Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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Credit Transactions

A profit share agreement between two parties under which one gives credit to the other and no date of repayment was fixed, are not guaranteed, may not have eventuated is not a loan subject to the National Credit Act (no 34 of 2005).

THE FACTS

Asmal issued cheques in favour of Essa. When Essa presented the cheques for payment, they were dishonoured because Asmal had countermanded payment. Essa brought provisional sentence proceedings against Asmal for payment according to the tenor of the cheques.

Asmal defended the action on the grounds that the cheques were given in repayment of loans made by Essa, that the loans were subject to the National Credit Act (no 34 of 2005) and Essa had failed to comply with sections 40(1), 129 and 130 of the Act. Asmal contended that the loans were secured loans as defined in the Act. The loans were agreed in the form of profit shares in which no date of repayment was fixed, were not guaranteed, may not have eventuated, and their value, if any, was to be determined by Asmal at his sole discretion.

Asmal contended that a credit agreement, as defined in the Act, entails credit being granted and the imposition of a 'fee, charge or interest' in respect of the deferred repayment, for the use of the credit. He contended that this qualified as a 'charge', one of the three wide terms used in s 8(4)(f) of the Act to describe payment for the use of money owed. Therefore the loans, of which the cheques were part and parcel, constituted credit agreements and were subject to the provisions of the Act. Because Essa was not registered as a credit provider, in breach of section 40(1)(b) of the Act, the credit agreements were unlawful and thus void in terms of section 89(2)(d) and the cheques could not found provisional sentence in the circumstances.

THE DECISION

The measures introduced by the National Credit Act were obviously intended to protect the consumer from any hidden costs that may arise from the credit agreement, and to ensure that he or she has an opportunity to consider the precise risk and cost involved before binding himself or herself. In that case, the parties must quantify the charge, fee or interest and specify the manner in which it is to be paid when they determine their contractual terms and conclude the credit agreement. It would follow that the indeterminate profit shares agreed upon by the parties, for which no date of repayment was fixed, which were not guaranteed and could well not even have eventuated, and whose value, if any, was to be determined by Asmal at his sole discretion, could not qualify as 'a charge' under the Act.

The loans were not credit agreements as envisaged by the Act if no charges attached to them. The loan agreements concluded by the parties were not secured loans.

Essa therefore had no obligation to register as a credit provider in the circumstances, and he had no duty to comply with sections 129 and 130 of the Act before commencing litigation against Asmal

MBD SECURITISATION (PTY) LTD v BOOI

Credit Transactions

A JUDGMENT BY DAFFUE J
(WILLIAMS AJ concurring)
FREE STATE DIVISION,
BLOEMFONTEIN
2 JULY 2015

2015 (5) SA 450 (FB)

A debtor may not consent to judgment which allows a court not having jurisdiction over him or her to grant judgment against him or her.

THE FACTS

MBD Securitisation (Pty) Ltd brought an action against Booi for payment of R4854,14. Its claim was based on the allegation that this amount outstanding to it as creditor in respect of goods sold and delivered. In signing a consent to judgment, Booi confirmed receipt of a letter in terms of section 129(1) of the National Credit Act (no 34 of 2005), acknowledged that the amount of R4854,14 was due and payable, and accepted liability to MBD for the debt, the costs of the letter of demand, further costs on an attorney and client scale in the amount of R2452,92 plus 10% collection commission on all payments received, and 14% VAT thereon.

The consent included a consent to the issue of an emoluments attachment order in the Hennenman Magistrates' Court in terms of section 65J of the Magistrates Court Act (no 32 of 1944). Respondent also explicitly consented in terms of section 45 to jurisdiction of that court in respect of the proceedings about to be instituted against her. Booi was resident in Alice, approximately 800 kilometres away from Henneman.

In its summons, MBD alleged that it had purchased a number of debtors' books from various companies. During the transfer of the portfolio, the physical file was not supplied to it and all attempts to obtain the documentation had been. A request for judgment was presented to the magistrate of the Hennenman Magistrates' Court. In terms thereof judgment was granted in favour of MBD. An emoluments attachment order was issued by the Hennenman clerk of the court

Booi applied for and obtained rescission of judgment. MBD appealed.

THE DECISION

There was no doubt that the Hennenman Magistrates' Court never had any jurisdiction over Booi in accordance with section 28 of the Magistrates Court Act. She was not resident or employed in that district and was never resident or employed there.

In terms of s 90(2)(k)(vi)(bb) of the National Credit Act, a provision in a credit agreement is unlawful if it contains a consent to jurisdiction of 'any court seated outside the jurisdiction of a court having concurrent jurisdiction and in which the consumer resides or works'.A credit provider is prohibited in terms of s 91(a) to directly or indirectly require or induce a consumer to enter into a supplementary agreement, or sign any document, that contains a provision that would be unlawful if it were included in the credit agreement.

Both the Magistrates Court Act and the NCA prohibit a provision in a contract embodying consent to jurisdiction in a specific district by one of the parties. The consent to judgment and the letter of demand referred to MBD as the plaintiff and apparent credit provider, but no reference was made in any of the documents to the fact that MBD was merely a purchaser of certain book debts of a specific and identified credit provider. The allegations in the documents prepared by appellant's attorney — the notice in terms of s 129(1) and the consent to judgment — were therefore blatantly false.

MBD's attorney decided for reasons unknown that proceedings had to be instituted in Hennenman notwithstanding the addresses of the parties and the fact that the cause of action, did not arise in that district.

The appeal was dismissed.

EURO BLITZ 21 (PTY) LTD v SECENA AIRCRAFT INVESTMENTS CC

A JUDGMENT BY MBHA JA (MAYA JA, MAJIEDT JA, PILLAY JA AND MAYAT AJA concurring)
SUPREME COURT OF APPEAL
19 MARCH 2015

2015 SACLR 230 (A)

A provision that interest be calculated daily does not mean that interest is to be calculated as compound interest.

THE FACTS

Secena Aircraft Investments CC claimed arrear rental from Euro Blitz 21 (Pty) Ltd in the sum of R353 126.40 as well as interest at the rate of prime plus 5% per annum. The claim for interest was based on clause 21.4 of the lease. It provided that Euro agreed to pay interest charges on all outstanding amounts due to Secena arising from any matter whatsoever, calculated on a daily basis, at a rate of prime plus 5%.

Secena obtained an order in the magistrates' court that Euro pay the sum claimed, plus interest on that sum at the rate of 'prime plus 5% calculated daily per annum a tempora morae to date of final payment'.

Secena contended that the interest was to be calculated daily and compounded daily from the date of default to date of payment. Euro contended that the interest was to be calculated as simple interest only.

THE DECISION

The rules of interpretation are that if there is no uncertainty in the meaning of words, the intention must be established primarily from the language used as construed according to the usual, well-known rules of interpretation of documents. If, however, uncertainty arises, regard may be had to extrinsic and the surrounding circumstances.

The word 'calculated' in the trial court's order pertaining to interest, had to be given its grammatical and ordinary meaning, unless that would result in some absurdity, repugnancy or inconsistency with the rest of the order. The Oxford English Dictionary defines the word as to '[e]stimate or determine by arithmetical or mathematical reckoning; estimate or determine by practical judgement or on the basis of experience'. On the other hand, 'capitalise' means to 'convert into a capital sum' and 'compound interest' is defined as 'reckoned on the principal together with the accumulated unpaid interest'.

Based on these distinctions, it could be concluded that the words 'calculated daily' do not envisage that interest is to be compounded daily.

In any events, it was trite law that compound interest was claimable only in certain defined circumstances. These were where parties agree to pay compound interest, if the obligation to pay interest was alleged, and if it was established by evidence that a universal custom of lessors charging compound interest on arrear rentals was uniformly and universally observed in leases concluded in the country. Secena did not establish any of these grounds. Its contentions were to be rejected.

CHETTY v HART N.O.

A JUDGMENT BY CACHALIA JA (WILLIS JA, SALDULKER JA, MATHOPO JA and GORVEN AJA concurring)
SUPREME COURT OF APPEAL
4 SEPTEMBER 2015

2015 (6) SA 424 (SCA)

Companies

Arbitration proceedings are 'legal proceedings' as referred to in section 133(1)(a) of the Companies Act (no 71 of 2008). Failure to notify a business rescue practitioner of the existence of legal proceedings does not result in nullity of those proceedings.

THE FACTS

Chetty concluded a subcontract agreement with TBP Building and Civils (Pty) Ltd for the provision of an electrical installation at a hospital. A dispute arose between the parties and the subcontract was cancelled on 6 October 2010. The disputed cancellation led to an arbitration. The proceedings were postponed for argument to 12 October 2012.

On 5 October 2012, TBP began business rescue proceedings by filing a resolution to place itself under business rescue. The business rescue was registered on 11 October 2012, and a business rescue practitioner was appointed to oversee the affairs of the company.The arbitrator heard argument and on 23 October 2012, unaware that TBP was under business rescue, he delivered his award.

Section 133(1)(a) of the Companies Act (no 71 of 2008) provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the company, may be commenced or proceeded with in any forum, except with the written consent of the practitioner.

The effect of this section was that once the business rescue proceedings began, the moratorium on legal proceedings applied to claims against TBP. The effect was that no legal proceedings against the company could proceed, except with the written consent of the practitioner. The consent of TBP's business rescue practitioner was not obtained.

Chetty contended that the arbitration was a 'legal proceeding' as envisaged in the section and that the moratorium therefore applied to her claim. Her failure to apply for consent thus nullified the award. She sought to invalidate the award in its entirety. TBP contended that the moratorium on legal proceedings in section 133(1) applied only to court proceedings, not arbitrations, and that, even if it did apply to arbitrations, the award was not a nullity.

THE DECISION

The purpose of business rescue is to give the practitioner an opportunity to assess the affairs of the company so that it can be restructured in a manner that would allow its return to financial viability. Based on this, only an interpretation of section 133 that includes arbitrations within, instead of excluding them from, the meaning of legal proceedings in the section, allows this provision to be read harmoniously with section 142(3)(b). That section obliges directors of a company in business rescue to assist the practitioner by providing details of any court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company.

There is no reason why section 142(3)(b) obliges the company to provide details of arbitrations to the practitioner other than because they are also legal proceedings.

The question then was whether the effect of failing to obtain the written consent of the practitioner results in nullity of the arbitration award. Section 133(1)(a) is not a shield behind which a company not needing the protection may take refuge to fend off legitimate claims. Section 133(1) in general, and s 133(1)(a) in particular, appears to have

been enacted exclusively for the benefit of the company and the practitioner appointed to oversee its affairs. In consequence, a claimant against the company may not rely on non-compliance with the section. Only the practitioner may seek its protection, and only he may waive or consent to dispense with compliance therewith.

But the question the respondent is unable to answer is, why the lawmaker would want the company to provide details of all proceedings, including arbitration proceedings, to a practitioner, but exclude arbitrations from the ambit of the moratorium and the obligation to obtain a practitioner's consent in s 133(1)(a). After all, the outcome of an arbitration by way of award is usually that the losing party has to pay a sum of money, which is the outcome of most court actions involving commercial disputes. In my view the answer lies in properly understanding the purpose of these provisions as they apply to business rescue proceedings and the consequences that flow from the parties' contending interpretations.

In my view once this purpose of business rescue — to give the practitioner breathing space — is properly understood, it becomes apparent that only an interpretation that includes arbitrations within, instead of excluding them from, the meaning of legal proceedings in s 133(1), allows this provision to be read harmoniously with s 142(3)(b). Such a reading is in line with the well-known canon of statutory construction, which is that if by any reasonable construction the two can be made to be compatible, not contradictory, that is the interpretation that should be given. There can be no reason why s 142(3)(b) obliges the company to provide details of arbitrations to the practitioner other than because they are also legal proceedings — as contemplated in s 133(1) — that may have a bearing on its financial viability and of which the business rescue practitioner must be cognisant.

Companies

HENNIE LAMBRECHTS ARCHITECTS v BOMBENERO INVESTMENTS (PTY) LTD

A JUDGMENT BY MOCUMIE J
(LEKALE J concurring, MOLOI J dissenting)
FREE STATE DIVISION
20 FEBRUARY 2014

2015 (6) SA 375 (FB)

In order to avoid an order that security for costs be ordered, a company should adduce all the evidence which will convince the court that it has sufficient funds to pay costs in the event that costs are granted against it.

THE FACTS

Bombenero Investments (Pty) Ltd brought an action against Hennie Lambrechts Architects. Hennie Lambrechts requested Bombenero to furnish security for its costs on the grounds that Bombanero did not own immovable property and/or tangible assets capable of attachment, which rendered it impecunious, did not disclose its financial statements as requested, and did not indicate whether any funds had been set aside for the prosecution of the action. Hennie Lambrects submitted, in the event that it succeeded with its defence and have the claim against it dismissed with costs, it would be unable to execute against Bombenero to recover its costs. It claimed security for costs.

Bombenero refused to tender such security. It disputed that it would be unable to pay the costs.

THE DECISION

The purpose of section 13 of the old Companies Act was to protect persons against liability for costs in regard to any action instituted by bankrupt companies and to ensure that companies, who were unlikely to be able to pay costs and therefore not effectively at risk of an adverse costs order if unsuccessful, did not institute litigation in circumstances where they have no prospects of success, thus causing their opponents unnecessary and irrecoverable expenses.

This section was not re-enacted in the new Companies Act, and so the common law had to determine the position regarding the provision of security. Companies consist of natural persons, directors, who, when sued, can hide behind the corporate veil and not furnish security, well knowing that the company they run is actually or commercially insolvent and will not afford the costs of an award in favour of the respondent. It cannot be 'just or equitable' to equate companies to what the Supreme Court of Appeal referred to as 'widows and orphans'. More so where there have been instances where even such 'widows and orphans' were ordered to furnish security, depending on the circumstances of the particular case.

A finding, as a general rule, that an incola company, regardless of the peculiar facts which call for the furnishing of security, is not bound to provide security would not be in keeping with the spirit, purport and objects of a Constitution designed to ensure equality of all before the law. Such a finding would mean that a party, who would be gravely prejudiced by another's refusal to furnish security because of the absence of the equivalent of section 13, would be without remedy, and thus left to suffer the considerable financial consequences. This would in turn offend against the principles of equality and of just and equitable decisions.

In order to avoid an order that security for costs be ordered, a company should adduce all the evidence which will convince the court that it has sufficient funds to pay costs in the event that costs are granted against it. Courts should insist on more details and not the say-so of the incola company.

In the present case, Bombenero had not done this. Therefore it was right that security for costs should be ordered against it.

LARRET v COEGA DEVELOPMENT CORPORATION (PTY) LTD

Companies

A JUDGMENT BY STRETCH J
EASTERN CAPE DIVISION,
GRAHAMSTOWN
13 MARCH 2015

2015 (6) SA 16 (ECG)

Section 163(1) of the Companies Act (no 71 of 2008) does not empower a court to authorise the institution of an action by a company as against a third party where such institution has not been duly authorised by the board of directors of the company.

