or supermarket, a fruit and vegetable shop exceeding 200 square metres or a grocery, fresh fish shop, butchery, bakery, fruit and vegetable shop and deli in respect of the mall extending from the supermarket mall entrance from the parking to the supermarket entrance as demarcated, without Pick n Pay's prior written consent.

Pick n Pay alleged that the fourth respondent intended to expand its business by selling an extensive range of perishable and non-perishable food items within an existing Game Store at the mall. It contended that this expansion of business would render the Game Store a supermarket which would be a violation of its right as provided for in clause 11of the lease agreement.

The fourth respondent had informed Liberty's managing agent that it intended to sell food products at its store, and the managing agent had informed the fourth respondent that this would be in breach of their lease agreement, and its agreement to such conduct would put it in breach of clause 11 of its lease agreement with Pick n Pay.

Pick in Pay sought an interim interdict prohibiting Liberty and its managing agent from acting in breach of their contractual obligations to it pending the outcome of arbitration proceedings, and against the fourth respondent from interfering in the contractual relationship between it and the Liberty pending the outcome of action proceedings to be instituted.

THE DECISION

By introducing a food line in the circumstances would constitute an attempt to unlawfully and intentionally interfere with the contractual relationship between Pick n Pay and Liberty. Such interference would probably have the effect that Pick in Pay would not obtain the performance to which it is entitled, ie to enjoy the right of exclusivity. This would be sufficient to constitute harm.

It was clear that the fourth respondent intended to expand its store at the Midlands Mall to incorporate a food line. Pick in Pay had indicated that once this was done, it would suffer damages which were largely unquantifiable and thus irreparable. An award of damages in due course would therefore not be a suitable alternative remedy in these circumstances.

The fourth respondent had stated that the prejudice it would suffer, should interim relief be granted, was considerable. However, it had proceeded with its actions in the knowledge of Pick n Pay's rights. In these circumstances, the balance of convenience was in Pick in Pay's favour.

The interdict was granted.

TRUSTEES OF THE SIMCHA TRUST v DE JONG

Property

A JUDGMENT BY NAVSA ADP (BRAND JA, MHLANTLA JA, ZONDI JA and SCHOEMAN AJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2015

[2015] 3 All SA 161 (SCA)

In applying section 8(1)(c)(ii)(bb) of the Promotion of Access to Justice Act (no 3 of 2000) a remedy of compensation is not available when an administrative act has been set aside and the matter remitted for reconsideration.

THE FACTS

The Simcha Trust obtained the approval of building plans from the City of Cape Town. It intended to develop certain property which fell within the area of jurisdiction of the City.

Adjoining property owners objected to the approval, and obtained an interdict preventing the continuation of building operations. They then applied for an order reviewing and setting aside the decision to approve the plans. The City and Simcha conceded this application. The property owners did not seek a costs order against either of them.

In the review application, Simcha filed a further affidavit. Its purpose was to require the court to order the City, (a) to pay the costs of the interim interdict and the review application, and (b) to order it to refund scrutiny fees of R82 327,60, paid in respect of the approved plans. Simcha also sought an order that the City should compensate it for out-of-pocket losses resulting from the grant of the interim interdict. Simcha contended that it was entitled to this in terms of section 8(1)(c)(ii)(bb) of the Promotion of Access to Justice Act (no 3 od 2000).

The section provides that the court or tribunal, in proceedings for judicial review, may grant an order setting aside the administrative action and (i) remitting the matter for reconsideration, or (ii) in exceptional circumstances, directing the administrator or any other party to the proceedings to pay compensation.

THE DECISION

The use of the word ‘and’ at the end of the introductory part of paragraph (c) followed by the separation of sub-paragraphs (i) and (ii) with the word ‘or’ is a strong ‘syntactical pointer’ in favour of the view that the remedies in those two sub-paragraphs are alternatives that are mutually exclusive. Sub-paragraph (ii) is qualified by the phrase ‘in exceptional circumstances’, indicating that the remedies in sub-paragraph (ii) apply in circumstances different from those in sub-paragraph (i). In consequence, a court cannot remit a matter for reconsideration by the decision-maker and also substitute or vary the action complained of. It followed that compensation in terms of section 8(1)(c)(ii) could not be granted where the court had set aside the administrative action and remitted the matter for reconsideration by the decision-maker. The alternative remedy of compensation, set out in sec-tion 8(1)(c)(ii) was not available.

The remedy of compensation is not available when an administrative act has been set aside and the matter remitted for reconsideration.

Simcha’s claim against the City failed.

YOUNG MING SHAN CC v CHAGAN N.O.

Property

A JUDGMENT BY COPPIN J
GAUTENG LOCAL DIVISION,
JOHANNESBURG
2 FEBRUARY 2015

2015 (3) SA 227 (GJ)

A landlord may not charge a tenant more for electricity consumed on the tenant's premises than that charged by the electricity provider.

THE FACTS

Young Ming Shan CC leased residential premises to various tenants. In terms of the lease, the tenant was liable for 'charges for electric current, gas and water . . . shall be in accordance with separate sub-meters which the landlord shall be entitled to install at any time'. The lease also provided that that the tenant would be liable for 'any charges (including basic charges and service charges in respect of submeters, if any) arising directly or indirectly out of its use of electric current, gas and water and all sanitary, sewerage, refuse- and rubbish-removal fees (including basic charges) in respect of the premises or in respect of the building and which are attributable to the use of the tenant'.

Young began levying an electricity service charge in the amount of about R385 per month on each of the tenants. This was an amount in addition to the costs of the electricity consumed by each of the tenants.

The tenants brought an application before the Gauteng Rental Housing Tribunal in which they sought an order that the levying of the electricity charge contravened regulation 13(1)(d), (e) and (f) of the Gauteng Unfair Practices Regulations 2001. Regulation 13(1)(f) provides that in a multi-tenanted building the landlord may not recover, collectively from the tenants for the services rendered, in excess of the amounts 'totally charged by the utility service provider and the landlord. Read with reg 13(d), in cases where the dwellings are separately metered, the landlord may only charge a tenant the exact amount for services consumed.

The tribunal granted the application and interdicted Young from levying the charges. Relying on the Promotion of Administrative Justice Act, Young brought an application to review the tribunal's decision.

THE DECISION

Although the functions of the tribunal resemble those of courts of law in some respects, it is not a court of law. The mere fact that its ruling is deemed to be an order of the magistrates' court in terms of the Magistrates' Courts Act, and is enforced in terms of that Act, does not make the tribunal a court of law and does not make its adjudicative actions judicial acts. Accordingly, its actions were properly regarded as administrative actions, and the Promotion of Administrative Justice Act applied.

But for the fact that it was close to the amount which the utility provider, the service charge levied in respect of each tenant, bore little resemblance to the utility provider's charge and was not the recovery of that charge, but Young's own charge levied against each of the tenants for the services it alleged it provided to the tenants, such as for billing and the maintenance of the electricity network.

Regulation 13 obliges a landlord, who is required by law or by the express or implied terms of a lease to provide, inter alia, electricity services to a tenant, to provide such services. It cannot interrupt or cut off the service without a court order, except in an emergency, or if the interruption is in order to do maintenance, or for repairs or renovations. The mere fact that the parties to the lease agreement may have agreed that the landlord may levy such charge, or that the tenant would pay such a charge levied by the landlord, does not preclude the tribunal from finding that such

an act constitutes a violation of the regulations and is an unfair practice. The regulations furthermore oblige the landlord to maintain the building (reg 7) and, inter alia, the electrical systems (reg 7(h)). This obligation is not made subject to or conditional upon the tenant paying a service charge to the landlord for such maintenance, or for providing the electrical service.

The tribunal's finding, in effect, that Young could not be equated with the utility service provider was reasonable and was not irrational. There were no grounds for overturning this finding.

Regulation 13 obliges a landlord, who is required by law or by the express or implied terms of a lease to provide, inter alia, electricity services to a tenant, to provide such services. It cannot interrupt or cut off the service without a court order, except in an emergency, or if the interruption is in order to do maintenance, or for repairs or renovations. But even in such instances reasonable notice must be given and the service must be resumed within a reasonable period after such emergency, maintenance, repairs or renovations. The mere fact that the parties to the lease agreement may have agreed that the landlord may levy such charge, or that the tenant would pay such a charge levied by the landlord, does not preclude the tribunal from finding that such an act (albeit agreed to) constitutes a violation of the regulations and is an unfair practice. 36 The regulations furthermore oblige the landlord to maintain the building (reg 7) and, inter alia, the electrical systems (reg 7(h)). This obligation is not made subject to or conditional upon the tenant paying a service charge to the landlord for such maintenance, or for providing the electrical service.

M.E.C. LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS v BOTHA N.O.

Property

A JUDGMENT BY FOURIE AJA (NAVSA ADP, SHONGWE JA, THERON JA and SWAIN JA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2014

2015 SACLR 1 (SCA)

A property owner which has fraudulently inflated the value of its property is not entitled to object a municipal valuation which sets the value of the property at a similarly inflated value.

THE FACTS

Universal Retail Portfolio (Pty) Limited owned property which was entered in the municipality's valuation roll maintained in terms of section 23 of the Local Government: Municipal Property Rates Act (no 6 of 2004) with a municipal valuation as R23m. The valuation was 500 per cent more than the true market value of the property and the actual price paid by Universal when it purchased the property in 2006, would not have been R24m, as had been stated at that time. The overwhelming probability was that this was a simulated purchase price which enabled Universal to fraudulently claim an inflated amount as VAT from the Receiver of Revenue.

After taking transfer of the property, Universal took no steps to change the municipal valuation, and paid property rates based on that valuation.

In 2010, Universal was placed in liquidation. The liquidators sold the property for R4.35m. The municipality provided the liquidators with a clearance certificate indicating that Universal owed it an amount of R2 708 900. The assessment was calculated on the municipal valuation of R23m.

The liquidators took the view that the municipal valuation of the property was substantially incorrect and contended that the true valuation of the property did not exceed R4.5m. The municipality refused to reconsider its valuation of the property.

The liquidators brought an application for an order setting aside the 2008 municipal valuation of the property, alternatively, an order granting the liquidators condonation for the late filing of an objection against the municipal valuation of the property in terms of section 80 of the Act, alternatively, an order directing that the M.E.C. for Local Government and Traditional Affairs to consider their application for condonation in terms of that section.

THE DECISION

The M.E.C. submitted that section 80 does not extend to applications made by affected parties other than municipalities.

The question whether or not the section did extend to parties such as Universal anticipated the prior question of whether or not Universal would have been entitled to enforce any rights under the section. Given the reasons for the inflated valuation of the property, Universal would not only have been prevented from benefiting from its own fraudulent conduct, but would also have been precluded from having such conduct condoned by allowing it to lodge a late objection to the valuation. Universal would certainly not be able to show 'good cause', entitling it to relief in terms of section 80.

The liquidators, who had assumed Universal's rights, were no more entitled to enforce any rights under section 80. Lacking any such rights, they were therefore unable to lodge a belated objection against the valuation of the property. The liquidators were in no better position than Universal.

No remedy was available to the liquidators under the Act which would entitle them to lodge an objection to the valuation.

WILLOW WATERS HOMEOWNERS ASSOCIATION (PTY) LTD v KOKA N.O.

Property

A JUDGMENT BY MAYA JA (THERON JA, SALDULKER JA, MOCUMIE AJA AND GORVEN AJA concurring)
SUPREME COURT OF APPEAL
12 DECEMBER 2014

2015 SACLR 12 (SCA)

A title deed condition imposed by a homeowners' association which intends to bind successors in title of the owner subject to the association's rules, and which subtracts from the rights of ownership in the land, is a real right and may be enforced in favour of the association. Such enforcement may take place in terms of section 89(1) of the Insolvency Act (no 24 of 1936) in the event of the sequestration of the estate of the property owner.

THE FACTS

Willow Waters Homeowners Association (Pty) Ltd was the homeowners' association of the Willow Waters Estate, which was made up of thirteen separate properties. One of the properties was owned by van der Walt and his wife. One of the conditions in the Deed of Transfer by which they took transfer was title condition 5(B)(ii). This provided that the owner of the property would not be entitled to transfer the property without a clearance certificate from the Home Owners Association that the provisions of the Articles of Association of the Home Owners Association had been complied with.

The van der Walts defaulted in their obligations to the Association, including falling behind in the payment of levies. Their estates were sequestrated.

In anticipation of the sale of the property, the association required the new owner to accept its rules and regulations, and the payment of three months' levies in advance from date of registration and all outstanding levies and penalties up to the date of registration prior to transfer of the property. The basis of the association's demand was section 89(1) of the Insolvency Act (no 24 of 1936) which it contended was applicable because of title condition 5(B)(ii).

The Association contended that the condition vested it with a real right which diminished the rights of ownership in relation to the property and, because of the van der Walt's default, entitled it to withhold the clearance certificate.

The trustees of the sequestrated estate contended that the condition was a mere personal right which did not detract from the rights of ownership of the property or bind them.

THE DECISION

To prove that a right or condition in respect of land is real, it is necessary to show that the intention of the person who created the right was to bind not only the present owner of the land, but also successors in title, and that the registration of the right or condition results in a subtraction from the right of ownership in the land. Whether the title condition embodies a personal right or a real right which restricts the exercise of ownership is a matter of interpretation. The intention of the parties to the title deed must be gleaned from the terms of the instrument ie the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being. The interest the condition is intended to protect is of particular relevance.

In the present case, the underlying purpose of the title deed condition was to create a general security for the payment of a debt as in the case of a lien or a mortgage bond. To achieve that purpose it had to bind all the successive owners. This object was also evident from the plain language of the condition. It was therefore clear that the intention of the person who created the right was to bind successors in title.

As far as the second requirement was concerned, the effect of the condition was like that of the conditions contained in section 118 of the Local Government: Municipal Systems Act (no 32 of 2000) which prohibit the Registrar of Deeds from registering the transfer of immovable property except on production of a certificate issued by a municipality or a

conveyancer confirming that all moneys due to the municipality or a body corporate have been fully paid. These objects were precisely what the title deed condition in this case sought to achieve.

The Association's contentions were upheld.

To determine whether a right or condition in respect of land is real, two requirements must be met: (a) the intention of the person who creates the right must be to bind not only the present owner of the land, but also successors in title; and (b) the nature of the right or condition must be such that its registration results in a 'subtraction from dominium*' of the land against which it is registered. Whether the title condition embodies a personal right or a real right which restricts the exercise of ownership is a matter of interpretation. the intention of the parties to the title deed must be gleaned from the terms of the instrument ie the words in their ordinary sense, construed in the light of the relevant and admissible context, including the circumstances in which the instrument came into being. The interest the condition is meant to protect or, in other words, the object of the restriction, would be of particular relevance.*

COWIN N.O. v KYALAMI ESTATE HOMEOWNERS ASSOCIATION

Property

A JUDGMENT BY MAYA JA (THERON JA, SALDULKER JA, MOCUMIE AJA AND GORVEN AJA concurring)
SUPREME COURT OF APPEAL
12 DECEMBER 2014

2015 SACLR 29 (SCA)

A title deed condition imposed by a homeowners' association as a real right enoforceable in favour of the association in terms of section 89(1) of the Insolvency Act (no 24 of 1936)

THE FACTS

Silver Tunnel Investments 7 (Pty) Ltd owned property in a residential estate operated by Kyalami Estate Homeowners Association. The title deed by which it held ownership included a condition that the property could not be transferred to any person without a clearance certificate from the association stating that the provisions of the Articles of Association of the association had been complied with. A provision of the Articles provided that no unit would be capable of being transferred without a certificate first being obtained from the association confirming that all levies and interest had been paid.

Silver Tunnel went into liquidation. The property was sold. The association refused to issue a clearance certificate before it had been paid a sum of R887 408,94 being arrear levies.

The joint liquidators took the view that the association's stance was contrary to the principle of a concursus creditorum having been established upon liquidation, and was contrary to the rights of Absa bank, a secured creditor which held mortgage bonds over the property.

THE DECISION

It was decided in *Willow Waters Homeowners Association (Pty) Ltd v Koka N.O.* that a title deed condition imposed by a homeowners' association which intends to bind successors in title of the owner subject to the association's rules, and which subtracts from the rights of ownership in the land, is a real right and may be enforced in favour of the association. Such enforcement may take place in terms of section 89(1) of the Insolvency Act (no 24 of 1936) in the event of the sequestration of the estate of the property owner.

That decision was contrary to the view taken by the joint liquidators. Applying that decision to the present case, the appeal had to be dismissed.

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

A JUDGMENT BY LEWIS JA (MHLANTLA JA, PILLAY JA, SCHOEMAN AJA and DAMBUZA AJA concurring)
SUPREME COURT OF APPEAL
22 MAY 2015

2015 (5) SA 77 (SCA)

Contract

Provided that a trust as borrower is sufficiently identified as such, a contract may be concluded citing the trust as a party.

THE FACTS

Standard Bank of South Africa Ltd lent money to Swanepoel acting on behalf of the Harne Trust. The trust defaulted in repaying the loan. The bank brought an action against Swanepoel in his capacity as trustee of the trust in order to enforce repayment. It alleged that Swanepoel had entered into a written agreement of loan in his capacity as a trustee of the Harne Trust duly represented by him, and annexed a copy of the loan agreement.