THE FACTS

Larret, a director of Independent Crushers Consortium (Pty) Ltd (ICC), brought an action in the name of the company against Coega Development Corporation (Pty) Ltd and the Standard Bank of Africa Ltd.

When the summons was issued Larret lacked the necessary authority from the board of directors of ICC to instruct attorneys to institute the action. When challenged on this point, the attorneys were unable to establish the requisite authorisation.

Larret brought an application in terms of section 163(1) of the Companies Act (no 71 of 2008). She alleged that she could not set up the required board meeting between herself and the other director in order to secure the necessary authorisation for the institution of the action, because the other director refused to co-operate.

Section 163(1) provides that a director of a company may apply to a court for relief if any act or omission of the company has had a result that is oppressive or unfairly prejudicial to, the applicant.

THE DECISION

Section 163(2) provides for the remedies a court may apply upon a successful application in terms of section 163(1). This includes the power to order a restraint against the conduct complained of. However, section 163(2) does not include the power to authorise the institution of an action by the company as against a third party where such institution has not been duly authorised by the board of directors of the company.

The legislature specifically designed section 165 for the very purpose of securing the rights of someone such as Larret in these circumstances whilst at the same time ensuring that the rights of the company and those of the third party concerned are properly taken into account. Extensive procedures have been created by that section towards these very ends, such as section 16(4)(a), which provides that the company must (upon a demand being made to commence or continue legal proceedings) appoint an independent and impartial person or committee to investigate the matter and to report to the board on various aspects, including the probable costs which would be incurred.

The appropriate section to have brought the application was section 165 which provides for derivative actions. The application was therefore dismissed.

MINNAAR v VAN ROOYEN NO

A JUDGMENT BY LEWIS JA
(TSHIQI JA, MAJIEDT JA,
DAMBUZA JA and BAARTMAN
AJA concurring)
SUPREME COURT OF APPEAL
10 SEPTEMBER 2015

2016 (1) SA 117 (SCA)

An order that a director be held personally liable for the debts of his company must be sought on the basis of evidence led, even if a default order is obtainable against the director.

THE FACTS

In 1999, Minnaar was appointed as a consultant to Askari Mining and Equipment Ltd. In 2000, he was appointed as its financial director in 2000. He resigned as a director in November 2001. Askari was provisionally liquidated in June 2003, and finally liquidated in July 2008.

In March 2004, an enquiry into the affairs of Askari was conducted. Four years later, the liquidators instituted action against the five directors, claiming an order that they be held personally liable for the debts of Askari. All the directors appointed the same attorney to represent them. They issued a joint plea to the claim, denying the allegations against them. The matter was set down for trial on 22 February 2012. Before that date, the directors and then liquidators had started discussing a settlement. Minnaar was advised that he was required to attend a pre-trial conference scheduled for 30 November 2011. He wrote to the attorney for the directors, on that day, by email, saying that he knew about the pre-trial conference and that settlement proposals would be made. He said that he was placing it on record that he would not be part of any settlement. His colleagues, he said, were free to settle the claims against them, but he was convinced that he had done no wrong, and in any event could not afford to pay what the liquidators were asking.

Minnaar also advised that he would handle his own defence and would appoint a new attorney as soon as possible. Minnaar failed to take any steps to appoint an attorney to represent him at trial. He did not attend court on 22 February 2012. When the trial was called, default judgment was granted against him.

Minnaar sought rescission of the default judgment.

THE DECISION

The remedy that a director be held personally liable for the debts of a company is a punitive one - a director can be held personally liable for liabilities of the company without proof of any causal link between his conduct and those liabilities. The onus is upon the party alleging recklessness to prove it on a balance of probabilities.

None of the allegations against Minnaar was supported by evidence, and none was led. There was thus no proof at all of whether his conduct had been fraudulent or reckless. Default judgment should, therefore, not have been granted.

The liquidators were not entitled procedurally to default judgment against Minnaar without leading evidence. By its very nature, the right to the relief sought had to be proved on a balance of probabilities. The liquidators were not entitled to rely on allegations made in the particulars of claim and denied in the defendants' joint plea. At the very least they should have led witnesses to show that the directors had acted recklessly or with intent to defraud creditors. The order was thus erroneously sought, and erroneously granted, and had to be rescinded.

Companies

MTHIMUNYE-BAKORO v PETROLEUM AND OIL CORPORATION OF SOUTH AFRICA (SOC) LTD

A JUDGMENT BY DAVIS J
WESTERN CAPE DIVISION, CAPE TOWN
4 AUGUST 2015

2015 (6) SA 338 (WCC)

The fiduciary duty directors owe to each other is of paramount importance. The central purpose of corporate governance is the accountability of senior management and the board of a company because of the extensive powers vested therein.

THE FACTS

During December 2014 it came to the attention of the board of Petroleum And Oil Corporation of South Africa (Soc) Ltd that the company was expected to declare a substantial loss of several billion rand for the financial year ending March 2015. The company had performed far below the target performances which had been expected. This loss was later revised in May 2015 in the amount of R14,89 billion.

The board then commenced a process of seeking to establish the cause of these losses. It formed the prima facie view that the poor financial performance could be attributed, at least in part, to Mthimunye-Bakoro's who was an executive director of the company and its chief financial officer. The board also held the prima facie view that Mthimunye-Bakoro had committed acts of serious misconduct and had possibly been involved in contraventions of the provisions of the Public Finance Management Act.

The company determined that an investigation was required into the causes of the substantial losses and the poor performance generally, together with Mthimunye-Bakoro's possible role in this poor performance and the losses which had been incurred. The company imposed a precautionary suspension on full pay of Mthimunye-Bakoro. On 2 June 2015, the company addressed a letter to Mthimunye-Bakoro in which she was advised of the board's proposal to place her on a precautionary suspension. She was called upon to make representations as to why this decision should not be taken. She was also advised that, if her precautionary suspension were confirmed, it was the board's intention to suspend her as a director.

A meeting of the non-executive directors of the company was called on 18 June 2015. The primary purpose of this meeting was to consider the precautionary suspension of Mthimunye-Bakoro. All of the company's directors, but not Mthimunye-Bakoro, were given notice of the meeting. At that meeting the board decided to place Mthimunye-Bakoro on precautionary suspension. All but one of the non-executive directors who attended voted in favour of this decision.

A further meeting of the board was held on 13 July 2015. The board reconsidered, the decisions which were taken at the meeting of 18 June 2015 to suspend Mthimunye-Bakoro. She was given notice of the meeting and attended it. The board confirmed its earlier decision.

Mthimunye-Bakoro brought an application for an order declaring the meeting to be unlawful, declaring any decision taken at such meeting to suspend her as employee and/or chief financial officer of the company to be invalid and of no force and effect and declaring the purported resolution of the board of directors taken at such meeting to be invalid and of no force and effect.

THE DECISION

Whatever the legality of the meeting of 18 June, the later meeting held the key to the resolution of the dispute. The meeting of 13 July was different from the earlier one in that Mthimunye-Bakoro was given notice, she attended the meeting, and addressed the meeting before being excused from it prior to the resolution being taken. Her complaint fell within four categories: (1) She was given insufficient notice of the meeting,

(2) She was not provided with sufficient information in order to participate, (3) A view was formed that she was conflicted when she was not, and she was compelled to leave the meeting, and (4) The meeting was called for an improper motive.

Timeous notice of the meeting was given to Mthimunye-Bakoro - four days prior thereto. With regard to the complaint of inadequate information, Mthimunye-Bakoro said that she was not given adequate information to properly formulate an opinion. However, she had made her opinion clearly known. There was a comprehensive case made out as to her attitude to the suspension.

With regard to questions of conflict, Mthimunye-Bakoro contended that she was not conflicted and that she should not have been required to leave the meeting. This averment had to be dismissed. There could be no rational basis for suggesting that a person who faces suspension has no conflict and can deal with the matter utterly impartially, without taking their own interest into account and only taking account of the company's interests.

With regard to the question of improper motive Mthimunye-Bakoro averred that the meeting of 13 July was called for an improper motive 'in an attempt to avoid the previous unlawful conduct of the non-executive directors'. The meeting of 13 July was held for the avoidance of any doubt. Mthimunye-Bakoro was invited, to avoid any further technical challenge. No more could be expected of the company in this connection. Even if the purpose of the meeting were to address an early invalid decision, there did not appear to be anything untoward and, as such, such conduct and the motivation would not invalidate the meeting.

The application was dismissed.

Whatever the legality of the meeting of 18 June and, in my view, without deciding, the resolution of suspension may have been valid. Given the law as I have outlined it, the later meeting holds the key to the resolution of this dispute. What was different about the meeting of 13 July was that the applicant was given timeous notice, she attended the meeting, and addressed the meeting before being excused from it prior to the resolution being taken.

Applicant's complaint appears then to fall within four categories:

(1) She was given insufficient notice of the meeting.

(2) She was not provided with sufficient information in order to participate.

(3) A view was formed that she was conflicted when she was not, and she was compelled to leave the meeting.

(4) The meeting was called for an improper motive.

CLOETE N.O. v FIRSTRAND BANK LTD

A JUDGMENT BY FOURIE AJA (NAVSA ADP, PONNAN JA, ZONDI JA AND SCHOEMAN AJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2015

2015 SACLR 215 (A)

Enforcement action as referred to in section 133 of the Companies Act (no 71 of 2008) does not refer to the cancellation of an agreement by a creditor.

THE FACTS

Firstrand Bank Ltd lent money to Skyline Crane Hire (Pty) Ltd by way of instalment sale agreements. On 29 May 2012 the board of Skyline voluntarily resolved that Skyline be placed under business rescue in terms of the provisions of section 129 of the Companies Act (no 71 of 2008), and on the following day, the resolution was filed with the Companies and Intellectual Property Commission.

Skyline had by then fallen into arrears in respect of the monthly instalments payable under the instalment sale agreements. On 30 May 2012 the bank despatched a letter to Skyline, cancelling the agreements due to Skyline's failure to pay the monthly instalments due in terms thereof.

The business rescue practitioner appointed in terms of the Act consented to the bank repossessing and selling the goods relating to the instalment sale agreements. The proceeds realised from the sale were sufficient to discharge the debt owing by Skyline to the bank, leaving a surplus of some R800 000. The bank retained the surplus, relying on set-off in respect of other amounts allegedly owing to it by Skyline.

On 10 September 2012 a final order of liquidation was granted against Skyline. Cloete and the other appellants were appointed as the co-liquidators of Skyline. The liquidators took the view that the bank's cancellation of the agreements was contrary to the provisions of section 133(1) of the Act and accordingly of no force or effect. They contended that the full proceeds of the sale of the goods were to be paid over to them to be dealt with under sections 83 and 84 of the Insolvency Act (no 24 of 1936).

THE DECISION

Section 133(1) provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except (inter alia) with the written consent of the practitioner, or with the leave of the court and in accordance with any terms the court considers suitable.

The liquidators argued that the cancellation of the agreements constituted 'enforcement action' as meant in the subsection, and as the written consent of the practitioner and the leave of the court had not been obtained,, the cancellation was of no force or effect. The bank submitted that the cancellation of an agreement does not constitute 'enforcement action' as envisaged by section 133(1) of the Act, so that the consent of the practitioner or the leave of the court was not required to effect a lawful cancellation of the agreements.

The essential issue was whether the cancellation of the agreements by means of the letter of 30 May 2012, constituted 'enforcement action' as meant in section 133(1) of the Act. 'enforce' or 'enforcement', usually refer to the enforcement of obligations, in contrast to cancellation. In the context of section 133(1) of the Act, it is significant that reference is made to 'no legal proceeding, *including* enforcement action'. The inclusion of the term 'enforcement action' under the generic phrase 'legal proceeding', indicated that 'enforcement action' is considered to be a species of 'legal proceeding' or, is meant to have its origin in legal proceedings. 'enforcement action' cannot mean the cancellation of an agreement. Contextually it referred to enforcement by way of legal proceedings.

FOUR ARROWS INVESTMENTS 68 (PTY) LTD v ABIGAIL CONSTRUCTION CC

A JUDGMENT BY SWAIN JA
(LEWIS JA, MHLANTLA JA,
WILLIS JA and SALDULKER JA
concurring)
SUPREME COURT OF APPEAL
17 SEPTEMBER 2015

2016 (1) SA 257 (SCA)

Property

An option, the purpose of which is to enable the sale of a portion of agricultural land without the consent of the Minister, falls within the prohibition contained in section 3(e)(i) of the Subdivision of Agricultural Land Act (no 70 of 1970).

THE FACTS

Four Arrows Investments 68 (Pty) Ltd concluded an agreement of sale of immovable property with Abigail Construction CC, Abigail being the seller and Four Arrows the purchaser.

Clause 2.7.1 provided that the agreement would be deemed to be an option to purchase the property granted by the seller to the purchaser 'at the price and upon and subject to the terms and conditions hereof which option shall be exercisable by the purchaser at any time after the purchaser and the seller succeeds in obtaining the required consent to the subdivision of the property from Portion 175'.

Four Arrows contended that the agreement constituted an option for the sale of a portion of agricultural land, and as such did not fall within the prohibition contained in section 3(e)(i) of the Subdivision of Agricultural Land Act (no 70 of 1970). The section provides that 'no portion of agricultural land . . . shall be sold or advertised for sale . . . unless the Minister has consented in writing'.

Four Arrows sought an order compelling Abigail to pass transfer of the property to it.

THE DECISION

The object of the legislation was not only to prohibit concluded sale agreements, but also preliminary steps which may be a precursor to the conclusion of a prohibited agreement of sale. This is clear from the fact that the legislature has prohibited the advertisement of a portion of agricultural land for sale in the absence of ministerial consent. The grant of an option would clearly be a precursor to the conclusion of a prohibited agreement of sale, at the election of the option holder.

An option falls within the ambit of the prohibition contained in the Act because the essence of an option is that it is binding on the option grantor. It is an offer to sell property, which cannot be revoked.

In the present case, the option grantor purported to be bound to sell a portion of agricultural land without ministerial consent, on the election of the option holder, contrary to the provisions of the Act. The fact that the option provided that the option holder could only exercise the option after the consent of the Minister had been obtained, was irrelevant. In the interim the option grantor purports to be bound to sell a portion of agricultural land without ministerial consent. This was contrary to the provisions of the Act.

The probable intention of the parties was to enable Four Arrows to purchase one-half of the property. The provisions of the contract which provided for the acquisition of the whole property were clearly subsidiary to this principal purpose. The offending clause consequently resulted in the entire contract being null and void.

LESTER v NDLAMBE MUNICIPALITY

A JUDGMENT BY MAJIEDT JA (MTHIYANE DP, CACHALIA JA, THERON JA and ZONDI AJA concurring)
SUPREME COURT OF APPEAL
22 AUGUST 2013

2015 (6) SA 283 (SCA)

Once it is established that a demolition order should be given in terms of section 21 of the National Building Regulations and Building Standards Act (no 103 of 1977), a court does not have a discretion to issue any other order including an order that the property owner be permitted to alter the dwelling so as to avoid the demolition order.

THE FACTS

Lester built a luxury house without having obtained any approved building plans as required by section 4(1) of the National Building Regulations and Building Standards Act (no 103 of 1977).

An order of court was obtained against Lester which required him to submit plans within one month complying with all statutory and zoning requirements. Failure to do so would render the house susceptible to demolition.

Lester sought to comply with this order by submitting various sets of amended and revised plans to the Ndlambe Municipality. None of them met secured approval. On 5 December 2010 Ndlambe adopted the recommendations of the building control officer and resolved in terms of section 7(1)(b) of the Act not to approve the final plans since they did not comply with the court order. Lester was notified of this outcome and a demolition application followed. Lester instituted a counter-application to permit him to alter the dwelling so as to avoid the demolition order.

A court granted the demolition order in terms of section 21 of the Act. The section provides that a court shall have jurisdiction to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorising such local authority to demolish such building if the court is satisfied that such erection is contrary to or does not comply with the provisions of the Act or any approval or authorisation granted thereunder. Lester appealed.

THE DECISION

Section 26 of the Constitution provides that everyone has the right to have access to adequate housing, and that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.

Lester argued that the court's authority to order a demolition under section 21 of the Building Standards Act had to be read with section 26 of the Constitution. Its requirement that the court consider 'all relevant circumstances' before making a demolition order conferred a wide discretion on the court to consider all the relevant circumstances before ordering the demolition of Lester's house.

This argument could not be sustained. What constitutes 'adequate housing' is a factual enquiry. Executing a writ of execution in respect of a luxury home, which Lester's house undeniably was, had no bearing on the right of access to adequate housing. The fact that the dwelling sought to be demolished was the person's primary residence did not detract from this principle. The cardinal question was whether demolition of Lester's property would infringe upon his right to access to adequate housing. The answer was clearly 'No'.

Section 21 gives a court no latitude not to order the demolition once it is proved that the building was erected contrary to the Act.

A court has a statutory and moral duty to uphold the law and to see to due compliance with its town planning scheme. A lenient approach could be an open invitation to members of the public to use land illegally with a hope that the use will be legalised

in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict. Ndlambe was in exactly this position — it was statutorily and morally duty-bound to approach the court below for a demolition order in order to uphold the law. The court had a concomitant duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention and criminal offence.

The appeal was dismissed.

I conclude by reverting to what Harms J said in United Technical Equipment (supra) with regard to the City Council's obligations to enforce the law in the face of an ongoing illegality being perpetrated by the appellant company in that case:

'The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict.'

Ndlambe is in exactly the same position as the respondent in the aforementioned case — it was statutorily and morally duty-bound to approach the court below for a demolition order in order to uphold the law. The court a quo, in turn, had a concomitant duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention and criminal offence.

Conclusion

[28] As stated, Lester has erected an unlawful structure on his property — this fact is unchallenged and common cause. The jurisdictional basis for a demolition order in terms of s 21 has therefore been established. All administrative actions, such as the unanimous resolution of Ndlambe's full council on 5 December 2010 not to approve the final revised plans, remain valid and legally binding until set aside on review or appeal. Absent any challenge on appeal — internally in terms of s 9 of the Act to a review board, or on review in terms of PAJA to a competent court — that resolution had legal consequences.

RUITERS v MINISTER OF HUMAN SETTLEMENTS

A JUDGMENT BY DONEN AJ
WESTERN CAPE DIVISION, CAPE TOWN
12 AUGUST 2015

2016 (1) SA 239 (WCC)

The Housing Consumers Protection Measures Act (no 95 of 1998) does not authorise the Registration Council to reject an application by an owner builder on the ground that the owner commenced building before making his application for exemption. The Act also does not prohibit an owner builder from commencing building before making application for exemption.

THE FACTS

Ruiters secured the approval of the City of Cape Town of certain building plans for a new house to be built on his property. He submitted the plans in terms of section 4 of the National Building Regulations and Building Standards Act (no 103 of 1977). He then began the construction of his home.

Some six months later, on 1 August 2012, the National Home Builders Registration Council served a notice of non-compliance with the provisions of section 14(1) of the Housing Consumers Protection Measures Act (no 95 of 1998) on Ruiters. The non-compliance report stated that, as a home builder, he had commenced the construction of a home prior to enrolment by the Council. He was required to achieve compliance by 8 August 2012.

Ruiters submitted an exemption application to the Council on 12 September 2012 in terms of the Act, in order to qualify as an owner builder. This qualification would exempt him from complying with the provisions of section 14 of the Act.

The Council advised Ruiters that his application had been rejected. The Council stated that sections 10 and 14 of the Act prohibited the commencement of construction of a home prior to registration of home builder and enrolment of a home. Accordingly, exemption in terms of section 14 of the Act could only be made prior to construction. As a result thereof the Council contended that Ruiters application for exemption did not fall within the ambit of the Act.

Ruiters appealed to the Minister of Human Settlements. Basing her decision on the criteria of section 29(1)(b) of the Act, the Minister dismissed the appeal. That section provides that an exemption may be granted if it would not undermine the objectives of the Act, or the effectiveness of the Council. Ruiters applied for an order reviewing and setting aside the Minister's decision, as well as her confirmation of the Council's refusal of his exemption application.

THE DECISION

The protective measures in the Act are directed at protecting housing consumers from home builders. There is no reference in the above protective provisions to owner builders. Nor are any duties placed upon them.

Two main consequences arise from the Act's definition of home builder. Firstly, if an owner builder has not applied for exemption in terms of section 10A, he or she remains subject to the duties resting upon a home builder and the consequence of breach of such duties. Secondly, if such application for exemption has been made, no such duties or consequences arise.

If an applicant for exemption satisfies the Council that he or she fulfils the definition of an owner builder, that would be sufficient to eliminate him or her from regulation as a home builder. The Act does not require an applicant who satisfies the Council that he or she is an owner builder also to satisfy the Council that the construction complies with technical requirements. The Minister made her decision with reference to the criteria in section 29(1)(b) of the Act. The Council did not appear to have considered those criteria. Because an owner builder poses no apparent risk to a housing consumer, an applicant for exemption who satisfies the Council that he or she is an owner builder would not appear to undermine the objects of the Act.

An undertaking such as the one made by Ruiters, to occupy and not to sell the owner builder's house for five years, coupled with indemnification of the Council from claims by housing consumers, would appear to eliminate the chance of undermining the effectiveness of the Council. Furthermore, severe prejudice to a bona fide owner builder would result if exemption were not granted, because the burdens of protecting housing consumers would be imposed on him or her for no reason. This would not be in the public interest. Prima facie therefore, a proven owner builder satisfies the requirements of section 29(1).

From the reasons given by the Council for its refusal to grant the applicant exemption, it would appear that the Council did not investigate and try to satisfy itself whether the section 29(1) criteria were established, or whether in fact Ruiters was an owner builder. Instead it based its rejection of the application on the ground that Ruiters commenced building before making his application for exemption. The Act does not authorise the Council to reject an application by an owner builder on this ground. Nor does it prohibit an owner builder from commencing building before making application for exemption.

The matter was is referred back to the Council for determination as to whether the applicant is entitled to exemption in terms of section 10A and s 29.

The Minister made her decision with reference to the criteria in s 29(1)(b) of the Act. The Council does not appear to have considered these criteria. Because an owner builder poses no apparent risk to a housing consumer, an applicant for exemption who satisfies the Council that he or she is an owner builder would not appear to undermine the objects of the Act. An undertaking such as the one made by the applicant, to occupy and not to sell the owner builder's house for five years, coupled with indemnification of the Council from claims by housing consumers, would appear to eliminate the chance of undermining the effectiveness of the Council. Furthermore, severe prejudice to a bona fide owner builder would result if exemption were not granted, because the burdens of protecting housing consumers would be imposed on him or her for no reason. This would not be in the public interest. Prima facie therefore, a proven owner builder satisfies the requirements of ss 29(1)(a), (b) and (c).

[64] The Minister accepted in her reasons that the applicant was an owner builder. Prima facie at least the conclusions above had to follow. In passing it should be noted that s 29 is framed in broad general terms. It avails 'a person or a home' with exemption from any provision of the Act. Passage through the criteria mentioned in s 29, for persons other than applicants in terms of s 10A, may not be as self-evident as for an owner builder.

The decision of the Council

[65] From the reasons given by the Council for its refusal to grant the applicant exemption, it would appear that the Council did not investigate and try to satisfy itself whether the s 29(1) criteria were established, or whether in fact the applicant was an owner builder. Instead it based its rejection of the application on the ground that applicant commenced building before making his application for exemption. The Act does not authorise the Council to reject an application by an owner builder on this ground. Nor does it prohibit an owner builder from commencing building before making application for exemption.

SNYDERS N.O. v LOUISTEF (PTY) LTD

A JUDGMENT BY JANSE VAN NIEUWENHUIZEN
GAUTENG DIVISION, PRETORIA
7 JULY 2015

2016 (1) SA 123 (GP)

The owner of an existing site falls within the provisions of regulation 12(2) of regulations promulgated under the Petroleum Products Act 120 of 1977. A site licence is transferred to the owner by operation of law immediately the licence held by another person occupying the site terminates.

THE FACTS

Louistef (Pty) Ltd conducted a petrol filling station on property owned by Snyders. It did so under a site licence granted to it by the third respondent. When Louistef's lease with Snyders terminated,, the parties entered into a written agreement in terms of which Snyders purchased the site licence from Louistef for R1m. In pursuance of the agreement, Snyders paid R1m into the bank account of the third respondent.

Prior to the purchase price being paid to Louistef, Snyders received legal advice to the effect that the written agreement was null and void and unenforceable. As a result, he instructed the third respondent to withhold payment of the purchase price. Snyders alleged that the agreement was invalid, null and void and unenforceable because a site licence was not an asset capable of being sold.

Louistef contended that the site licence formed part of its property, had a value and was capable of being sold.

THE DECISION

Section 2A(1) of the Petroleum Products Act 120 of 1977 stipulates inter alia that a person must have a site licence to hold or develop a site and must have a retail licence to retail prescribed petroleum products. Regulation 12(2) provides that the site licence issued to (a) a land owner, must be transferred to the new owner of that land, or (b) a lessee, must be transferred to the new lessee or to the new owner of that land.

In distinguishing between 'new site' licences and 'existing site' licences, the legislature created two distinct scenarios to which different criteria apply. 'New sites' have more cumbersome requirements than 'existing sites'. In view of the provisions of regulation 12, Snyders contended that Louistef was obliged to transfer the site licence to him.

No reason appears from the Act and regulations to distinguish between a new owner and an existing owner of an 'existing site'. Having regard to the structure of the Act and the regulations, it followed logically that the owner of an existing site should by implication fall within the provisions of regulations 12(2) and (3). The fact that an existing owner of an 'existing site' is not expressly referred to in regulation 12, renders this interpretation reasonable and necessary.

In view of this interpretation, Louistef had a statutory obligation to transfer the site licence to Snyders. A site licence therefore did not have commercial value and was not an asset which could be sold. Consequently the sale agreement between the parties did not comply with the essential elements of a valid sale agreement and was null and void.

MAYO N.O. v DE MONTLEHU

A JUDGMENT BY WILLIS JA (BOSIELO JA, LEACH JA, MAJIEDT JA and ZONDI JA concurring)
SUPREME COURT OF APPEAL
23 SEPTEMBER 2015

2016 (1) SA 36 (SCA)

Insolvency

Section 44(1) of the Insolvency Act (no 24 of 1936) applies to claims by creditors against a company in liquidation by virtue of the operation of section 366(1) of the Companies Act (no 61 of 1973).

THE FACTS

Chevreau Construction (Pty) Ltd took over the completion of a townhouse property development from Starspan Investments (Pty) Ltd. A dispute arose between the parties as to which was responsible for estate agents commission. Chevreau was wound up by way of a special resolution adopted on 22 July 2011 and registered on 6 September 2011.

After the appointment of Mayo as joint liquidator, and at a time when no creditors had proved claims against the company in liquidation, the joint liquidators launched an application to set aside the sales and transfers of two immovable properties by Chereau to two companies. In response de Montlehu, who had been the sole director and shareholder of Chevreau brought a counter-application seeking a stay of the winding-up of Chevreau on the grounds that Starspan had not proved its claim, with the consequence that the company no longer appeared to be insolvent, with no other creditors having submitted claims.

On 5 October 2012, Mayo convened a special meeting of creditors for the purpose of proving claims. Two claims by Starspan were lodged. The first was for R173 479,40, being an amount of taxed costs awarded in an arbitration, and R1 577 432,70, being the amount in dispute in the arbitration. The Master admitted both claims to proof.

De Montlehu contended that the proof of these claims was flawed as it had taken place without the leave of the Master as required by section 44(1) of the Insolvency Act (no 24 of 1936). The section provides that no claim shall be proved against an insolvent 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.

THE DECISION

The essential question was whether the three-month time frame as provided for in section 44(1) of the Insolvency Act, applied to companies in liquidation or not.

Section 366(1) of the Companies Act (no 61 of 1973) provides that in the winding-up of a company, the claims against the company shall be proved at a meeting of creditors mutatis mutandis in accordance with the provisions relating to the proof of claims against an insolvent estate under the law relating to insolvency. Section 366(2) provides that the Master may 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.

The question therefore, was what precisely was affected by the qualification 'mutatis mutandis'. The strictness of meaning to be given to 'mutatis mutandis' implied that the fixed time period provided for in section 44(1) of the Insolvency Act, and therefore the fixing of costs by the Master and the payment thereof by the creditor, should apply both in the case of sequestration and the liquidation of a company.

A plain reading of section 366(2) of the Companies Act does not affect the applicability of the three-month time period in section 44(1) and the issues that arise therefrom. Neither in logic nor in the grammar of the respective provisions is there a

reason why the three-month time period, together with the fixing of costs and the payment thereof by a late creditor, should not apply alongside the discretionary power granted in terms of section 366(2). In both instances, the lodging of claims needs momentum driven by the factor of time.

Were the three-month period not to apply, then in the absence of a time period being fixed by the Master in terms of section 366(2), there would be no formal time period within which creditors would be required to lodge and prove their claims. The three-month period stipulated in section 44(1) of the Insolvency Act relating to the proof of claims remains the bench mark in both sequestrations and liquidations.

Section 366(2) does not affect the applicability of section 44(1) of the Insolvency Act to companies in liquidation.

The court a quo found that the reasoning in Stone & Stewart was wrong and that s 366(2) of the old Companies Act did not, in the case of companies in liquidation, push aside the time period in s 44(1) of the Insolvency Act. I agree. A plain reading of s 366(2) of the old Companies Act does not affect the applicability of the three-month time period in s 44(1) of the old Companies Act and the issues that arise therefrom. Neither in logic nor in the grammar of the respective provisions is there a reason why the three-month time period, together with the fixing of costs and the payment thereof by a late creditor, should not apply alongside the discretionary power granted in terms of s 366(2). In both instances the lodging of claims needs momentum driven by the factor of time.