Swanepoel excepted to the claim on the grounds that it cited the trust as the debtor. The trust, not being a separate legal entity, it lacked the capacity to contract and accordingly the contract of loan was a nullity.

THE DECISION

As stated in *BOE Bank Ltd v Trustees, Knox Property Trust* [1999] 1 All SA 425 (D) it may well be that it would have been more correct to describe the principal debtor as the named trustee, in his capacity as trustee of the trust or as the trustee for the time being of the trust. However, the identity of the borrower was clear as the bank's particulars of claim had stated that the borrower was the trust and had annexed the loan agreement which identified the trust.

It was clear that Swanepoel, when signing the loan agreement was doing so in his capacity as trustee of the trust. There were no grounds for asserting that the bank intended to contract with the trust, and not its trustee. The contractual documents clearly designated the trust as the party to the contract, the borrower, acting through Swanepoel as trustee. There was no indication that Swanepoel was acting in his personal capacity, and there was nothing in the particulars of claim to suggest that the trust was acting without a trustee.

The exception was dismissed.

VENALEX (PTY) LTD v VIGRAHA PROPERTY CC

Contract

A JUDGMENT BY OLSEN J
KWAZULU NATAL HIGH COURT, DURBAN
10 MARCH 2015

[2015] 2 All SA 645 (KZD)

A sale agreement which describes the purchaser as a party to be formed does not exclude the nomination of a purchaser already in existence at the time the agreement was concluded.

THE FACTS

Vigraha Property CC signed an agreement to sell certain fixed property. Clause 3 of the agreement described the purchaser as 'Pty/Ltd to be formed: Directors'. The names of three parties who were to become the directors of Venalex (Pty) Ltd were inserted thereafter.

Clause 17 provided that should the purchaser sign the agreement in their capacity as a director/ member/trustee for a company or close corporation to be formed, then the purchaser would be personally liable in terms of the agreement should that entity not be formed within a period of thirty days of the date of signature, or if that entity failed to ratify and adopt the agreement within a period of seven days of date of registration or incorporation.

Venalex had been formed earlier as a shelf company. The three parties nominated it as purchaser, and this was formally recorded in an addendum which also provided for other matters relevant to occupation of the property. This was later signed by the seller. A resolution by Venalex recorded its acceptance of its nomination and its decision to buy the property and to ratify the agreement which had been concluded by its directors.

Vigraha contended that the agreement had lapsed and become unenforceable because no company had been formed as contemplated in clause 3, Venalex having already been formed at the time the agreement was concluded. It contended that the words 'to be formed' in clause 3 indicated that the company which could become the purchaser had to be one not yet incorporated at the date of conclusion of the agreement.

Venalex applied for an order declaring the agreement to be binding and of full force and effect.

THE DECISION

Vigraha sought to draw between a newly incorporated company and a shelf company. In the former case, immediately upon incorporation the company will be an entity which has not previously participated in any business. In the case of a shelf company precisely the same situation would arise. If the intention was only to allow such a company to take on the rights and obligations of purchaser under the agreement, then it made no difference whether the company was newly incorporated or a shelf company. It was clear that if at the time of contracting the parties had considered the question as to whether the company had to be incorporated after the agreement, or whether a shelf company could be used, the answer would have been that either would be acceptable.

The three directors acted in their individual capacities, but stipulated for the substitution of a company in their place if that could be achieved by a fixed date. As a matter of law the question as to whether the company was one which existed or did not exist at the time of conclusion of the contract was therefore irrelevant. The remaining question was whether the contract itself rendered it relevant, with the result that only a company incorporated after the conclusion of the original agreement could take on the rights and obligations of purchaser under the agreement. Clause 3 however, could not be interpreted in this way. The word 'formed' did not

have a specific and narrow meaning equivalent to the word 'incorporated'.

This interpretation of the word 'formed' was consistent with its meaning as used in the Companies Act (no 73 of 2008). There, it is recognised that the 'formation' of a company is not necessarily to be equated to its incorporation with limited liability under a statute. There was no reason to ascribe to persons making a manuscript insertion on a printed form, an intention to bind themselves to the technical meaning of the word 'incorporated' as it is used in section 13 of that Act, when they used the word 'formed'. There was no reason why the acquisition of a shelf company could not legitimately be employed as a means to achieve the intended incorporated status of a company formed by the three parties who signed the agreement.

The application was granted.

If, as recently as the commencement of the Companies Act, 2008 in May 2011, our statutory law recognised that the "formation" of a company was not necessarily to be equated to its incorporation with limited liability under a statute, there seems to be no reason at all to ascribe to ordinary persons of business, making a manuscript insertion on a printed form, an intention to bind themselves to the technical meaning of the word "incorporated" as it is used in section 13 of the Companies Act, 2008, when they actually used the word "formed". I can see no reason why the acquisition of a shelf company could not legitimately be employed as a means to achieve the intended incorporated status of a company "formed" by and amongst the three businessmen who signed the original agreement. That does no offence to the word "formed" where it appears in clause 3 of the original agreement.

MOGALE CITY MUNICIPALITY v FIDELITY SECURITY SERVICES (PTY) LTD

Contract

A JUDGMENT BY WALLIS JA (NAVSA DP, SALDULKER JA, MBHA JA and ZONDI JA concurring)
SUPREME COURT OF APPEAL
19 NOVEMBER 2014

2015 SACLR 51 (SCA)

Although a bar on awarding a tender to a particular party might exist, this does not mean that a possible obstacle to the award of the tender cannot be removed before the decision on the tender is made. In such circumstances, the body awarding the tender must take into account the removal of the obstacle and consider the bid put by that party.

THE FACTS

Mogale City Municipality called for tenders for the provision of security services to the municipality for a period of three years.

The municipality required tenderers to answer certain questions, the first of which was whether the bidder or any of its directors were listed on the National Treasury's data base as a company or person prohibited from doing business with the public sector. Fidelity answered this in the negative. Unbeknown to Fidelity Security Services Proprietary Limited, one of the tenderers, when the tender was submitted Mr Godfrey Jack, one of its directors, had been so listed on the National Treasury's data base. Mr Jack subsequently resigned from Fidelity.

The municipality's Bid Evaluation Committee met to consider the different tenders. It had all the documents provided by Fidelity in relation to Mr Jack's position and his resignation as a director. During the course of the meeting, the Committee sought and obtained the advice of the acting manager of legal services in the Municipality about the validity of Fidelity's tender. His advice was that it was to be rejected on the grounds that at the time that the tender was submitted Mr Jack's name appeared on the National Treasury data base.

The municipality, acting on the recommendation of a Bid Evaluation Committee offered the contract to Mafoko Security Services (Pty) Ltd, which accepted it.

Fidelity contended that its disqualification from the tender process was unlawful and invalidated the entire process.

THE DECISION

As a result of the advice received, the Committee did not consider Fidelity's bid. The advice was, however, patently wrong. Although there might exist a bar on awarding a tender, this does not mean that a possible obstacle to the award of the tender cannot be removed before the decision on the tender is made. The exclusion of Fidelity was accordingly wrong and a reviewable error in terms of The Promotion of Administrative Justice Act (no 3 of 2000). The adjudication of the tender was therefore in breach of Fidelity's right to fair administrative action.

Other defects in the evaluation and award process indicated that the tender was awarded incorrectly. The appropriate order was for the award to be reviewed and set aside, and for the municipality to re-evaluate the bids, the invalidity of the existing award to be suspended while the municipality did so.

SHERIFF OF THE HIGH COURT, ROODEPOORT v AMIEN

Contract

A JUDGMENT BY MOSHIDI J
GAUTENG LOCAL DIVISION,
JOHANNESBURG,
5 FEBRUARY 2015

2015 SACLR 51 (GNP)

If a party is in breach of its obligations under a sale agreement, it cannot obtain an order for specific performance of the agreement.

THE FACTS

Amien bought a property sold by the Sheriff at a sale in execution of a judgment. In terms of clause 4.4 of the sale agreement, the balance of the purchase price was to be paid to the Sheriff against transfer and was to be secured by a bank guarantee, to be approved by the execution creditor's attorney, which was to be delivered to the Sheriff within 21 days after the day of sale. Should the purchaser fail to furnish the Sheriff with a bank guarantee within 21 days after the date of sale, the Sheriff could grant the purchaser a 5 day extension within which to provide the required bank guarantee. Should the purchaser fail to furnish the Sheriff with a bank guarantee, which was to be approved by the execution creditor's attorney, within the required time, the sale could be cancelled.