[19] Were the three-month period not to apply, then in the absence of a time period being fixed by the master in terms of s 366(2), there would be no formal time period within which creditors would be required to lodge and prove their claims. The risk of tardiness, if not inertia, would be ever present. Clearly, this would not be in the interest of either the creditors or the general public. The three-month period stipulated in s 44(1) of the Insolvency Act relating to the proof of claims thus remains the bench mark in both sequestrations and liquidations. Section 366(2) does not, therefore, affect the applicability of s 44(1) of the Insolvency Act to companies in liquidation.

ABSA BANK LIMITED v HAMMERLE GROUP (PTY) LTD

JUDGMENT BY MBHA JA (BRAND, MAYA, CACHALIA AND MHLANTLA JJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2015

2015 SACLR 238 (A)

A subordination clause in a loan agreement makes the creditor a contingent creditor but does not prevent such a creditor from bringing an application to liquidate the debtor.

THE FACTS

Absa Bank Ltd advanced two loans to Hammerle Group (Pty) Ltd. Hammerle became commercially insolvent and unable to pay its debts. The bank's attorney addressed a letter of demand to Hammerle for payment of the arrears within 30 days of receipt of the letter, failing which the entire capital and interest outstanding would immediately become due and payable. Hammerle's attorney replied stating, that Hammerle would tender payment only if there were surplus funds available subject to a subordination clause contained in one of the loan agreements, known as the subscription agreement. In terms of that agreement, the bank's loan was subordinated in favour of Hammerle's other creditors

The bank's attorney despatched a notice in terms of section 345(1) of the Act calling upon Hammerle to settle all outstanding arrears within three weeks after delivery of the notice, failing which the bank would apply for the liquidation of Hammerle. Hammerle's attorney replied stating that '[o]ur client has always indicated that it would like to make [a] settlement proposal . . .'. It also stated that '[n]otwithstanding the aforesaid, please note that our client has been struggling to turn the business around. However, our client believes that it may in due course turn the business around by making it profitable. At this stage our client has not been able to make any meaningful profit in the business'.

Absa applied for the winding up of Hammerle on the grounds that it was commercially insolvent and unable to repay the loans. The bank averred that as at 31 May 2011, Hammerle was indebted to it in the total amount of R21 005 197,46. This amount comprised of R4 693 437,78 owing under the loan agreement and the notarial bond, and R16 311 759,68 arising from the subscription agreement.

Hammerle raised two defences, that the bank's claim under the loan agreement had prescribed and consequently that the debt had become extinguished, and that as the loan advanced in terms of the subscription agreement was subordinated in favour of Hammerle's creditors and as Hammerle was indebted to its creditors in the amount of R2 205 657,07, the amount claimed by the bank was not due and payable.

THE DECISION

In the light of the subordination clause in the subscription agreement, the bank was a contingent creditor of Hammerle. In terms of section 346(1) of the Companies Act (no 61 of 1973), the bank was within its right to apply for the winding-up of the respondent. The section provides that an application to court for the winding-up of a company may be made by one or more of its creditors, including contingent or prospective creditors.

The contents of Hammerle's attorney's letter showed an unequivocal acknowledgement of indebtedness by Hammerle in the amount claimed under the loan agreement. It also showed that Hammerle was unable to pay its debts and, was in consequence, commercially insolvent.

This was an admission which interrupted the running of prescription, and showed that Hammerle was susceptible to being wound up as it was commercially insolvent.

BOTHMA-BATHO TRANSPORT (PTY) LIMITED v NEDBANK LIMITED

A JUDGMENT BY WILLIS JA (PONNAN JA, LEACH JA, SALDULKER JA AND MEYER AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2015

2015 SACLR 207 (A)

Contract

A court will not order parties to reinstate an agreement upon the terms of an existing agreement if there are no grounds for the importation of the terms of the existing agreement.

THE FACTS

Bothma-Batho Transport (Pty) Limited ceded to Nedbank Ltd a life insurance policy on the life of Mr T Bothma as security for a loan given by the bank to that company.

The company defaulted in fulfilling its obligations to the bank. A settlement agreement was reached but the company again defaulted. The life insurer cancelled the life policy because of non-payment of the premiums.

As a result of the cancellation, the bank brought an application that the insured and the debtor take steps to reinstate the policy, alternatively that they take steps to take out a similar policy and cede it to the bank. The high court ordered that the debtor and the insured procure a policy with at least similar benefits than the previous policy, and cede such policy to the bank.

The company and Bothma appealed.

THE DECISION

There was no basis upon which the bank could obtain an order in the terms it sought. The order sought was vague and lacking in certainty. It failed to indicate in what degree the benefits had to be 'similar', failed to specify to whom the policy had to appear to be 'similar', whether or not it was to be taken out with the same insurer, what would happen if the insurer declined, whether or not the bank had to first approve the policy before it came into operation, and by when performance had to take place. The order also might have been impossible of performance.

Even if such an order were considered not to be vague or lacking in certainty, it required that terms be imported into the contract which were neither alleged in the founding papers, nor appeared from the contract between the parties.

The appeal was upheld.

AIRPORTS COMPANY SOUTH AFRICA LTD v AIRPORT BOOKSHOPS (PTY) LTD

A JUDGMENT BY DODSON J
GAUTENG LOCAL DIVISION, JOHANNESBURG
3 JULY 2015

2016 (1) SA 473 (GJ)

Contract

An organ of state must comply with section 217 of the Constitution in its contractual dealings and accordingly any agreement it enters into may incorporate a tacit term which ensures that that section is complied with.

THE FACTS

In 2009 the Airports Company South Africa Ltd (Acsa) and the Airport Bookshops (Pty) Ltd (Exclusive Books) entered into a lease agreement in terms of which Acsa let to Exclusives shop premises at OR Tambo International Airport. The lease was for a period of five years terminating on 31 August 2013.

On 15 August 2013 the parties concluded an extension agreement. It provided that the existing lease agreement was renewed month on month at the minimum monthly rental of R585 761,70 excluding VAT.

On 4 December 2013 Acsa issued a ‘request for bids’ which invited suitably qualified companies to submit bids to take up the rental of 13 shops.Exclusive Books responded by submitting a bid with a view to retaining its tenancy of its shop. On 18 June 2014 Acsa informed Exclusive Books that its bid had been unsuccessful. Acsa addressed an email to Exclusive Books, giving it notice to vacate the premises by 31 July 2014. On 25 June 2014 Exclusive Books’ attorneys addressed a letter to Acsa, asserting that the decision to award the tender was irrational, procedurally flawed and therefore invalid. It also asserted that Acsa was obliged to give reasonable notice of the termination of the renewal agreement. The letter called on Acsa to withdraw the ‘purported cancellation’ and to undertake that ‘any subsequent cancellation notice will be based on a reasonable period’.

Acsa insisted that Exclusive Books was obliged to vacate in accordance with the notice given. Another reminder to vacate was sent on 29 July 2014. Consistent with the stance in its letter, Exclusive Books did not vacate. Acsa brought an application for eviction of Exclusive Books from the premises.

Acsa contended that it was entitled, on the basis of the extension agreement, to terminate the lease on a month’s notice at its discretion. Exclusive Books contended that the extension agreement was subjected to a tacit term, in terms of which neither party was entitled to terminate the extension agreement until completion of a valid and lawful tender process to identify a new tenant.

THE DECISION

Given the fact that the extension agreement was not clear, a simple reliance on its terms would not assist. Section 217 of the Constitution 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. As a state-owned company, Acsa was bound to comply with this section when letting of the shop, as this involved the disposal by way of letting of a state asset. The effect of the contract was to provide a service for those members of the public making use of the departure area at the airport.

The extension agreement was a variation of the original lease agreement. Neither party suggested that the original lease agreement was invalid. The constitutional and statutory framework for contracting by an organ of state applied at the time of its conclusion. If one took the extension agreement as consisting only of its express words and interpreted it in the manner contended for by Acsa, it contemplated a lease that could run indefinitely. This is so, notwithstanding that it was

'month on month'. So read, the extension agreement had the potential to bypass the requirements of section 217 and the statutory framework of the Preferential Procurement Policy Framework Act (no 5 of 2000). As an indefinite lease it was a contract that could not have been envisaged at the time of the original tender process. That tender process envisaged a lease of limited duration. On that basis the extension agreement and the decision-making giving rise to it would be unlawful and invalid. If, on the other hand, the tacit term contended for by Exclusive Books was incorporated in the extension agreement, the extension operated only temporarily and only for as long as it took to complete a valid tender process for a new lease agreement. It provided for what wasprobably an unforeseen circumstance, ie that the tender process for a new lease had not been completed by the end of the previous lease. The limitation in duration brought about by the tacit term thus rendered the extension agreement compliant with section 217 of the Constitution and the statutory framework, on the basis that it was a limited and legitimate exception to the competitive process that should ordinarily apply.

The tacit term contended for was therefore to be incorporated in the extension agreement, and the eviction of Exclusives could not be allowed.

Acsa is an organ of state as envisaged in s 217(1). However, the question that then arises is whether the phrase 'contracts for goods or services' refers to the acquisition of goods or services only, or whether it includes the disposal of goods, such as the sale or letting of state-owned immovable property.

NOVARTIS SA (PTY) LTD v MAPHIL TRADING (PTY) LTD

Contract

A JUDGMENT BY LEWIS JA (MAJIEDT JA, PILLAY JA, ZONDI JA and MATHOPO JA concurring)
SUPREME COURT OF APPEAL
3 SEPTEMBER 2015

2016 (1) SA 518 (SCA)

Whether or not a contract has been concluded is determined by the significance of the terms discussed between the parties, and not by an interpretation of the meaning of such terms.

THE FACTS

Van Jaarsveld, the business manager of Sandoz Specialty Division one of the divisions of Novartis SA (Pty) Ltd, approached Lambrecht, a director of Maphil Trading (Pty) Ltd, and suggested that Sandoz and Maphil enter into an arrangement in terms of which Maphil would receive a fee for putting Sandoz branding on the packaging of devices supplied by Maphil to hospitals. Lambrecht was amenable to this.

Maphil was about to put in a bid for the supply of medical devices to Mediclinic, a national private-hospital group. If Sandoz committed to paying a fee for the marketing proposed, Lambrecht would be able to reduce the prices of the items that Maphil was tendering to supply by some R3m. Lambrecht's tender documents had to be submitted to Disa-Med, the procurement department for Mediclinic.

Van Jaarsveld and a director of Sandoz, Van der Spuy, produced a signed draft marketing agreement between Sandoz and Maphil, offering a marketing fee of R3,5m for the year 2005. After some amendments effected to it by the Sandoz representatives at Lambrecht's request, he orally accepted the commitment.

The full contract could not be concluded in 2004 because Maphil and Sandoz had yet to agree upon the exact items on which the Sandoz name would be used and on the details of logos and naming. Furthermore, Maphil did not yet know what items tendered for would be accepted by the party to which it was submitting its tender, Disa-Med. Addendum A to the agreement presented to Maphil by Sandoz was headed 'Marketing Agreement', and typed below that were the words 'To be finalized by 30 November 2004'. There was never any formalised addition to the addendum.

The tender by Maphil, in which the prices had been reduced by some R3m, was in due course accepted by Disa-Med. Maphil proceeded as if there were a contract with Sandoz, as did Sandoz. By February of the following year the chairman of the executive committee of Sandoz, Hallam, had second thoughts about the feasibility of the contract, and after a meeting with a representative of Mediclinic, at which he discovered that SSD would not get rebates on medicines. On 4 March 2005 Hallam wrote a letter to Maphil, stating that there was no contract between Novartis and Maphil, and that the invoice that Maphil had submitted to it for the first monthly payment would not be paid.

Maphil treated Novartis' conduct as a repudiation of the contract between them, and instituted action for damages for breach of contract.

THE DECISION

Maphil contended that the marketing agreement on which it relied, comprising both written and oral agreements, was concluded in the meetings and by subsequent exchange of emails, ending on 30 November 2004. The material terms of the agreement were that Maphil would perform marketing activities for Sandoz at a fee of R3,5m for the year 2005, payable in monthly instalments on receipt of an invoice issued by Maphil to Sandoz. Novartis contended that no contract had been proved; the document signed in 2004 was inchoate and lacked exigible content; the parties had intended to conclude a contract only when one was drafted by an attorney; and none

of the representatives of Novartis who purported to bind it had authority to do so.

The agreement expressly provided that the marketing activities had to be finalised in the future, ie before 30 November 2004. In agreeing such activities in a meeting and by way of email the parties did exactly what they contemplated, in agreeing to the content of the document. Nothing in the document required that the future agreement should comply with any formality. In the absence of a statutory requirement that particular formalities be adhered to, or an agreement that an instrument will have no force unless particular formalities are followed, as long as the terms of a contract satisfy other requirements for contractual validity, the parties may conclude their contract in any manner they choose.

Both parties did want a lawyer’s contract to replace the one drafted by Sandoz, signed by Van Jaarsveld and Van der Spuy, and concluded orally and by email correspondence. But they nonetheless regarded the latter as binding, and took steps to implement it on that understanding. Lambrecht’s evidence that the contract was not concluded on 14 October when he was given the undertaking by Van Jaarsveld and Van der Spuy did not assist Novartis since he made it clear that he wanted legal advice and to know the outcome of Maphil’s tender to Disa-Med: but these matters had been resolved by 30 November when the marketing activities were confirmed. The material terms of the contract had in fact been agreed. The contract pleaded and relied on by Maphil was concluded by 30 November 2004.

This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded — the context — to determine the parties’ intention.

The passage cited from the judgment of Wallis JA in Endumeni summarises the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper.

AFRICAN INFORMATION TECHNOLOGY BRIDGE 1 (PTY) LTD v THE MEMBER OF THE EXECUTIVE COUNCIL FOR INFRASTRUCTURE DEVELOPMENT

JUDGMENT BY SCHOEMAN AJA (MAYA JA, BOSIELO JA, FOURIE AJA AND MAYAT AJA concurring
SUPREME COURT OF APPEAL
2 JULY 2015

2015 SACLR 281 (SCA)

A contract will be void ab initio if one of the parties mistakenly thinks the other is a different party and the mistake is reasonably made and is fundamental to the contract.

THE FACTS

Executive Council for Infrastructure Development, Gauteng Province, invited African Bridge (Pty) Ltd to complete a pilot project for the department in conjunction with another company, iNathi Technology Holdings. The abbreviation AITB was used for African Bridge in dealings between the department and African Bridge. The abbreviation on the letterheads of African Bridge referred to AITB and African Bridge referred to itself as AITB. Following the successful completion of this pilot project, the Executive Council called for tenders for the development of Construction Contact Centres.