Amien submitted a guarantee after expiry of the 21-day period. The guarantee was however, considered unacceptable. After the delivery of an acceptable guarantee, the Sheriff alleged that Amien was in breach of her obligations in that she had not provided clearance figures from the municipality as required in the conditions of sale. The parties entered into compromise discussions, but did not reach agreement.

Three years after the conclusion of the sale agreement, the judgment creditor's attorneys addressed a letter to Amien alleging that she was in breach of her obligations arising out of the Conditions of Sale in that she had failed to deliver a guarantee for the purchase price. The letter stated that her failure to fulfil her commitments constituted a breach of her obligations in terms of the Conditions of Sale and notice was given that should she not remedy the breach within 7 days, their client intended taking action to cancel the sale.

The Sheriff sought an order cancelling the sale agreement.

THE DECISION

The essential question for determination was whether or not Amien was in breach of her obligations when the attorneys addressed their letter to her.

Amien had been in breach inasmuch as she had not provided the clearance figures required in the conditions of sale. This was a clear manifestation of a breach of the conditions of sale. The payment of clearance figures was essential for the transfer of the property from the execution debtors to Amien. This entitled the Sheriff to cancel the sale in execution.

In these circumstances, including the delay in providing the guarantee, Amien was not entitled to specific performance of the sale agreement.

The Sheriff's application was granted.

VISSER v 1 LIFE DIRECT INSURANCE LTD

A JUDGMENT BY SWAIN JA
(CACHALIA JA WILLIS JA and
FOURIE AJA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2014

2015 (3) SA 69 (SCA)

Insurance

An insurer must prove the truth of hospital records relevant to its repudiation of an insurance policy by leading the evidence of the doctor who attended the patient at the hospital. Failure to do so will result in the hospital records being inadmissible in evidence.

THE FACTS

Visser was an 80% beneficiary in terms of a life-insurance policy issued by 1 Life Direct Insurance Ltd, in favour of Ms S Ntobongwana. Ntombongwana died. 1 Life repudiated a claim by Visser in terms of the policy on the grounds that a misrepresentation had been made by Ntombongwana prior to the policy having been completed.

1 Life asserted that the misrepresentation consisted in false information being supplied to it in respect of her pre-existing medical condition. It asserted that she had failed to disclose that she had received medical advice or treatment for fainting in 2005 and chest pains in 2006. This had precluded 1 Life from properly assessing the risk.

The evidence given by 1 Life in substantiation of its position was, inter alia, records of Groote Schuur Hospital, of visits paid by her to the emergency unit at the hospital on 15 August 2005 and 11 July 2006. The records contained details of the medical complaints, medical tests carried out on her, as well as the observations of the attending doctor. The doctor in question was not called to give evidence.

Visser sued for payment in terms of the policy.

THE DECISION

In order to establish that a misrepresentation had been made, 1 Life would have had to call the attending doctor to prove the truth of the hospital records. It had not done so, and there had been no agreement between the parties that the hospital records were accurate reflections of what had taken place on the relevant dates.

1 Life therefore failed to discharge the onus of proving the truth and accuracy of the contents of the hospital records. It consequently failed to prove that Ntombongwana had experienced episodes of anxiety or stress, had received medical advice or treatment for fainting in 2005 and chest pains in 2006.

The issue of whether Ntombongwana made a misrepresentation during previous discussions, as well as the materiality of any alleged misrepresentation or non-disclosure, did not arise in the absence of proof of her pre-existing medical condition.

The claim was upheld.

ABOOBAKER N.O.v SERENGETI RISE BODY CORPORATE

A JUDGMENT BY STEYN J
KWAZULU NATAL LOCAL
DIVISION, DURBAN
29 JUNE 2015

2015 (6) SA 200 (KZD)

Property

Inadequate notification given in terms of section 47bis of the Town Planning Ordinance will result in a rezoming of property being declared unlawful and invalid. The result will be that building plans approved on the assumption that the rezoning was lawful and valid will be set aside.

THE FACTS

Serengeti Rise Body Corporate applied to the Ethekweni Municipality for the approval of building plans relating to a property it owned in Durban. The municipality approved the plans, allowing Serengeti to erect a four-storey building on the property.

The property was then rezoned from General Residential 1 to General Residential 5, and Serengeti submitted a deviation plan. This was also approved by the municipality, allowing Serengeti to erect a nine-storey building on the property.

Notice of the rezoning was given to neighbouring property owners by means of registered letters, and by means of an advertisement in a local newspaper. This was done in terms of section 47bis of the Town Planning Ordinance. The notices did not include a locality plan, and did not indicate the the intended zonal change or the purpose of the rezoning. No street address, email address, work-telephone or fax numbers were provided for the purpose of objecting to the proposal.

Aboobaker and other neighbouring property owners applied for an order that the municipality's approval of the building plans and approval of the rezoning of the property be declared unlawful and invalid.

THE DECISION

Serengeti failed to show that notification of the intended rezoning was sent to each affected landowner or occupier of land adjacent to its property. The Ordinance requires service of the notice on all owners and occupiers of land within 100 metres of the boundary of the site. The notification process failed to comply with the notification as required by the Ordinance. Furthermore, the notice that ought to have been displayed in terms of section 74ter(1)(a) could not be shown. The notification was not in accordance with the applicable law and this non-compliance rendered the rezoning process invalid.

The notification to the public was wholly inadequate and failed to comply with the Ordinance. did not have the power to rezone because of its failure to notify the applicants in accordance with the Ordinance. The deviation plan could not be separated from the rezoning, since it was only after the rezoning that the deviation plan could be approved and the nine-storey structure erected. Without a rezoning Serengeti had erected an illegal structure because the plan authorising the building could not have been authorised in terms of a GR1 zoning, which permitted a building no higher than four storeys. Serengeti submitted plans in accordance with the GR1 zoning.

The review application was concerned with the legality of the rezoning and the authorisation of the plans. Under these circumstances, there were no grounds for considering the approval of the plans because the approval had been given on the assumption that the rezoning was valid and lawful. The judgment given in Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) was therefore distinguishable from the present case.

The application was granted.

DOUG PARSONS PROPERTY INVESTMENTS (PTY) LTD v ERASMUS DE KLERK INC

Property

A JUDGMENT BY MAKGOKA J (TEFFO J and BALOYI J concurring)
GAUTENG LOCAL DIVISION, JOHANNESBURG
23 JULY 2014

2015 (5) SA 344 (GJ)

A conveyancer is obliged to make inquiries directed at establishing that the seller of property is a registered VAT vendor. If the conveyancer fails to obtain a company resolution authorising payment of VAT received on a property sale to a person other than the VAT vendor, this will be considered a breach of the conveyancer's duty of care to the purchaser, but the conveyancer will not be liable in damages if it is not shown that the loss to the purchaser was causally related to such breach.

THE FACTS

Doug Parsons Property Investments (Pty) Ltd bought certain fixed property from Loxtons Strydom Park Investments for R8m plus Value Added Tax. The conveyancers appointed to effect transfer were Erasmus De Klerk Inc.

Erasmus requested Doug Parsons to pay VAT of R1 120 000. Doug Parsons did so. Loxtons produced to Erasmus a tax invoice reflecting the VAT payable on the transaction. At the request of Loxtons, the VAT was paid by Erasmus to one of its members.

It subsequently transpired that Loxtons was not registered for VAT. Doug Parsons was unable to claim the VAT paid when rendering its own VAT return to the South African Revenue Service.

Doug Parsons contended that Erasmus had acted in breach of a duty of care to (a) determine if the sale of the property was subject to VAT (b) determine whether Loxtons was a VAT vendor before claiming VAT from the appellant (c) ensure that any VAT collected by it from it was paid to the South African Revenue Service.

It claimed damages in the sum of the VAT paid to Erasmus.

THE DECISION

The essential duty contended for was that Erasmus was obliged to determine that Loxtons was registered for VAT. The evidence showed that Erasmus had made inquiries and requested information relating to Loxtons' supposed status as a registered VAT vendor. There was no legal duty to go beyond the information furnished to it to determine its veracity.

Once the money was paid into the conveyancer's trust account, the question arose whether or not there was a breach of duty in paying the money to Loxtons. A reasonable conveyancer would have ensured that the money was paid only in accordance with a valid instruction from its trust creditor, Loxtons, and not from its individual shareholders or directors. That instruction would have been in the form of a valid company resolution. Paying out the VAT money without a valid instruction from its trust creditor, Erasmus was negligent. However, it had not been shown that this was causally related to the loss Doug Parsons ultimately suffered. If a company resolution had been obtained, the money would have been paid to Loxtons which would have paid it to its member. The loss would have taken place irrespective of the failure to obtain a company resolution.

Doug Parsons had therefore not established that Erasmus was liable to it in damages.

BUSINESS PARTNERS LTD v WORLD FOCUS 754 CC

A JUDGMENT BY MNGUNI J
KWAZULU NATAL LOCAL
DIVISION, DURBAN
12 AUGUST 2015

2015 (5) SA 525 (KZD)

Companies

A party wishing to bring an action for damages pursuant to section 347(1)(a) of the Companies Act (no 61 of 1973) is not bound to do so in the court where a finding in terms of that section is made.

THE FACTS

On 21 May 2010 World Focus 754 CC was placed under a provisional winding-up order. The application for winding-up had been brought by Business Partners Ltd, and had been opposed. On 10 December 2010 World Focus was placed under a final winding-up order.

Pursuant to the granting of the final order the liquidator took control of the property of World Focus. This included certain immovable property. The immovable property was sold at a sale in execution on 10 March 2011 and transferred to a third party.

World Focus appealed the grant of the final order. The appeal was upheld on 25 January 2013, the appeal court holding that the winding-up procedure had been an abuse of the process of court. World Focus then alleged that it had suffered damages, being the difference in the market value of the property as at 6 May 2013, the date when the property should have been restored to it by the liquidator, less the amount owing to Business Partners in respect of the respondent's indebtedness, plus loss of rentals and other expenditure.

World Focus brought an action claiming damages.

THE DECISION

Section 347(1)(a) of the Companies Act (no 61 of 1973) provides that whenever a court is satisfied that an application for the winding-up of a company is an abuse of the court's process or is malicious or vexatious, the court may allow the company forthwith to prove any damages which it may have sustained by reason of the application and award it such compensation as the court may deem fit.

Business Partners contended that, in the light of this provision, the only court which had the power to grant the relief which World Focus sought was the court hearing the winding-up application. However, having regard to the context of the provision, it would be wrong to interpret it as meaning an action for damages must be commenced in the court which determines the application for winding-up was an abuse of the court's process. At the stage when such an application is brought, the outcome is not known. Accordingly an action based on that outcome cannot be brought at such an early stage.

The proper course to be followed would be to assume the procedure designed for the commencement of the action by way of simple summons. The claim for damages was referred to trial.

ELIAS MECHANICOS BUILDING & CIVIL ENGINEERING CONTRACTORS (PTY) LTD v STEDONE DEVELOPMENTS (PTY) LTD

A JUDGMENT BY PLOOS VAN AMSTEL J
KWAZULU NATAL LOCAL DIVISION, DURBAN
11 DECEMBER 2014

2015 (4) SA 485 (KZD)

A party wishing to sue a company under business rescue must bring a separate and prior application for leave to do so in terms of section 133(1)(b) of the Companies Act (no 71 of 2008).

THE FACTS

Elias Mechanicos Building & Civil Engineering Contractors (Pty) Ltd concluded a joint-venture agreement with Stedone Developments (Pty) Ltd and the second respondents for the purposes of contracting with the King Sabata Dalindyebo Municipality for the construction of a housing development. Elias brought an application against Stedone and the second respondent for an order compelling them to produce certain documents relevant to the joint venture agreement. When the application was brought, Stedone and the second respondent were in business rescue proceedings as contemplated in section 128 of the Companies Act (no 71 of 2008).

Section 133(1)(b) of the Act provides that during business rescue proceedings no legal proceeding against the company may be commenced or proceeded with in any forum, except with the leave of the court and in accordance with any terms the court considers suitable. Elias did not obtain the leave of the court before bringing the application but incorporated an application for such leave in the main application.

Stedone argued that argued that the leave of the court must be obtained before the main application is launched.

THE DECISION

The construction which Elias placed on section 133(1)(b) was that the proceeding could be commenced without the leave of the court and that leave to do so could be sought as part of the relief in the main application. However, this was inconsistent with the wording of the section. It would defeat one of the purposes of the moratorium, ie to give the company and the business rescue practitioner space and time to deal with the rescue of the company without having to deal with litigation by creditors. The practitioner will in each such proceeding have to deal not only with the application for the court's leave in terms of section 133(1)(b), but also with the merits of the claim, because it is all part of one application.

Allowing the incorporation of this application in the main one would also result in the court being asked, when the matter was argued, for leave for the proceeding to be commenced with, at a time when it had already commenced. The leave of the court is also required to proceed with a legal proceeding against a company during business rescue proceedings. This contemplates a company which goes into business rescue after legal proceedings against it had commenced. It seems that the proceedings come to a halt when the company goes into business rescue, and may only proceed with the leave of the court. On Elias' construction, the proceedings simply proceed and all the plaintiff or applicant is required to do is to seek leave at the hearing for the matter to proceed.

It was also significant that in granting leave for the legal proceeding to be commenced or proceeded with the court may impose such terms as it considers suitable. This suggests that the court's leave must be obtained before the proceeding is commenced or proceeded with.

Bringing the application without the leave of the court was not competent and it therefore had to be dismissed.

ABSA BANK LTD v COLLIER

A JUDGMENT BY SAVAGE J
(VELDHUIZEN J and GAMBLE J concurring)
WESTERN CAPE DIVISION, CAPE TOWN
12 MARCH 2015

2015 (4) SA 364 (WCC)

Insolvency

Property subject to a mortgage in respect of which a judgment creditor is the mortgagee may be considered to be disposable property as referred to in section 8(b) of the Insolvency Act (no 24 of 1936). A sheriff's return of service being a nulla bona return is prima facie evidence but may not be accepted as sufficient proof thereof if contradicted by plausible evidence.

THE FACTS

Absa Bank Ltd brought an application for sequestration of Collier's estate, claiming an amount in excess of R800 000, including a judgment debt of R169 342,81.

The judgment debt had resulted in the sheriff giving a return of nulla bona following an attempt to serve a writ of execution against Collier's movable property to satisfy the judgment debt. The sheriff's return of service stated that Collier had stated that 'it was impossible to pay the amount claimed or any sum' and that except exempted property, no property or assets could, after enquiry, be pointed out to satisfy the writ. The return stated that 'Despite a diligent search and enquiry I could not find sufficient disposable property to satisfy this writ. I therefore make a return of nulla bona. The debtor was requested to declare whether he has any immovable property which is executable, on which the following answer has been furnished: I do not own movable or immovable property.'

Collier admitted the judgment debt but disputed the bank's right to bring the application. He denied having informed the sheriff that it was impossible for him to pay the amount due and stated that he had said to the sheriff that with Perl Zips CC, a close corporation of which he was the sole member, he held a damages claim against the bank for a sum exceeding R50m arising from a negligent misstatement made by the bank. He contended that this claim should be set off against the bank's claim.

The bank contended it was entitled to the sequestration of Collier's estate on the basis of section 8(b) of the Insolvency Act (no 24 of 1936). The section provides that a debtor commits an act of insolvency if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment.

THE DECISION

Section 8(b) refers to two acts of insolvency. The first is committed when the debtor fails to satisfy the judgment or to indicate sufficient disposable property to satisfy it, and the second when the sheriff fails to find sufficient property to satisfy the judgment.

There was no dispute that the bank was the holder of a first mortgage bond over Collier's property. The question therefore was whether that immovable property constituted 'disposable property' within the meaning of s 8(b) or not.

Just as an asset subject to a mortgage does not immunise it from execution at the instance of an unsecured creditor, execution by a subsequent mortgagee may proceed subject to there being a yield to the preferent claim of the prior mortgagee. Immovable property, in respect of which a preferent creditor may obtain a writ and execute, is considered to be disposable because there exists no restriction on such execution, and no consent of other mortgagees or judgment creditors is required in order to proceed against the property. In the present case, the immovable property held by the bank was therefore disposable at its instance as the judgment creditor, being the first mortgagee, for purposes of s 8(b), regardless of the fact that the property had not

been declared specially executable.

As far as the significance of the return of service was concerned, although this constituted prima facie evidence of an act of insolvency, given that Collier's version was not untenable, palpably implausible or far-fetched, it could not be accepted as sufficient compliance with the requirements of section 8(b).

CHATER DEVELOPMENTS (PTY) LTD v WATERKLOOF MARINA ESTATES (PTY) LTD

A JUDGMENT BY THERON JA (NAVSA ADP, WALLIS JA, MBHA JA and DAMBUZA AJA concurring)
SUPREME COURT OF APPEAL
28 NOVEMBER 2014

2015 (5) SA 138 (SCA)

A person which has purchased property of a company in liquidation from a liquidator who has not obtained the necessary authorisation to sell such property may rely on section 82(8) of the Insolvency Act (no 24 of 1936) to validate the transaction.

THE FACTS

Chater Developments (Pty) Ltd was placed in liquidation. The second meeting of creditors was held for the purposes of proof of claims and the passing of resolutions empowering the liquidator to sell its assets. At the adjourned meeting, a resolution was adopted which authorised the liquidator to dispose of Chater's movable assets by public auction, private treaty or public tender in his sole discretion.