African Information Technology Bridge 1 (Pty) Ltd (AITB 1), a different company from African Bridge, submitted tenders. African Bridge did not do so because one of its directors was a sister of one of the senior managers in the Department. This company was controlled by one of the directors of African Bridge, a certain Mr Tucker. In motivating for the tender, Tucker used the name of African Bridge. The Department's Acquisition Council awarded the tenders to 'AITB', iNathi and another company. Letters of acceptance for the tenders were written and signed and were addressed to African Bridge (AITB) and iNathi. The following day, AITB 1 requested that the letters of appointment be changed to reflect that the tender of AITB 1 had been accepted. An employee of the department, signed the letters in the absence of the Director: Procurement and BEE and the signatory to the letters of acceptance. The Acquisition Council did not meet to discuss the amended letters of award. It would not have awarded the tenders to AITB 1 because that company had no experience, no assets and no personnel.

AITB 1 brought an action for damages based on the contracts it alleged were concluded with the Department. The Department pleaded that it intended to contract with African Bridge and not AITB 1 and therefore no contracts were entered into in respect of those tenders. It contended that there was a unilateral mistake on the part of the Department which rendered the contracts void ab initio.

THE DECISION

Tucker used the name of African Bridge instead of AITB to present to the Department that the same company that successfully completed the pilot project with Inathi, was the one bidding for the tenders. He knew that had the true state of affairs come to the attention of the department, the bid by AITB 1 would not have been accepted as it did not qualify for the tender. It was clear that Tucker deliberately misled the Department to create the impression that it was African Bridge contracting with the department and not a different entity with no experience, no assets and no personnel.

The Department was clearly mistaken with regard to the entity with whom it thought that it was contracting. There was no doubt that the Department intended to award the tenders to African Bridge, a company that it was familiar with and which had completed the pilot project and complied with all the requirements of the department in respect of the particular tenders. The Department's continued reference to African Bridge and not AITB 1 showed that this is what the Department intended.

The mistake was also clearly a material one: if the tenders were submitted with the particulars of AITB 1, it would not have been awarded the tender.

The mistake of the Department was justus as the actions of Tucker were deliberately taken to mislead. It was reasonable for the Department to conclude that it was accepting the tender of African Bridge as Mr Tucker had deliberately created the confusion. The Department was of the view that it was African Bridge that had submitted the tenders. Such mistake in respect of the identity of the other contracting party was fundamental. Therefore, there was a material and justus error in respect of the contracts purportedly entered into between AITB 1 and the Department. In such a situation, there is no contract and both were void ab initio.

The court a quo found the following.
‘ On a consideration of all the facts, I am satisfied that Tucker conveniently used the name of AITB [African Bridge] instead of the plaintiff [AITB 1] to present to the defendant that the same company that successfully completed the pilot project with Inathi, was the one bidding for tenders 1417, 1418 and 1419. He knew that had the true state of affairs come to the attention of the department, the bid by the plaintiff would not have been accepted. The plaintiff simply did not qualify in any respect for the tender.’
I agree with this conclusion. It is clear that Mr Tucker deliberately misled the department to create the impression that it was African Bridge contracting with the department and not a different entity with no experience, no assets and no personnel.

STANDARD BANK OF SOUTH AFRICA LTD v A-TEAM TRADING CC

A JUDGMENT BY PLOOS VAN AMSTEL J
KWAZULU NATAL DIVISION, PIETERMARITZBURG
17 NOVEMBER 2015

2016 (1) SA 503 (KZP)

Insolvency

The effect of a business rescue application is to suspend an application for the liquidation of the company in question.

THE FACTS

Standard Bank of South Africa Ltd brought an application for the provisional winding-up of A-team Trading CC on the grounds that it is unable to pay its debts. After the application was brought, but before it was heard, an application was brought for an order placing A-Team under supervision and commencing business rescue proceedings in terms of section 131 of the Companies Act (no 71 of 2008).

The issue between the parties was whether it was competent to grant a provisional winding-up order, given that the business rescue application had been brought. A-Team contended that the effect of the business rescue application was to suspend the liquidation application in terms of section 131(6) of the Act. The bank contended that the effect of the section was not to suspend the liquidation application, but the liquidation process which follows upon a liquidation order, until either of the events referred to in section 131(6)(a) and (b) occurred.

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

THE DECISION

If the bank's contentions were correct, and a provisional winding-up order was granted, A-Team would be precluded from running its business, but so would the liquidator, as the winding-up process would be suspended in terms of section 131(6). This hiatus would continue until the court had adjudicated upon the business rescue application. In the interim A-Team might lose its contracts and its customers and there might be no basis for a rescue plan. The interpretation did not appear to be a sensible one It was also not supported by the wording of section 131(6).

The application for liquidation itself formed part of the liquidation proceedings, in the same way as an application for the eviction of an unlawful occupier forms part of the eviction proceedings. The description merely tells one what the nature of the proceedings is. Sub-section 6 refers to liquidation proceedings which have already been commenced 'by or against' the company.

The effect of the business rescue application was therefore to suspend the application for the liquidation of A-Team.

HENDRICKS v HENDRICKS

A JUDGMENT BY MAJIEDT JA (MHLANTLA JA, LEACH JA, TSHIQI JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
25 NOVEMBER 2015

2016 (1) SA 511 (SCA)

Property

A holder of a right of habitation is a person in charge of property as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) and has locus standi to bring an eviction application in respect of persons occupying that property.

THE FACTS

On 5 November 1990 Mrs A Hendricks, the appellant, sold her residential property to her son, Mr G Hendricks, the second respondent. A lifelong right of habitation was registered in favour of Mrs Hendricks in the property's title deed. A cession of right of habitation, signed by Mr G Hendricks in favour of Mrs A Hencricks in respect of the property, was recorded in a notarial deed Mrs A Hendricks lived in the property when her son took occupation thereof after registration of the transfer.

Mr G Hendricks married the first respondent in community of property. She took up residence in the property. After their divorce, the first respondent remained in occupation of the property, together with her daughter from a previous relationship, her granddaughter and the three children born of the marriage between her and Mr G Hendricks. Mrs Hendrick's attorneys wrote to the first respondent, asserting her right of habitation and calling upon the first respondent to vacate the property by 22 February 2012, failing which an eviction order would be obtained.

The first respondent contended that Mrs A Hendricks did not have the right to evict her in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998) as she was not a 'person in charge' as defined in that Act.

THE DECISION

The question was whether, as far as the Act was concerned, a holder of the limited real right held by Mrs A Hendricks was a 'person in charge' of the property in respect of which the habitatio operated, and whether that holder could obtain an eviction order against an owner who occupied the property without the holder's consent.

The first respondent's bare dominium as owner of the property had to yield to Mrs A Hendrick's right of habitation. Like usus and usufruct, habitatio is a limited real right, enforceable to the extent of the right itself, against the entire world. Without the consent of Mrs A Hendricks, the first respondent was an unlawful occupier of the property.

Section 4(7) provides that a court may grant an eviction order only if it is satisfied that it is just and equitable to do so. In order to make that determination, it must consider the factors enumerated in the subsection. Some of the factors to be considered in terms of section 4(7) are the rights and needs of the elderly, children, disabled persons and households headed by women. There was little information on these and other potentially relevant aspects. In the circumstances, the matter had to be remitted to the Somerset West Magistrates' Court for a full enquiry as contemplated in section 4(7) into whether it would be just and equitable to order the eviction of the first respondent, and all those occupying the property through her.

MIGHTY SOLUTIONS CC v ENGEN PETROLEUM LTD

A JUDGMENT BY VAN DER WESTHUIZEN J (MOGOENG CJ, MOSENEKE DCJ, CAMERON J, JAFTA J, KHAMPEPE J, MADLANGA J, MATOJANE AJ, NKABINDE J, WALLIS AJ and ZONDO J concurring)
CONSTITUTIONAL COURT
19 NOVEMBER 2015

2016 (1) SA 621 (CC)

There is no constitutional reason to develop the common law rule that lessees cannot raise the defence that the lessor has no right to occupy the property when being sued for ejectment at the termination of the lease.

THE FACTS

Engen Petroleum Ltd leased a property from its registered owner and developed the property into a branded service station. In September 2005 Engen entered into an operating lease with Mighty Solutions CC. The lease was to continue until the end of March 2008 and was cancellable at a month's notice by either party. Under the lease, Mighty Solutions operated a service station on the property, and used Engen's equipment, signage and trademarks.

Mighty Solutions was a licensed petroleum retailer in terms of the Petroleum Products Act (Act). The lease continued on a month-to-month basis until it was validly cancelled in July 2009. Following the cancellation, Mighty Solutions continued to occupy the site. It continued using Engen's equipment, signage and trademarks without paying rent to Engen or the registered property owner.

In 2013 Engen applied to the High Court for an order to evict Mighty Solutions. The issues to be determined were (a) whether Engen had locus standi at common law to evict Might Solutions, and (b) whether Mighty Solutions could rely on possessory rights arising from its fuel retail licence as read with the Petroleum Products Act. The parties agreed that Mighty Solutions had no common law right to continue occupying the premises, as both the operating lease and any subsequent lease arrangements had been validly terminated.

As regards the first issue, Mighty Solutions contended that Engen lacked legal standing to seek its eviction because Engen's head lease with the site owner had terminated before the commencement of the eviction proceedings.

As regards the second issue, Mighty Solutions contended that the Act had effectively abolished Engen's common law rights. It argued that a retail licence-holder in its position acquired possessory rights under the Act and that these could only be terminated after the licence was revoked by the Controller. It relied mainly on section 2A(5)(a) of the Act, which provides that no person may make use of a business practice, method of trading agreement, arrangement, scheme or understanding which is aimed at or would result in a licensed wholesaler holding a retail licence except for training purposes as prescribed. Mighty Solutions argued that the contract between it and Engen amounted to a scheme that resulted in a wholesaler effectively holding a retail licence. Once a retail licence had been granted to a party to sell petrol on a particular property, the landowner or lessor could not evict that licence-holder. If a landowner or lessor wished to evict a licensed retailer, they had to apply to the Controller to have the licence revoked.

THE DECISION

The common law rule is that law that lessees cannot raise the defence that the lessor has no right to occupy the property when being sued for ejectment at the termination of the lease. The facts of the case did not require the court to consider whether a lessee can rely on a defence that the lessor lacks valid title in circumstances where the lessee asserts its own independent title to the premises. Mighty Solutions did not establish that it had acquired any independent title to the premises. It abandoned its argument that its retail licence gave it statutory possessory rights.

Mighty Solutions' submission

that the common-law rule fell away, because its rationale did not apply in this case, was untenable. The rule was clear: a lessee or sublessee cannot rely on a defence that its lessor or sublessor lacks title in order to resist eviction upon termination of the lease. Mighty Solutions was a sublessee trying to do exactly that. Under the common law Engen had standing to evict Mighty Solutions. The common law rule in question was so entrenched that it was a natural incident of all contracts of lease. That is, it is implied by law unless the parties expressly agree otherwise. For this reason, a development of the common law would itself not be enough for Mighty Solutions' success. Even if this settled common-law rule were adjusted, the contract between Engen and Mighty Solutions would still stand. There was no basis for developing the common law. The rule did not offend the spirit, purport and objects of the Bill of Rights, or the values of our constitutional democracy.

Since under the common law of lease Mighty Solutions could not question Engen's title as a defence in eviction proceedings after the valid termination of the lease agreement between it and Engen, Engen had standing to evict Mighty Solutions.

Mighty Solutions' submission that the common-law rule 'falls away', because its rationale does not apply in this case, is untenable. The rule is clear: a lessee or sublessee cannot rely on a defence that its lessor or sublessor lacks title in order to resist eviction upon termination of the lease. Mighty Solutions is a sublessee trying to do exactly that. Under the common law Engen had standing to evict Mighty Solutions. Questioning the rationale for the rule takes us rather to a separate question, namely whether the law ought to be developed.

TSHWANE CITY v LINK AFRICA

Property

A JUDGMENT BY CAMERON J and FRONEMAN J (KHAMPEPE J, MADLANGA J, MOLEMELA AJ and THERON AJ concurring, JAFTA J, TSHIQI AJ, MOSENEKE DCJ and NKABINDE J dissenting)
CONSTITUTIONAL COURT
23 SEPTEMBER 2015

2015 (6) SA 440 (CC)

Section 22 of the Electronic Communications Act (no 36 of 2005) does not permit arbitrary deprivation of property rights and is accordingly not unconstitutional.

THE FACTS

Link Africa chose the municipal area of Tshwane City as a place where it wished to install fibre-optic cabling network. In 2011, it submitted a formal proposal to the City's chief information officer. In terms of the proposal, the City was required to grant Link Africa the right to make use of existing municipal infrastructure, especially existing service ducts and sewage and stormwater infrastructure. In exchange for this right of use Link Africa would either provide the City with the use of two fibre pairs on all routes deployed, and endeavour to route the fibre-optic cables as closely as possible to the City points of interest to facilitate easy connections, or pay the City an annual rental on a per-metre basis for the City's infrastructure used for the deployment.

The City's Water and Sanitation Division granted Link Africa permission to 'proceed with physical surveys of the proposed initial sites'. A series of meetings took place and in March 2012 the Division's acting executive director recommended the approval of Link Africa's request. The City's strategic executive director for services infrastructure also recommended approval and in his capacity as acting deputy city manager, granted final approval.

Link Africa published a press release confirming the installation of the network. When the city manager was alerted to the approval, he did not endorse it. He immediately convened a meeting with Link Africa. Following this meeting the city manager wrote a letter requesting Link Africa to halt the installation of the fibre-optic cables on the City's infrastructure, pending an investigation into the approval by the City. Link Africa acceded to this request and temporarily stopped the installation.

Link Africa invited the City to make representations to it in relation to its proposed decision. The city manager outlined the new direction the City wanted to take in relation to the roll-out of broadband connectivity. He also stated that the City was in a tender process for the broadband project and would have expected Link Africa to tender and participate in the process if it were serious about partnering with the City in the furtherance of its vision to build a 'smart city'. In the same letter the City informed Link Africa that its request to install an electronic communications network on its underground infrastructure was refused.

Later, Link Africa provided the City with full reasons for its decision to proceed with the installation. It also informed the City of its right to review the decision. Link Africa's attorneys addressed a letter to the City stating, among others, that as the City had at no stage sought to review and set aside Link Africa's decision to proceed with the installation of its fibre-optic cables, Link Africa would proceed with the installation, and it did so.

On 6 December 2013 Link Africa had already completed phase one of the installation of its fibre-optic cables in the City's underground infrastructure. Subsequent to that it was agreed between the parties that Link Africa would suspend phase two of the installation of its fibre-optic cables, if the City launched interdict proceedings by 27 January 2014.

On 28 January 2014 the City brought an application for a declaration that section 22 of the Electronic Communications Act (no 36 of 2005) requires consent of

the landowner before action authorised by the section could be undertaken. It also sought an interdict restraining Link Africa from taking the actions listed in section 22, on the City's infrastructure, without consent or agreement from the City, and a mandamus directing Link Africa to remove the cables already installed was also requested. It also sought to impugn Link Africa's decision on the basis that it breached the principle of legality. A fourth part of the application was devoted to a constitutional attack against sections 22 and 24 of the Act. The constitutional attack contended that by authorising licence-holders to install an electronic communications network or facility on municipal infrastructure, section 22 of the Act forced municipalities to accept services from licence-holders in contravention of s 217(1) of the Constitution. It also contended that, contrary to section 25 of the Constitution, section 22 permitted arbitrary deprivation of property.