On 18 August 2004 Waterkloof Marina Estates (Pty) Ltd entered into a written agreement with Chater Developments in terms of which it purchased from the latter 40% of the issued shares in City Lake Marina (Pty) Ltd and Chater Developments' claims against City Lake Marina, for the amount of R6m. In concluding this agreement Chater Developments was represented by the liquidator who acted under the authority granted to him at the adjourned meeting of creditors. He had however, not obtained a resolution authorising him to conclude the sale.

Chater Developments refused to comply with the terms of the agreement, asserting that it was invalid and unenforceable because the liquidator had not obtained a resolution from the members as required by section 386(3)(a) of the 1973 Companies Act (no 61 of 1973). Waterkloof Marina issued summons claiming delivery and transfer of Chater Developments' 40% shareholding in City Lake Marina, and its claims against City Lake Marina against payment of R6m.

Chater Developments contended that the agreement was not valid and enforceable because the liquidator had not been authorised by its members to sell its movable property by private contract as envisaged in section 389(3)(a) read with section 386(4)(h) of the Companies Act. Waterkloof Marina contended

that the agreement was valid and enforceable by virtue of the provisions of section 82(8) of the Insolvency Act (no 24 of 1936), read with section 339 of the Companies Act.

THE DECISION

The liquidator acted without the necessary authorisation. This would ordinarily invalidate the transaction unless Waterkloof Marina was entitled to the protection of section 82(8) of the Insolvency Act. This section provides that if any person has purchased in good faith from an insolvent estate any property which was sold to him without authority, 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.

The right in section 82(8) is a substantive right. It offers protection to an innocent third party such as Waterkloof Marina, from the consequences of an unenforceable transaction. It validates a purchase in good faith. By contrast, the provisions of section 387(4) provide for a situation where the relief sought is dependent upon the exercise of a discretion by the court.

Waterkloof Marina should not be required to rely on a discretionary remedy in circumstances where it is able to assert a valid purchase by virtue of the provisions of section 82(8) of the Insolvency Act. There is no provision in the Companies Act that validated a purchase in good faith from a liquidator who is not authorised to sell. Such a situation is not 'specifically provided for in this Act'. It followed that section 82(8) was applicable, and Waterkloof Marina was entitled to rely on it.

The agreement was therefore valid and enforceable.

The provisions of s 387(4) do not detract from the applicability of s 82(8) of the Insolvency Act. The right in s 82(8) is a substantive right that offers protection to an innocent third party such as the first respondent, from the consequences of an unenforceable transaction. It validates a purchase in good faith. By contrast, the provisions of s 387(4) provide for a situation where the relief sought is dependent upon the exercise of a discretion by the court. Waterkloof Marina should not be obliged to rely on a discretionary remedy in circumstances where it is able to assert a valid purchase by virtue of the provisions of s 82(8) of the Insolvency Act. It was common cause that Chater Developments was a company unable to pay its debts as envisaged in s 339. There is no provision in the 1973 Companies Act that validates a purchase in good faith from a liquidator who is not authorised to sell. Such a situation is not 'specifically provided for in this Act' and it follows that s 82(8) is applicable.

PMG MOTORS KYALAMI (PTY) LTD v FIRSTRAND BANK LTD, WESBANK DIVISION

A JUDGMENT BY GORVEN AJA (LEWIS JA, PONNAN JA, WILLIS JA AND MATHOPO AJA concurring)
SUPREME COURT OF APPEA
24 NOVEMBER 2014

2015 SACLR 156 (SCA)

A company resides within the jurisdiction of a court when its principal place of business is within the area of jurisdiction of that court. This principle also applies after the company is placed in liquidation. Section 84(2) of the Insolvency Act (no 24 of 1936) does not apply to property which is the subject of an instalment sale agreement which has been cancelled prior to the date of commencement of liquidation of the debtor.

THE FACTS

Firstrand Bank Ltd, trading as Wesbank, concluded floorplan agreements with the motor vehicle dealerships, PMG Motors Kyalami (Pty) Ltd, PMG Motors Westville (Pty) Ltd and PMG Motors Alberton (Pty) Ltd. The registered address of all of the dealerships was in KwaZulu-Natal. PMG Westville had its principal place of business in KwaZulu-Natal but the other dealerships had their principal places of business within the jurisdiction of the Gauteng South High Court.

On 23 January 2009, letters cancelling the agreements were delivered to the three companies. Wesbank collected all of the vehicles subject to the agreements, and then sold them. On 26 January 2009, all of the dealerships presented applications to the KwaZulu-Natal High Court, Durban to place themselves in liquidation. Final liquidations orders were obtained and liquidators appointed.

Relying on section 84(2) of the Insolvency Act (no 24 of 1936), the liquidators requested that Wesbank pay them the amounts realised from the sale of the vehicles. Wesbank made the payments, but later took the view that section 84(2) did not apply to these amounts and that the payments had therefore been made in the mistaken belief that they were owing. The liquidators refused to repay the amounts and lodged accounts with the Master reflecting the amounts as assets of the dealerships. Wesbank objected to the accounts, and then brought an application in the Gauteng South High Court to claim back the three amounts paid to each dealership.

The liquidators opposed the application on the grounds that the Gauteng South High Court did not have jurisdiction over the matter, as opposed to the Kwazulu-Natal High Court. They also contended that the provisions of section 84(2) of the Insolvency Act applied to the money realised from the sale of the vehicles, and they were entitled to retain the money for this reason. The section provides that in relation to property the subject of an instalment sale agreement, if a debtor returned the property to the creditor within a period of one month prior to the sequestration of his estate, the trustee may demand that the creditor deliver to him that property or the value thereof at the date when it was so returned to the creditor.

THE DECISION

The dealerships contended that, because their registered offices were all in KwaZulu-Natal and the liquidation order issued from the KwaZulu-Natal High Court, Durban, that was the appropriate court with jurisdiction and the Gauteng South High Court had no jurisdiction to determine the application. On the other hand, Wesbank relied on the fact that PMG Kyalami and PMG Alberton resided within the jurisdiction of the Gauteng South High Court. In relation to PMG Westville, Wesbank relied on section 19(1)(*b*) of the Supreme Court Act (no 59 of 1959). The section confers jurisdiction in respect of a party 'who is joined . . . to any cause in relation to which such provincial or local division has jurisdiction . . . if the said person resides or is within the area of jurisdiction of any other provincial or local division'.

In relation to a company, residence as a basis of a court's jurisdiction is considered to be determined by the periodic, usual

or habitual location of the directing mind of the company. This has been held to be the company's 'seat of its central management and control, from where the general superintendence of its affairs takes place, and where, consequently, it is said that it carries on its real or principal business' (*Estate Kootcher v Commissioner for Inland Revenue* 1941 AD 256 at 260). This is conveniently stated to be the company's principal place of business. In the case of PMG Kyalami and PMG Alberton, this was situated within the jurisdiction of the South Gauteng High Court.

The dealerships submitted that, after liquidation, they could no longer be considered to have a principal place of business. There were however, no grounds for this submission.

As far as PMG Westville was concerned, section 19(1)(*b*) of the Supreme Court Act applied. Since it did, considerations of convenience did not apply.

As far as section 84(2) was concerned, its applicability depends on whether or not the instalment sale agreement in relation to the property concerned exists at the time the debtor is liquidated. In the present case, the agreements had been cancelled by Wesbank prior to the date on which the applications for liquidation were brought.

The dealerships argued that section 84(2), unlike section 84(1), did not depend on the agreements being in existence at this time. However, both sub-sections were on the same footing. Both are subsections of the same section headed 'special provisions in case of goods delivered to a debtor in terms of an instalment agreement'. There is no indication that they deal with different subject matter or distinctly different aspects arising from the same subject matter. Furthermore, subsection 84(2) is inextricably bound to subsection 84(1), because it is in the first subsection that one obtains the meaning for the expressions 'the property' 'the debtor' and 'the said transaction'. Subsection 84(1) describes 'property' as any property [which] was delivered . . . under a transaction and the 'debtor' as a person to whom property was delivered under a transaction and the 'transaction' refers to a transaction that is an instalment agreement pursuant to which the property was delivered.

It is also clear that subsection 84(2) in itself requires an existing agreement because it refers to an 'amount payable under the . . . transaction'.

The dealership's contentions could not be upheld.

FAIRHAVEN COUNTRY ESTATE (PTY) LTD v HARRIS

A JUDGMENT BY HENNEY J
WESTERN CAPE DIVISION
8 JULY 2015

[2015] 3 All SA 618 (WCC)

Competition

The registrant of a domain name does not by mere registration acquire exclusive rights to the use of the domain name.