Section 22(1) provides that an electronic communications network service licensee may (a) enter upon any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic, (b) construct and maintain an electronic communications network or electronic communications facilities upon, under, over, along or across any land, including any street, road, footpath or land reserved for public purposes, any railway and any waterway of the Republic, and (c) alter or remove its electronic communications network or electronic communications facilities, and may for that purpose attach wires, stays or any other kind of support to any building or other structure.

Section 22(2) provides that in taking any action in terms of subsection (1), due regard must be had to applicable law and the environmental policy of the Republic.'

THE DECISION

The essential question centred on the common-law position when the owner of a servient property, one over which a servitude is granted, is confronted by a servitude created by law.

The common-law principles regarding servitudes show that section 22 of the Act inflicts no arbitrary deprivation of property. While section 24 does not contain the express injunction found in section 22(2) to the effect that other applicable law (ie the common law on servitudes) applies, it too must be interpreted in a manner that is least invasive of fundamental rights if it is reasonably possible to do so. It is reasonably possible to do so. Section 24 contains express procedural and substantive safeguards, including requirements of notice and compensation. The result is that deprivation of property under s 24 will not be arbitrary.

The primary object of the Act is to regulate electronic communications in the public interest. The language of section 22 is broad. It provides access to any land in order to construct electronic communications facilities. This is intended to serve a legitimate and important legislative purpose which is essential for the unhindered universal provision of electronic communications services. The important point is that the grant of the right under section 22(1) to a network licensee does not determine how that licensee may exercise it. For that, it is necessary to examine section 22(2). This explicitly requires that '(i)n taking any action in terms of subsection (1), due regard must be had to applicable law'. Here the analogous principles and rules of the common law of servitudes point the way to the statute's validity.

Section 24 differs from section 22 in that it does not contain the express injunction that 'due regard must be had to applicable law and the environmental policy of the Republic'. However, the provision harmonises the exercise of licensees' powers and the protection of local authorities' or ownership interests, by incorporating express procedural and substantive safeguards. First, the licensee is required to provide 30 days' prior written notice of its intention to construct, maintain or alter electronic communications facilities. Second, the notice must specify the manner in which the infrastructure is to be constructed and maintained. Third, it may provide for compensation for 'all reasonable expenses incurred . . . or any supervision of work relating to such alteration'. The provision thus clearly contemplates a measure of agreement between licensee and landowner. This is necessary to determine 'reasonable expenses incurred'. And it demands sufficient deference to the local authority or owner, because they are entitled to 'supervise' the licensee's work on their property.

The rights section 22 grants are similar to a general servitude. These allow the dominant owner to select the essential incidental rights of the necessary premises and to take access to them as needed for the exercise of the servitude. But the right is not

unrestricted. The dominant servitude-holder cannot simply assert its rights. Section 22(2) requires that due regard must also be had to this statute when action is taken under section 22(1) of the Act. The wording of the subsection contains no express or necessary exclusion of the operation of the Expropriation Act. Therefore, the public-law protection of compensation for expropriation by juristic persons other than the state found in the Expropriation Act also applies to action taken under section 22(1).

Even if the City did have section 25 rights, there was no evidence that Link Africa's intended actions amount to substantial interference with the its infrastructure. There was also no evidence of arbitrariness. The deprivation was in fact entirely reasonable. This was because of the landowner's multiple safeguards, both substantive and procedural. The statute provided not only sufficient reason for the deprivation, but afforded a compelling basis showing that the provisions at issue were needed.

The real issue is whether s 22 is consistent with s 25(1) of the Constitution. We follow a two-stage enquiry in determining this issue. 35 First, we need to consider whether there is a limitation of the rights in s 25(1). If there is, we must determine whether the limitation is justified. Put differently, we must decide whether s 22 permits deprivation of property and whether that deprivation is justified.

PEEN N.O. v THE WESTVILLE COUNTRY CLUB

Property

A JUDGMENT Y CHETTY J
KWAZULU NATAL HIGH COURT, DURBAN
30 JULY 2015

2015 SACLR 267 (KZD)

THE FACTS

In June 2007 the Westville Country Club entered into an agreement of sub-lease with Proproyale Developments CC in terms of which it leased certain premises for a period of 40 years. The Club held its rights in the property in terms of a 99-year lease concluded with the municipality. When Proproyale entered into the sub-lease, the premises were being constructed, and Proproyale expended R1,8m on the construction of the portion of the premises in respect of which the sub-lease was concluded.

In order to sub-let the premises, the Club obtained a permit from the municipality. This provided that in consideration for the consent to sub-let, from 2011 the Club would have to pay the municipality a rental of R2 088 per month. The permit was annexed to the sub-lease concluded with Proproyale.

Proproyale ceded and assigned its rights and obligations under the sub-lease to the Indigo Dawn Trust, in consideration for which the trust paid Proproyale R1.8m. Peen and the other applicants were trustees of the trust.

Clause 10 of the sub-lease provided that the sub-lessee was obliged to pay all charges levied by any competent authority for electric current, water and all other municipal services for the premises. The sub lessee would be responsible for the payment of all municipal rates and charges payable to the local authority in respect of the premises over and above the rental due.

The Club rendered accounts to the trust including the rental of R2 088 per month as provided for in the permit. It described this as ‘rates’. The trust contended that it was not obliged to pay this amount as it was not provided for in clause 10 of the sub-lease. The Club contended that it was properly considered ‘charges’ as referred to in clause 10, and was therefore payable by the trust.

THE DECISION

The rental referred to in the permit could not be considered a charge as referred to in clause 10. Despite the Club having described the amount charged to the trust as ‘rates’ this was not rates but the rental referred to in the permit.

There was no basis upon which the obligation to pay the rental referred to in the permit could be imposed on the trust.

The context of the business relations between the parties supported this interpretation: the investment of R1,8m which the Trust paid to Proproyale at the time when it entered into the cession of the sub-lease, represented a benefit which would ultimately inure in favour of the Club. The trust could not have been expected to pay its rental of R3500 plus rates, services such as electricity and water, membership fees to the Club as well as the amounts billed to it as ‘rates’.

FEDGROUP PARTICIPATION BOND MANAGERS (PTY) LTD v TRUSTEES OF THE CAPITAL PROPERTY TRUST

JUDGMENT BY NAVSA ADP AND SALDULKER JA
(MHLANTLA JA, PILLAY JA AND WILLIS JA concurring)
SUPREME COURT OF APPEAL
30 JUNE 2015

2015 SACLR 294 (SCA)

A party whose property has encroached on that of another party has no right to claim subdivision of that other party's property including the area encroached upon.

THE FACTS

On 31 July 2006 Fedgroup Participation Bond Managers (Pty) Ltd and the Capital Property Trust (CPT) entered into an agreement in terms of which CPT acquired from Fedgroup twenty-seven income producing properties and associated businesses, as letting enterprises, for R308 035 000. One of the properties acquired by CPT was erf 990 situated in Sunninghill Extension 85 Township. Registration of the property into CPT's name took place on 15 December 2006.

Fedgroup retained ownership of an adjoining property, erf 989. On it was an incomplete structure which partially encroached on CPT's property. In 2008, Fedgroup discovered that there was such an encroachment. The structure had been erected unlawfully by Fedgroup's predecessor in title.

Fedgroup brought an application for an order directing CPT to allow the subdivision of erf 990 in accordance with a subdivision plan, and allow the transfer of the newly-created portion of the property, including the area encroached upon, to Fedgroup. This portion included land additional to that on which the partially erected structure was situated because Fedgroup needed the additional vacant land for optimal development of its own property. It alleged that CPT would have no use for this undeveloped additional piece of land and that without it, the transfer it sought would be worthless. It is uncontested that the land sought by Fedgroup constitutes 20 per cent of the total extent of the property owned by CPT. Fedgroup undertook to bear the costs of subdivision and pay CPT R1 950 000.00.

THE DECISION

There is no basis on which an encroacher may, as of right, claim the transfer of ownership into his or her name of another person's land. An encroacher might be able to defend an action or application for removal on the basis that it is unjust and unfair to order demolition and removal. However, this is a defensive position. In exercising the discretion to award compensation instead of ordering removal, courts do so on the basis of policy considerations such as unreasonable delay on the part of the landowner, or on the basis of what might be viewed as acquiescence. However, an encroacher does not have an independent cause of action, and cannot offensively compel another person to part with rights of ownership.

In any event, adjudication in relation to encroachment was a matter fraught with complexities, including the determination of the value of use and occupation of the land in question.

The application was dismissed.

ZIETSMAN v DIRECTORATE OF MARKET ABUSE

A JUDGMENT BY
AVVAKOUMIDES AJ
(TUCHTEN J concurring)
GAUTENG DIVISION, PRETORIA
1 OCTOBER 2015

2016 (1) SA 218 (GP)

Companies

A person who deals in shares, despite knowing of inside information regarding a loan which will affect the value of the shares, commits the offence of insider trading.

THE FACTS

In 2010, Zietsman purchased the first acquisition of 15 000 shares in a company with the intention of retaining the shares in pursuance of a strategy to acquire a controlling share in African Cellular Towers Ltd (ACT) and access certain operational capabilities within ACT. Later that year, Zietsman purchased more shares in 23 trades totalling 835 805 shares. He and the second appellant continued to acquire ACT shares until March 2011.

On 24 January 2011 the Industrial Development Corporation addressed a letter to ACT advising it that it would make available to it a total funding package of R99m. Later that month,
a meeting was held between the Directorate of Market Abuse and members of the board of ACT. At the meeting, a director of ACT, De Villiers, alleged that ACT had secured a possible loan facility of R99m from the IDC on an 'approval in principle basis'. The ACT representatives indicated that contracts had not been concluded for the facility, and no substantiating information was made available in support of the granting of such funding. During this meeting, nothing in writing was presented in confirmation of the alleged funding, and De Villiers did not inform those present what the conditions precedent were, whether ACT was capable of complying with any conditions precedent, what the repayment terms were and what any of the other terms of the alleged funding were.

Between 26 January 2011 and 9 February 2011 Zietsman came to know that the IDC granted ACT the loan facility. The amount of the loan and the fact that the lender was the IDC were details which were not known to the public

A Stock Exchange News Service ('SENS') announcement was published by ACT in which shareholders and the market were informed that the company was successful in securing debt funding and was in the process of finalising the terms of the debt facility with the potential funder which, when successfully concluded, could affect the price of the company's shares. The announcement did not disclose the amount and other details of the facility to the market, nor the details of the funder, as a decision was taken by the board of ACT that, although ACT had received the approval letter, those details ought not to be disclosed before the agreements with the IDC were concluded. The publication of the first SENS announcement had no effect on the share price of ACT.

Zietsman continued to acquire shares in ACT with the intention of acquiring a controlling share in the company. During the period 15 February 2011 to 10 March 2011, Zietsman purchased 19 491 977 ACT shares at a total price of R2 096 517.

The agreements with the IDC were signed in March 2010. On 11 March 2011 ACT published a further SENS announcement advising shareholders that the agreement had been entered into with the IDC in respect of a R99m funding facility. The ACT share price increased by 54%, from 11 cents to 17 cents.

Charges were brought against Zietsman and the second appellant that they had contravened the provisions of sections 73(1)(a) and 73(2)(a) of the Securities Services Act (no 36 of 2004). The enforcement committee determined that information pertaining to the amount of the Industrial Development Corporation ('IDC') loan facility constituted inside information as defined in the Act

and that Zietsman and the second appellant were guilty of insider trading as charged. The enforcement committee fined them the sum of R1m. They contended that they were not aware at the time of the trades in question that a loan had in fact been granted to ACT, but only had limited, vague and unreliable information in respect of a possible future loan, and that the enforcement committee ought to have found that the information available to them at the time of the trades in question did not constitute 'inside information' as defined in section 72 of the Act.

THE DECISION

Zietsmans argued that he had not had knowledge that would affect the trading price of the shares in ACT. He argued that at the time that he came to know about the loan, there were no details of the loan to show whether ACT would be able to pay the loan and neither were the terms of the loan known.

Inside information, as defined in section 72(b) of theAct refers to information which, if it were made public, 'would be likely to have a material effect on the price or value of any security listed on a regulated J market'. The word 'likely' has been interpreted to mean 'less than a probability but more than a mere possibility.' The 11 March 2011 SENS Bulletin, which made public the IDC loan of R99m, in fact had an impact on the share price by increasing it from 11 cents to an average I of 17 cents per share. This in itself was an ex post facto indicator that the information was price-sensitive.Therefore the information was price-sensitive. Not only did it have the capacity to materially affect the share price, but the spike in the share price after disclosure of the information confirmed that the information was price-sensitive. Zietsman had knowledge of the identity of the lender and the amount of the loan, and the breakdown of the funding package.

Zietsman's belief that the information was not price sensitive was not based on reasonable grounds. However, the provisions of section 73(2)(a) of the Act merely require knowledge of the inside information at the time of dealing in the relevant shares. Despite, knowing of the inside information regarding the IDC loan of R99m, Zietsman dealt in ACT shares, thereby committing the offence of insider trading.

Having heard and considered the arguments raised and considered the papers before me I am persuaded that:

(a) The enforcement committee is an administrative tribunal that determines the probabilities on documents serving before it. In this regard I am of the view that the rule in Plascon-Evans does not apply B to the proceedings before the enforcement committee.

(b) The information that the IDC had approved a loan of R99 million to ACT was specific and precise.

(c) The information was not available to the public and was price-sensitive.

(d) The appellants knew they had inside information on ACT when they dealt in ACT shares between 26 January 2011 and 11 March 2011.

(e) There is no basis for setting aside the determination.

FIRSTRAND BANK LIMITED v NKATA

A JUDGMENT BY WILLIS JA
(MAYA, CACHALIA, MAJIEDT,
and SALDULKER JJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2015

2015 SACLR 242 (SCA)

Credit Transactions

In order for a consumer to re-instate a credit agreement, the debtor need not pay the full accelerated debt but merely the arrear instalments. However, once a sale in execution has taken place, no such reinstatement is possible.

THE FACTS

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

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

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

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

The court held that the mortgage loan agreements were reinstated by not later than when the arrears were cleared for the first time. Firstrand appealed.

THE DECISION

In order for a consumer to re-instate a credit agreement, the debtor need not pay the full accelerated debt but merely the arrear instalments. Section 129(3)(b) read with 129(3)(a), and section 129(4) of the National Credit Act give the consumer the right to ‘re-instate’ a credit agreement and ‘resume possession’ of the property in question (the equivalent of ‘redemption’ at common law) by paying the credit provider all amounts that are overdue, together with ‘default charges’ and ‘reasonable costs of enforcing the agreement’. This does not alter the common law consequence of a sale in execution. At common law one could, up to the time of the sale, redeem ownership and possession by discharging the full amount of the debt. Now, under the Act, ownership and possession can be redeemed merely by paying the amount overdue, together with charges and costs. The point at which this is no longer possible is the point when the sale in execution takes place. The National Credit Act has not changed this. In fact, it has expressly provided that a consumer may not ‘re-instate’ a credit agreement after the execution of a court order enforcing the agreement.