THE FACTS

On 28 July 2011, Harris registered the domain names 'fairhavenestate.co.za and 'fairhaven.co.za'. He did so at a time when the Fairhaven Country Estate development formed part of the Nedbank Limited distressed property portfolio. He did so in order to assist him to obtain a mandate from Nedbank to market and sell the properties forming part of the development.

Fairhaven Country Estate (Pty) Ltd purchased the development from Nedbank Limited.Fairhaven concluded an agreement with Harris with regard to the sales and marketing of the unimproved plots in the development. Sales commenced in September 2012. After the relationship between Fairhaven and Harris had come to an end, Fairhaven's website, under the domain of www.fairhavenestate.co.za continued to operate, and was conducted and maintained by its marketing agent

On 15 January 2015, Fairhaven became aware of the fact that Harris registered the domain name on his name. Fairhaven brought an application for an order that Harris take all steps to ensure that registration of the domain names was to be transferred to it. It contended that even though Harris was the registrant, he was not the owner of the domains.

THE DECISION

The registration of the domain names was directly linked to the name of the property which belonged to Nedbank at that stage, namely, the Fairhaven Country Estate Development. The name was therefore not inextricably linked to Harris but to the property belonging to another party. It was not something that was connected to Harris. The purpose of the registering of the domain names was to assist it marketing and selling properties on behalf of either Nedbank. The only connection at the time between the first respondent and the domain names was the fact that he was the person responsible for the registration thereof.

Fairhaven had established an inextricable link between the domain names and its name, even though Harris was responsible for the registration thereof. As the owner of the domain names Harris did not have the exclusive rights of use thereto. The mere registration of the domain name that was linked to the property which belonged to someone else, could not result in Harris acquiring exclusive right to the use of that domain name.

The order sought by Fairhaven was granted.

JERRIER v OUTSURANCE INSURANCE CO LTD

A JUDGMENT BY CHETTY J (VAHED J and POYO-DLWATI J concurring)
KWAZULU NATAL DIVISION, PIETERMARITZBURG
7 JULY 2015

2015 (5) SA 433 (KZP)

Insurance

An insured's failure to disclose facts which an insurer has required does not entitle an insurer to repudiate a claim made under the policy does not in itself entitle the insurer to repudiate the claim.

THE FACTS

Outsurance Insurance Co Ltd insured Jerrier's motor vehicle against damage. The policy provided that Jerrier was obliged to inform Outsurance of any changes in circumstances that might influence whether Outsurance would give cover. It obliged Jerrier to report any claim or any incident that might lead to a claim to Outsurance as soon as possible, but not later than 30 days, after any incident. This included incidents for which he did not want to claim but which might result in a claim in the future. It required him also to inform it of any changes to his circumstances.

The policy also provided that should Jerrier not claim for three consecutive years, he would receive 10% of all premiums paid in this period at the end of the third year.

Jerrier did not inform Outsurance of an accident in which his vehicle was involved. He did not do so as he did not wish to claim against Outsurance in terms of the insurance cover as this would have resulted in him losing the refund of 10% of all premiums paid.

Jerrier was involved in a later accident resulting in damages to his vehicle quantified at R608 772,29. He claimed payment of this from Outsurance. Outsurance repudiated the claim on the grounds that he had failed to disclose the incident in respect of which he made no claim.

THE DECISION

The requirement that Jerrier inform Outsurance of any changes of circumstances provided no basis upon which Outsurance could allege he had failed to disclose relevant matters to it because it is not clear that a change in financial position is what is contemplated in this provision. This could therefore not provide a basis upon which Outsurance could allege that Jerrier had failed to comply with his obligations under the policy.

As far as the failure to disclose the first accident was concerned, as long as Jerrier understood that he would have no claim against Outsurance for this, there was no obligation on him to bring the matter to its attention. His motives for doing so were irrelevant, although it was known that it was because he wished to preserve his no-claim bonus.

Outsurance could not be permitted to avoid liability under the insurance agreement in respect of loss sustained in a later, unrelated accident. Jerrier resolved not to claim in respect of the incident and to carry the costs associated with his own damage and that of the driver of the other vehicle. His underlying intention was to preserve the reward of a refund, being of a percentage of his premiums for not claiming. The attraction of this bonus to consumers should not be underestimated. It was a key feature that differentiated the Outsurance policy from others in the insurance industry.

Outsurance was obliged to pay the claim.

REGENT INSURANCE COMPANY LTD v KING'S PROPERTY DEVELOPMENT (PTY) LTD

A JUDGMENT BY LEWIS JA (PILLAY JA, WALLIS JA, FOURIE AJA AND MEYER AJA concurring)
SUPREME COURT OF APPEAL
21 NOVEMBER 2014

2015 SACLR 175 (SCA)

An insurer is entitled to repudiate a claim made under an insurance policy if it was induced to provide the cover by a failure to disclose facts material to the risk.

THE FACTS

In April 2008, Regent Insurance Company (Pty) Ltd insured King's Property Development (Pty) Ltd for various risks including fire at its premises. Under this section of the policy, cover was provided in respect of plant and machinery. Later in the year, fire insurance in respect of the premises was deleted, and the risk address was changed.

On 9 February 2010, King's broker requested Regent to provide a rate for cover in respect of three properties, one of which was certain offices and a warehouse in Crown Mines. Regent responded by stating that it would not be able to go on risk until both buildings were surveyed. The parties took this no further and the survey did not take place. On 16 March 2010, King's broker requested Regent to add the Crown Mines property to the policy. Regent revised the policy to add the premises under the 'buildings combined' section of the policy. King's broker then requested that a survey of the premises be conducted, but this also did not take place.

On 24 May 2010, the premises burnt down. At the time, the premises were occupied by a tenant which manufactured truck and trailer bodies using resin and fibreglass, highly flammable materials.

Kings claimed under the insurance policy R9 031 717 plus interest, as the reasonable cost of repairs, and R1 111 800 in respect of loss of rental.

Regent repudiated on the grounds that it would not have undertaken the risk had it known of the nature of the business being conducted at the premises. Regent would not have accepted a risk relating to classified fibreglass goods manufacturers, retailers or wholesalers without its technical management's assessment and the decision of the general manager. Even if those conditions had been met, Regent would still not have insured the premises against fire under the building combined section of the policy. That section expressly precluded cover in respect of buildings used for manufacturing.

Kings contended that it had made sufficient disclosure of the nature of the premises: the risks pertaining to a warehouse included that of having flammable material on the premises, so that there was thus no failure to disclose that risk. The survey requested would have revealed the precise nature of the risk. Despite not having done the survey, Regent issued the insurance policy in respect of the premises unconditionally.

THE DECISION

The test of whether or not an insurer was induced by a failure to disclose a material fact to issue a policy is subjective — was the particular insurer so induced?

On the facts of this case, Regent could possibly have ascertained information about the premises from the records available to it, but what it would not have discovered was that the premises were occupied by a tenant which manufactured truck bodies and trailers, using flammable materials. The presence of that tenant in the building, and the fact that it occupied a substantial portion of the building, made a material difference to the risk. A reasonable person would have regarded that fact as material and disclosed it to Regent.

As far as the failure to conduct the survey was concerned, it was significant that the survey was not requested before the policy was revised to include the premises, and the insurance was

not made conditional on the survey being completed. The request for the survey did not relieve Kings of the duty to make a full disclosure as to the use of the premises.

The evidence showed that had Regent known that the premises were used for manufacturing it would have declined to extend insurance under the buildings combined section; had it known that fibreglass was being used it would have declined to extend the cover at all. It followed that Regent had been induced to issue the insurance policy because of the failure to inform it of these relevant facts.

Regent was entitled to repudiate the claim.e

I conclude, therefore, that King's Property's non-disclosure of the fact that there was a manufacturing business that used highly flammable materials in the process of manufacturing to Regent was material, in that the reasonable, prudent person would consider that it should have been disclosed so that Regent could have formed its own view as to the effect of the information on the assessment of the risk (s 53(1)(b) *of the Short-Term Insurance Act). The non-disclosure quite obviously induced Regent to extend the cover. And thus Regent was entitled to reject the claim and to regard the policy as void.*

KILBURN v TUNING FORK (PTY) LTD

A JUDGMENT BY SALDULKER JA and MEYER AJA (CACHALIA JA, MHLANTLA JA and GORVEN AJA concurring)
27 MARCH 2015
SUPREME COURT OF APPEAL

2015 (6) SA 244 (SCA)

Suretyship

An agreement which cites the division of the party in respect of which debts may arise must be interpreted to refer only to debts arising in respect of that division and not other debts which may arise.

THE FACTS

Kilburn Auto Enterprises (Pty) Ltd purchased goods on credit from After Market Products, a division of Tuning Fork (Pty) Ltd. Mr I Kilburn completed a credit application form for this purpose, and signed a deed of suretyship in favour of Tuning Fork for the due fulfilment of Kilburn Auto's obligations to it. The suretyship agreement was headed 'Tuning Fork (Pty) Ltd t/a After Market Products'.

Kilburn Auto defaulted in its obligations to Tuning Fork. Tuning Fork claimed payment of invoices totalling R808 883,01. These related to debts arising in respect of divisions other than After Market Products. It brought an action against Kilburn Auto and Kilburn as surety to enforce payment.

Kilburn defended the action against him on the grounds that the suretyship agreement confined his obligations to debts arising in respect of the After Markets Products division only, all of which had been paid.

THE DECISION

The question was what was intended by the inclusion of the trading name After Market Products in the heading of the deed of suretyship?

Tuning Fork contended that since the heading conflicted with the terms of the suretyship agreement, the heading should be ignored. However, there was no necessary conflict between the two. The reference to Tuning Fork in the body of the agreement could be construed as a reference to Tuning Fork operating as After Market Products.

Tuning Fork's contention that the addition of the business division in the heading was superfluous was also to be rejected. Every word in an agreement is to be attributed meaning, including such descriptive words.

There was no conflict between the heading and the body of the deed of suretyship. When effect was given to all the words in the deed of suretyship, and account taken of the circumstances in which it came into existence, the liability of Kilburn was correctly limited to those debts incurred by Kilburn Auto in its purchases from the After Market Products division of Tuning Fork.

NEW PORT FINANCE COMPANY (PTY) LTD v NEDBANK LIMITED

Suretyship

A JUDGMENT BY BY WALLIS JA (NAVSA ADP, MAJIEDT, SALDULKER AND ZONDI JJA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2014

2015 SACLR 147 (SCA)

Once a creditor obtains judgment against a principal debtor, the extent of the liability of the surety is fixed. Any compromise then made by the creditor in respect of the principal debt will not affect the surety's liability.

THE FACTS

New Port Finance Company (Pty) Ltd and Mostert were sureties in favour of Nedbank Limited in respect of the debts of Wedgewood Village Golf and Country Estate (Pty) Ltd and Danger Point Ecological Development Company (Pty) Ltd. Those companies defaulted in their obligations to Nedbank. Nedbank obtained judgments against them and successfully applied for their liquidation.

Nedbank brought applications for the liquidation of New Port and the sequestration of Mostert. Wedgewood and Danger Point were taken out of liquidation, and placed under supervision under orders of court granted in terms of section 130(1) of the Companies Act (no 71 of 2008) and business rescue plans had been adopted.

New Port and Mostert sought to interdict Nedbank from proceeding against them. They contended that the terms of the business rescue plans, which were binding on Nedbank, altered the obligations of the principal debtors. This had the effect of rendering them liable for no more than the obligations of Wedgewood and Danger Point under the business rescue plans. Accordingly, they were no longer liable immediately to satisfy the judgments taken against them, because the principal debtors had been given time to pay the same debts. If the business rescue proved successful in each case their obligations to Nedbank would be discharged because the obligations of Wedgewood and Danger Point would have been discharged.

The business rescue plan in relation to Wedgewood subsequently fell away as a result of Wedgewood's default. In consequence, the business rescue proceedings were terminated in terms of section 132(2)*(a)* of the Act, and Nedbank became entitled to proceed against it under the liquidation application.

THE DECISION

Because the business rescue proceedings had fallen away, the rationale for the interdict fell away. However, even if they had not fallen away, the liability of the sureties was established when Nedbank obtained judgments against the principal debtors. There is no authority for the proposition that a compromise of the principal debtor's liability under a judgment, whether as a result of business rescue or otherwise, would accrue to the advantage of the surety after judgment had been taken against it. The surety's rights are not prejudiced thereby, because the extent of the surety's liability for the debt in question has been fixed and determined by the judgment. How the creditor thereafter executes the judgment against the principal debtor does not affect either the nature or the extent of the surety's liability.

In any event, the suretyship agreements provided for this eventuality. Its provisions entitled the bank to pursue the sureties notwithstanding their dealings with the principal debtor and the grant of any extension of time, or any compromise in relation to the scope and extent of the principal debtor's indebtedness. Any default on the part of the principal debtor entitled the bank to sue the sureties. The benefit of excussion was waived.

The sureties were not entitled to the interdict they sought.

STUPEL & BERMAN INCORPORATED v RODEL FINANCIAL SERVICES (PTY) LTD

A JUDGMENT BY BRAND JA (MHLANTLA, WILLIS JJA AND FOURIE AND GORVEN AJJA concurring)
SUPREME COURT OF APPEAL
27 FEBRUARY 2015

2015 SACLR 194 (SCA)

Contract

An agent appointed to perform certain duties in connection with the execution of an agreement concluded between two other parties does not become a party to that agreement, and cannot be considered a debtor under that agreement. If a principal terminates an agent's mandate, a third party may not require that the agent perform some obligation toward it which the agent had been appointed to perform.

THE FACTS

Cross Atlantic Properties 186 (Pty) Ltd bought certain fixed property for R7.2m. The seller, Amber Falcon Properties 3 (Pty) Ltd, obtained bridging finance loans from Rodel Financial Services (Pty) Ltd amounting to a total of R1.4m. In terms of the loans, Amber ceded to Rodel the net proceeds of the sale. Stupel & Berman Inc signed schedules to the loans in which it confirmed that it was attending to the registration of transfer of the property in terms of the sale, that it had received irrevocable instructions from the seller to pay the amount payable to Rodel from the proceeds of the sale and that it undertook to pay this amount within 72 hours of registration of transfer unless prevented by interdict or operation of law.

A few months later, because Amber Falcon had attempted to cancel the sale and find another purchaser at a higher price, and this had been prevented when Cross Atlantic brought interdict proceedings against it, Stupel & Berman confirmed to Rodel that the sale was proceeding. However, on the same day, Amber Falcon incorrectly informed Rodel that the transfer of the property might not proceed, and offered Rodel a lesser amount due to it in terms of the loans. In response, Rodel cancelled the loan agreements and demanded repayment.

Amber Falcon then appointed another firm of attorneys to attend to registration of transfer of the property and instructed Stupel & Berman to withdraw its undertaking in favour of Rodel. Stupel & Berman did so.

Rodel was unsuccessful in obtaining repayment of its loans from Amber Falcon. It then claimed payment by Stupel & Berman, basing its claim on the undertaking it had given.

THE DECISION

It would be incorrect to describe the agreement to which Stupel & Berman was a party as a tripartite agreement. Although it was contained in the loan agreement, it stood by itself as an agreement between Stupel & Berman and Rodel. The rights and obligations of the parties to the loan agreement were therefore independent of Stupel & Berman's obligations toward Rodel. Therefore, Stupel & Berman was entitled to assert their right to withdraw from the undertaking, whatever the legal position was as between Amber Falcon and Rodel, if the terms of the undertaking allowed it to. In any event, Stupel & Berman was not Rodel's debtor. It was Amber Falcon's agent, appointed to transfer the property and pay the net proceeds to Rodel.

The question therefore was whether or not the terms of the undertaking obliged Stupel & Berman to pay Rodel's claim. In terms thereof, it plainly undertook to pay the net proceeds of the sale to Rodel within 72 hours of registration of transfer and receipt of the purchase price. But it was clear that it undertook this obligation not in its personal capacity, but in pursuance of its mandate as the agent of Amber Falcon. The undertaking made it clear that it was given on the instructions of Amber Falcon and that it would let Rodel know if Amber Falcon terminated or tried to terminate its mandate. If the undertakings to pay were personal, termination of the mandate would be of no consequence to Rodel.

Once it was accepted that Stupel & Berman gave the undertaking in the capacity of an agent on the

instructions of a principal, the law of agency applied. It provides that, as a general rule, those instructions can be terminated. The fact that these instructions were described as irrevocable did not detract from the principle. There is an exception to this principle: when the agent has an interest in executing the mandate. However, this exception did not apply in this case, even in relation to the fact that Stupel & Berman stood to receive a conveyancing fee for executing the mandate to transfer the property. In relation to that interest, Stupel & Berman would not have been entitled to insist on executing that mandate, as they would only have been entitled to institute a possible claim for damages for having been prevented from doing so. In any event, the mandate upon which Rodel rested its argument was the mandate in which Stupel & Berman did not have an interest, ie that of paying the net proceeds to Rodel.

Amber Falcon had therefore been entitled to revoke its mandate to Stupel & Berman to transfer the property. Having done so, it had no option but to act upon that termination, and was prevented from paying Rodel 'by operation of law'.