After the sale in execution but before registration of transfer has taken place, redemption cannot take place by paying the full

amount of the debt. No such inference is possible from reading the Act. This is also contrary to the common law.

The provisions of s 129(4)(b) of the NCA are peremptory. In clear terms they provide that a consumer may not re-instate a credit agreement after the execution of any court order enforcing that agreement. Reinstatement can only occur prior to a sale in execution at a public auction. Nkata fell foul of this provision. In order to avoid it, she would have had to timeously re-instate the credit agreement and apply for and successfully obtain a rescission of the judgment and the setting aside of the writ of attachment and a stay of execution before that sale had taken place.

Accordingly, the high court's conclusion that execution only takes place when the proceeds of the sale in execution are paid over to the judgment creditor was wrong. The appeal succeeded.

Section 129(3)(b) read with 129(3)(a), together with s 129(4) of the NCA give the consumer the right to 're-instate' a credit agreement and 'resume possession' of the property in question (the equivalent of 'redemption' at common law) by paying the credit provider all amounts that are overdue, together with 'default charges' and 'reasonable costs of enforcing the agreement', but does not alter the common law consequence of 'the axe falling' upon the sale in execution. At common law one could, up to the time of the sale, redeem ownership and possession by discharging the full amount of the debt. Now, under the NCA, ownership and possession can be redeemed merely by paying the amount overdue, together with charges and costs. The Rubicon has been and remains the sale in execution. The NCA has not changed this. On the contrary, it has expressly provided that a consumer may not 're-instate' a credit agreement after the execution of a court order enforcing the agreement.

ABSA BANK LIMITED v KEET

JUDGMENT BY ZONDI JA (MAYA JA, BOSIELO JA, WALLIS JA AND MEYER AJA concurring)
SUPREME COURT OF APPEAL
28 MAY 2015

2015 SACLR 313 (SCA)

A claim based on rights conferred in an instalment sale agreement which reserve ownership in the thing sold to the creditor until all amounts due under the agreement have been paid does not prescribe in the period applicable to an ordinary debt as provided for in the Prescription Act (no 68 of 1969). Such a claim is a vindicatory claim so that the period of prescription relevant to it is thirty years.

THE FACTS

Keet bought a motor vehicle under an instalment sale agreement. In September 2003, Absa Bank Ltd took cession of the seller's rights under the agreement. The agreement provided that ownership in the vehicle would only pass to Keet after he had paid all amounts due. If Keet failed to comply with any provisions of the agreement, or failed to make any payment in terms thereof, Absa would be entitled to the return and possession of the vehicle. In that event Absa would also be entitled to demand payment of any arrear instalments.

In November 2011, Absa instituted action against Keet. It alleged that the respondent was in breach of the agreement in that he had defaulted in paying the instalments due and that it had cancelled the agreement.

Keet raised a special plea that the agreement would have come to an end on 1 November 2007, the date on which the amount alleged to be outstanding became due and payable. Keetcontended that in terms of section 11 of the Prescription Act (no 68 of 1969), 'any claim for arrears' against him pursuant to the agreement prescribed on 31 October 2010. Consequently, Absa could not cancel the agreement and recover possession of the vehicle.

Absa contended that its claim was a vindicatory claim being a claim to ownership in a thing and not a claim for payment of a debt, and therefore did not prescribe after three years.

THE DECISION

The issue was whether or not Absa's claim for the repossession of its vehicle was a 'debt', which for the purposes of the Prescription Act prescribes after three years. In Staegemann v Langenhoven 2011 (5) SA 648 (WCC) it was held that a claim of this kind is a vindicatory claim being a claim to ownership in a thing and not a claim for payment of a debt, and therefore does not prescribe after three years. However, this judgment was not followed in other courts.

Staegemann correctly stated that the solution to the problem was to be found in the basic distinction between a real right and a personal right. The manner in which the Prescription Act is structured, reflects this distinction - acquisitive prescription of real rights is dealt with in Chapters 1 and 2 and the extinctive prescription of obligations is dealt with in Chapter 3. The view that the vindicatory action is a 'debt' as contemplated by the Prescription Act which prescribes after three years is contrary to the scheme of the Act. It would undermine the significance of the distinction which the Prescription Act draws between extinctive prescription, and acquisitive prescription. To equate the vindicatory action with a 'debt' would have the result that by way of extinctive prescription the debtor acquires ownership of a creditor's property after three years instead of 30 years. This is not a sensible interpretation of the Prescription Act.

Absa's contention was upheld. The special plea was dismissed.

BLAIR ATHOLL HOMEOWNERS ASSOCIATION v TSHWANE CITY

A JUDGMENT BY CACHALIA JA
(LEWIS JA, TSHIQI JA, PILLAY JA and DAMBUZA JA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2015

2016 (2) SA 167 (SCA)

Property

A municipality is not bound to relate the level of rates imposed on property to the level of services provided to property owners.

THE FACTS

A property development, known as the Blair Atholl Estate was an upmarket residential development with a golf course, located 50 kilometres west of Pretoria. The City of Tshwane Municipality approved the development as a township, subject to specific conditions, under the Town-Planning and Townships Ordinance (no15 of 1986). The relevant area fell outside the City's priority areas for the establishment of new townships, and had no water and sewerage services. Approval was given on condition that the developer installed these services.

In order to do so, the developer and the City concluded an 'Engineering Services Agreement' in terms of which the developer undertook to install all engineering services for which municipalities are usually responsible. The services included water, electricity, sewerage networks, stormwater drainage systems, and road infrastructure. The Blair Athol Homeowners Association, whose establishment was one of the conditions in the agreement, became responsible for the maintenance of the services inside the estate. The residents, who were obliged to be members of the association, paid a monthly levy to it to cover these costs. The City maintained the services outside the estate, including the supply of water, for which the residents paid, but it did not raise sewerage charges.

The agreement specifically provided for rates to be levied according to the City's policies once the township was proclaimed. It made no provision for the township to be treated as a different category of rateable property. Rates were to be levied as usual, as with other residential property.

On 4 May 2011 the City's Council met to approve the draft rates policy and draft bylaws, and after considering the Association's submissions, resolved to reject its demand for a separate category of rateable property in its rates policy. It took the view that property tax was not related to the services rendered by the Council.

The Association complained that the City's rates policy was inequitable, and thus unlawful, because it imposed the same liability for rates on property owners of the estate as for other differently situated ratepayers. It contended that it was entitled to be treated differently from other property owners in the City's jurisdiction because the property owners provided and maintained their own services and thus qualified for an exemption, a reduction, or a rebate in rates.

THE DECISION

The Association contended that the rates policy adopted on 4 May 2011 did not meet the threshold requirement of equitability in section 3(3)(a) of the Rates Act (no 6 of 2004) because it imposed a rates burden on the property owners of Blair Atholl that other differently situated ratepayers did not bear. It also contended that the imposition of this additional burden was irrational because it was not rationally connected to the objectives of the Rates Act.

The power of municipalities to levy rates on property is an original power derived from section 229(1)(a) of the Constitution. Rates are levied on the value of property to cover the running costs of a municipality, and to achieve its objects. The statute regulating the exercise of this power is the Rates Act. A rates policy must determine

criteria if the council levies differential rates for categories of properties; exempts, reduces or grants a rebate to any category; or increases or decreases rates. It must also provide criteria for determining categories of properties liable for different rates.

The adoption of a rates policy is therefore a political decision that involves balancing the interests of various parties. It is underpinned by the principle of equitability in section 3(3)(a).

The Association's essential complaint was that property owners in Blair Atholl should not be made to pay equivalent rates to other differently situated communities as they provide and pay for their own basic services, while not having access to other communal services because of its geographic location. However, this failed at its first hurdle, for it assumed there was, or ought to be, a fair relationship between the services a municipality provides its ratepayers and the rates they are liable to pay. Section 229(1)(a)13 of the Constitution distinguishes between rates and surcharges: the latter may be imposed for services the municipality provides, while the former bears no such constraint.

Furthermore, there is no provision in the Rates Act that supported the Association's contention. In fact, the contrary was true. Ratepayers who have the means are required to bear an additional burden to subsidise those who cannot afford to pay for their services. Rates also support local social and economic development, unrelated to the provision of services.

The appeal was dismissed.

Stripped of the verbiage the essential complaint is that property owners in Blair Atholl should not be made to pay equivalent rates to other differently situated communities as they provide and pay for their own basic services, while not having access to other communal services because of its geographic location.
[27] But this challenge fails at its first hurdle, for it assumes there is, or ought to be, a fair relationship between the services a municipality provides its ratepayers and the rates they are liable to pay. In this regard the court a quo observed correctly that s 229(1)(a)13 of the Constitution distinguishes between rates and surcharges: the latter may be imposed for services the municipality provides, while the former bears no such constraint. In addition we were referred to no provision in the Rates Act that supports the appellants' contention. In fact, the contrary is true. Ratepayers who have the means are required to bear an additional burden to subsidise those who cannot afford to pay for their services. Rates also support local social and economic development, unrelated to the provision of services.

HERITAGE HILL DEVCO (PTY) LTD v HERITAGE HILL HOMEOWNERS ASSOCIATION

Property

A JUDGMENT BY RABIE J
(LEGODI J and BAQWA J concurring)
GAUTENG DIVISION, PRETORIA
24 APRIL 2015

2016 (2) SA 387 (GP)

A developer is to be considered the owner of unsold erven, and as such will be liable for levies imposed by a homeowners' association of which the developer is a member.

THE FACTS

Heritage Hill Devco (Pty) Ltd obtained transfer of the property known as Portion 53 of the farm Brakfontein 390, Registration Division JR, Province of Gauteng, on 6 January 2005 in terms of deed of transfer No T/82544/05 registered as such on 30 June 2005 by the Registrar of Deeds, Pretoria.

The land described in the title deed was subdivided into a township known as Extension 48 and a general plan in respect of the township was registered by the Registrar of Deeds on 7 February 2006. After the registration of the plan and compliance with all the formalities, Heritage as developer proceeded to sell and transfer some of the erven to individual owners.

Heritage was a member of the Heritage Hill Homeowners Association. Clause 9 of the articles of association of that company empowered the directors of the Association, from time to time, to determine the levies payable by the members for the purpose of meeting all expenses which it had incurred or which the directors reasonably anticipated the Association would incur in the furtherance of its objects. Clause 9.2 provided that members were to be liable in respect of any levy determined from time to time in equal shares, in respect of each property owned by such member.

The Association sought payment in the sum of R2,5 million which it alleged was due by Heritage as levies in respect of aits ownership of the various erven situate within the Heritage Hill Estate. Heritage contended that it was no more than the owner of the remainder of the township, and that it was not the owner of the individual erven situated in that township.

THE DECISION

The question was whether Heritage was, subsequent to the establishment of the township and for the purposes of the articles of association of the Association, the registered owner of individual properties in the township? If so, it would be liable to pay the levies. Put another way, the question was whether Heritage was the registered owner of the remaining extent of the township and not the registered owner of the individual erven in the township. If so, it would not be liable for levies.

The Deeds Registries Act (no 47 of 1937) defines 'erf' as 'every piece of land registered as an erf, lot, plot or stand in a deeds registry, and includes any defined portion, not intended to be a public place, of a piece of land laid out as a township, whether or not it has been formally recognised, approved or proclaimed as such. Section 46(1) of the Act provides that if land has been sub-divided into lots or erven shown on a general plan, the owner of land sub-divided shall furnish a copy of the general plan to the registrar, who shall, subject to compliance with requirements of this section and of any other law, register the plan and open a register in which all registrable transactions affecting the respective lots or erven shown on the plan shall be registered.

These provisions show that the substratum for registrable transactions is the general plan, and that substratum comes into being once the general plan is registered in the deeds registry. On the other hand, section 47 enables an owner of land in respect of which a register has been opened to transfer the whole or a portion of such land, provided that if a portion only is sought to be transferred, the

transfer shall be passed in accordance with a diagram from which shall be excluded all erven on the land which have already been transferred, and secondly the boundaries of such portion shall coincide with one or more of the lines of division shown on the general plan and shall not intersect any of the erven shown thereon.

The purpose of the provisions of sections 46 and 47 is thus to ensure the recognition of the existence of each and every individual erf depicted on the general plan and adherence to that plan in regard to all registrable transactions.

If one has regard to the provisions of section 46 of the Act then it is clear that the registration of the general plan had the effect of creating separate erven, the ownership of which could only have vested in the township developer , ie Heritage.

Heritage was therefore the registered owner of the unsold erven within the context of the articles of association.

For the purposes of the articles of association the defendant was in fact the owner and indeed the registered owner of the various erven in the township that came into existence upon the registration of the general plan and the subdivision of the township. It must follow that if the various individual erven depicted on the general plan vested in the defendant, the answer to the question as to who the registered owner of those erven were for the purposes of the articles and the imposition of levies could only be that it was the defendant.'

I concur with the reasoning and the conclusion reached by the court a quo

NELSON MANDELA BAY METRO v GEORGIOU

Property

A JUDGMENT BY GOOSEN J
EASTERN CAPE LOCAL
DIVISION, PORT ELIZABETH
20 OCTOBER 2015

2016 (2) SA 394 (ECP)

A local authority cannot, in deciding whether or not approve a rezoning application, ignore the rights conferred by a restrictive condition of title.

THE FACTS

Georgiou was the owner of three adjacent properties situated along the Kragga Kamma Road in Port Elizabeth. He conducted a boutique hotel and spa from buildings situated on the properties. The properties were adjacent to one another and were located in a residential urban area. They were all zoned as residential 1 properties in terms of the Port Elizabeth zoning scheme which applied to the area.

Each of the erven was subject to certain restrictive conditions of title. In the case of one, erf 1756, its use was restricted to residential purposes only. All three properties were burdened with restrictions regarding the nature and extent of buildings which could be erected on them and the area within which such buildings could be erected. They had not been consolidated into a single erf, although Georgiou used them as a single property.

In 2007, Georgiou applied for the rezoning of one property, erf 2787, from residential 1 to residential 3. On 18 February 2009 the executive mayor refused the application and simultaneously refused an application for special consent to use the property to operate a hotel. Special consent was, however, granted for the operation of a 12-bedroomed guesthouse on the property. On 18 August 2010 the executive mayor again refused an application for special consent to operate a health spa on the third property, erf 2318, but granted special consent to operate a 4-bedroomed guesthouse on the property.

Georgiou built a gymnasium and chapel on erf 2787 without approved building plans. The chapel encroached upon the rear building line as specified by a restrictive condition applicable to the erf. A sunroom and enclosed patio were erected on erf 1756 without approved building plans. Georgiou operated a boutique hotel and spa from the properties. Applications were brought against Georgiou, and these activities were found to be unlawful.

On 9 December 2013 Georgiou made application for the rezoning of the subject properties from residential 1 to business 1 zoning. The purpose of the application was to facilitate the development of ‘a 5-star hotel . . . spa, conference centre & gift shop’. The executive mayor decided that the rezoning of the three properties, from residential 1 to residential 3 should be granted, subject to the restrictive conditions applicable to the properties being removed, and that they should be consolidated. The application for a Council Special Consent (EC 300/ 2014), to permit a Licensed Hotel, and a place of worship (Chapel) on the properties was approved, subject to the Chapel being limited to the existing footprint.

The Nelson Mandela Bay Metro sought to review and set aside these decisions. It contended that a ‘conditional rezoning’ was prohibited by clause 1.6.5 of the Zoning Scheme Regulations and was in conflict with the common-law principles applicable to the status of restrictive conditions of title.

THE DECISION

The rezoning of the subject property to residential 3 purported to confer primary-use rights which were in conflict with the restrictive condition registered against the title deed. The primary uses of a residential 3 property include dwelling units, residential buildings and guesthouses, and its secondary

uses included licensed hotels, medical uses, places of amusement, public assembly, worship, assembly and instruction, institutions, special uses and parking.

The principal issue was whether the granting of a consent or a rezoning in conflict with a restrictive condition of title was lawful when it was granted subject to the condition that the restrictive condition of title be removed or varied. Two decisions pertinent to the issue, *South African Broadcasting Corporation v Transvaal Townships Board* 1953 (4) SA 169 (T) and *Enslin v Vereeniging Town Council* 1976 (3) SA 443 (T), were distinguishable.

Section 42 of the Land Use Planning Ordinance 15 of 1985 (Western Cape) deals with conditions which may be imposed when an application for rezoning, subdivision or a departure is approved by the local authority. It provides that when the Administrator or a council grants authorisation, exemption or an application, he may do so subject to such conditions as he may think fit. The concept of a 'condition' is not defined by LUPO. In order to discern its ambit, and whether a particular 'condition' is one lawfully imposed in terms of the section, it is necessary to consider the type of approval given and the type of conditions which ordinarily are relevant to such approval. It is also necessary to examine the interplay between sections 42 and 39 in order to understand the character and efficacy of such conditions.

Rezoning refers to the 'category of directions' given by the local authority to define the purpose for which land may be used and the land-use restrictions which are to apply. The act of zoning therefore is the determination of that set of directions. Each use zone is subject to defined land-use restrictions dealt with in the development parameters provided for in the zoning scheme. These apply automatically unless a departure, by way of the imposition of a condition in terms of section 42 is authorised.

A local authority cannot, in deciding whether or not approve a rezoning application, ignore the rights conferred by a restrictive condition of title. Section 39 obliges the local authority to enforce compliance with conditions imposed in terms of the Ordinance and conditions imposed in terms of inter alia the Townships Ordinance 1934. Section 39(1) also pertinently requires that a municipality 'not do anything the effect of which is in conflict with the intention' of the subsection. On this basis too, administrative decision-making which purports to circumvent the effect of a restrictive condition of title by deferring decision-making in relation to it to another administrative decision-maker, would be unreasonable and irrational.

This pointed ineluctably to the conclusion that a conditional rezoning such as that which occurred in the present instance was unlawful. It followed that it had to be set aside.

WERNER v FLORAUNA KWEKERY BK

A JUDGMENT BY MPATI P (MAJIEDT JA, PILLAY JA, SCHOEMAN AJA and VAN DER MERWE AJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2015

2016 (2) SA 282 (SCA)

Conditions imposed by a local authority for the development of property are not binding on that property if the development is not proceeded with.

THE FACTS

Florauna Kwekery BK, and Mr J Horn were the original developers of adjacent properties. They engaged the same town developer to bring about the development. Permission in respect of each development was granted during 1996, with certain conditions. One of the conditions imposed by the provincial authority was that provision had to be made for an access road from the development to the provincial road between Pretoria and Brits.

According to the sketch plan, the only permissible access to the Brits road was through Horn's property. In order to fulfil the condition relating to the access road a subdivisional diagramme, indicating a servitude area over Horn's property, was registered in the office of the Surveyor-General. Horn did not proceed with his planned development - a filling station and shopping centre on his property - but caused a certificate of registration of title in respect of the property concerned to be issued in his name.

The conveyancer had omitted to have the servitude over the property, as indicated on the subdivisional diagram, registered in the deeds office, but made an entry on the back of the cover of the file in the deeds office that the servitude on the subdivisional diagramme would be registered on transfer to a third party. A caveat was accordingly noted on 10 December 2003, that on transfer of the property to a third party there was to be a condition in the transfer deed confirming the servitude.

In 2005 Horn sold the property toWerner, who had it registered in the names of his two minor children. No servitude was, however, registered over it, although the caveat was still recorded in the deeds office. At the time the registration of transfer of ownership was effected into the names of Werner's minor children a servitude note on the subdivisional diagram had been cancelled.

Florauna brought an application for an order confirming the servitude over the property. Werner brought a counter-application declaring that no servitude existed over the property and that any 'caveat' in respect of the property be removed or deleted from the register.

THE DECISION

Werner contended that Florauna was not entitled to the order it sought as it did not rely on any agreement in terms of which a servitude had been created, that a caveat is merely an internal cautionary note for officials in the Deeds Office and does not by itself establish any rights or obligations on owners of land and that Florauna did not rely on prescription or any other original form of acquisition of rights for the registration of a servitude.

Because Horn did not proceed with the development, the business rights he had obtained had lapsed and so had the condition attached thereto, of having to provide access in the form of a servitude to his property where the businesses were to be established. The mere fact that a servitude area was depicted on the subdivisional diagram of the Surveyor-General relating to the property did not convert what had been a temporary access road into a servitude of right of way in favour of the public.

Florauna had therefore not shown that it was entitled to confirmation of the servitude.

RANDBURG MANAGEMENT DISTRICT v WEST DUNES PROPERTIES 141 (PTY) LTD

Property

A JUDGMENT BY LEACH JA (TSHIQI JA, THERON JA, WILLIS JA and MATHOPO JA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2015

2016 (2) SA 293 (SCA)

The imposition of City Improvement District levies amountd to 'the imposition of rates and other taxes, levies and duties' as envisaged by section 160(2)(c) of the Constitution. This is therefore a function which cannot not be delegated by a municipal council to a body such as a mayoral committee.

THE FACTS

After the formation of the Randburg city improvement district (CID), levies under the Gauteng City Improvement Districts Act (no 12 of 1997) were imposed on properties owned by West Dunes Properties 141 (Pty) Ltd. They were situated within the geographical area of the Randburg Management District.

West Dunes refused to pay certain of these levies. In due course the City of Johannesburg brought actions seeking payment of the amounts it contended West Dunes owed.

In order to prove its case, the City was obliged to prove that a petition relating to the formation of the Randburg CID under section 3(2) had been properly approved in terms of these provisions. The petition was to take the form of a CID plan.

For the formation of the Randburg CID, the necessary preliminary requirements of public consultation had been fulfilled. Thereafter, a letter dated 18 October 2004 was sent to the company that had lodged the petition for the establishment of the Randburg CID stating that its application for the establishment of a city improvement district in the Randburg area to be called the Randburg Improvement District was approved by the mayoral committee. It confirmed that all the requirements in terms of the Act had been complied with.

THE DECISION

It was startling that neither the City nor the Randburg Management District was able to produce any further direct or documentary proof relating to the approval and formation of the Randburg CID. The Randburg CID had probably been made by the mayoral committee and not by the municipal council itself. The Randburg Management District contended however, that the assumption in the letter of 18 October 2004 had been correct and the municipal council must have duly delegated the mayoral committee to deal with the petition. Accordingly, the latter's approval of the petition was valid and binding.

The first obstacle to this argument was that there was no proof, documentary or otherwise, that the municipal council had in fact delegated authority to the mayoral committee to deal with the approval of the Randburg CID petition. But, assuming that such a delegation did take place, that delegation was unlawful.

Section 60(1)(a) of the Local Government: Municipal Structures Act (no 117 of 1998) provides that if a municipal council has more than nine members, its executive mayor may appoint a mayoral committee from amongst the municipal. However, although section 59(1)(a) of the Local Government: Municipal Systems Act (no 32 of 2000) provides that a municipal council may delegate certain of its powers, section 59(2)(a) goes on to provide that any such delegation 'must not conflict with the Constitution'. Section 160(2) of the Constitution provides that a municipal council may not delegate 'the imposition of rates and other taxes, levies and duties'. Consequently the imposition of a levy is a function that the City was not permitted to delegate to its mayoral committee. The delegation upon which the Randburg Management District relied would be invalid.

In these circumstances it cannot be said that the levy which a ratepayer becomes obliged to pay under the Act, albeit after having been subjected to debate in the public participation process, was

not determined and imposed by the municipality. Even if the monthly sum is reflected on property owners' accounts as a separate item from other rates and taxes, and is collected by the municipality before being paid to the management board of a CID, it is clearly imposed by the municipal council and is not an amount merely collected by the municipality.

The alternative argument was that even if the monthly amount a ratepayer became due to pay under the CID was to be regarded as a levy, it does not fall within the category of 'rates and other taxes, levies and duties', the imposition of which, under section 160(2)(c) of the Constitution, may not be delegated by a municipal council.The argument was that CID levies were intended neither to provide revenue to the state nor unilaterally imposed upon property owners but were, rather, 'payable by the property owners to their own private management body consequent upon their majority decision to form an improvement district'. It was also argued that as the persons who benefited from the CID levies formed only a portion of the populace of the larger municipal area, the levies could not be regarded as being required for municipal services.

Neither of these contentions could be accepted. Section 160(2)(c) of the Constitution clearly seeks to impose a limitation upon a municipal council's power to delegate, so as to ensure that the council, and only the council, is responsible for the function of raising municipal revenue. Undoubtedly this was such a function. The imposition of CID levies amounted to 'the imposition of rates and other taxes, levies and duties' as envisaged by section 160(2)(c) of the Constitution. As the imposition of such levies is therefore a function which could not be delegated by a municipal council, any delegation to the mayoral committee to decide upon the approval of a CID plan under section 3 of the Act was invalid. Consequently a decision of the mayoral committee to approve such a plan lacked legality

In these circumstances it cannot be said that the levy which a ratepayer becomes obliged to pay under the Act, albeit after having been subjected to debate in the public participation process, was not determined and imposed by the municipality. Even if the monthly sum is reflected on property owners' accounts as a separate item from other rates and taxes, and is collected by the municipality before being paid to the management board of a CID, it is clearly imposed by the municipal council and is not an amount merely collected by the municipality.

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA v CHIDAWAYA

A JUDGMENT BY BAQWA J
GAUTENG DIVISION, PRETORIA
11 SEPTEMBER 2015

2016 (2) SA 115 (GP)

Credit Transactions

If proper notice of intention to recover a debt is not made in terms of section 129 National Credit Act (no 34 of 2005), the defect cannot be remedied by annexing the relevant notice to a summons in which repayment of the debt is claimed.

THE FACTS

The Land and Agricultural Development Bank of South Africa brought an action against Chidawaya for repayment of R11 582 245,22, being an amount alleged to be due in terms of a loan secured by a mortgage bond.

Notice of demand for repayment had been made in terms of section 129 National Credit Act (no 34 of 2005) but the notice had been returned to sender. The bank annexed the notice to its summons in the action.

Chidawaya defended the action. The bank brought an application for summary judgment. Chidawaya admitted his indebtedness but opposed the application on various grounds, one of which was that there had not been compliance with section 129 of the National Credit Act.

THE DECISION

A section 129 notice may be attached to a summons as proof of compliance with the Act but not as constituting compliance. It is clear from the wording of the Act that it is a pre-litigation step and must accordingly precede litigation. If litigation is embarked upon without compliance with section 129 then s 130(4) provides the procedural mechanism to remedy this defect. To hold otherwise would render section 130(4) irrelevant and would ignore the directives of the legislature, as well as undermine the purpose of the Act as set out in section 3. This is to address issues such as overindebtedness and debt-restructuring. These would be undermined if the pre-litigation notice were dispensed with.

Attachment of a section 129 notice to a summons should not be taken as proper service as intended by the Act. This is because by the time summons will have been issued the guillotine would have fallen and the service provider would have commenced with judicial enforcement.

In the circumstances, the bank did not comply with the requirements of section 129 of the Act as defined in *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC).

Despite the technical defences Chidawaya had attempted to raise, he did not deny that he was in arrears. The procedure to be followed where there is non-compliance with the requirements in serving a section 129 notice is set out in section 130(4). Applying this provision, application for summary judgment was postponed sine die. The bank was directed to serve section 129(1)(a) notices on Chidawaya and the other defendants.

KGOMO v STANDARD BANK OF SOUTH AFRICA LTD

A JUDGMENT BY DODSON J
GAUTENG DIVISION, PRETORIA
10 JUNE 2015

2016 (2) SA 184 (GP)

Strict compliance with notice of default in terms of section 129 of the National Credit Act (no 34 of 2005) is necessary.

THE FACTS

The Standard Bank of South Africa Ltd lent money to Kgomo, the loan being secured by a mortgage bond. Kgomo defaulted, and the bank sent notices of default to him in terms of section 129 of the National Credit Act (no 34 of 2005). Kgomo's address on the notice was given as 353 Sterling Street, Ormonde View, 2091. This was not in fact the address of Kgomo. The error came about as a result of the erf number having been substituted for the street number. Their address was 40 Sterling Street, Ormonde View. As a result, the notice did not reach Kgomo before the bank issued summons.

The bank obtained default judgment for payment of R276 278,15, together with interest, an order declaring certain immovable property to be specially executable, an order authorising the Registrar to issue a warrant of execution against the property, and costs on the attorney and client scale.

Kgomo applied for rescission of judgment. The basis for the application was that the judgment was erroneously sought and granted because of the bank's failure to comply with section 129(1) read with section 130 of the National Credit Act.

THE DECISION

The question that arose was whether non-compliance with section 129(1) and the relevant parts of section 130 was merely a dilatory defence that did not give rise to an erroneous seeking or granting of default judgment. If so, rescission of judgment had to be refused.

In *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) the court held that the bank was not required to prove that the notice had in fact come to the subjective attention of the debtor, a debtor must respond reasonably when the creditor has properly taken steps to bring the notice to his or her attention and not bothering to respond to a notice requiring him or her to go to the post office and collect a registered item did not amount to reasonable conduct on the part of a debtor.

Based on *Kubyana*, strict compliance with section 129(1) remained necessary. Strict compliance required that where section 129(1) was not complied with, section 130(4)(b) came into play. It peremptorily requires that the court 'must . . . adjourn the matter . . . and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed'.

The bank pleaded delivery of the notice to Kgomo in its particulars of claim. Yet it was clear that its pleading was erroneous and that there was no such delivery. In terms of section 129(1)(b), the bank was precluded from commencing any legal proceedings without delivering a section 129(1) notice beforehand. In terms of section 130(1)(a), 10 business days had to have elapsed after any notice, before legal proceedings were commenced. That too was not complied with. The judgment was therefore erroneously sought. Rescission of judgment had to be granted.

LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA v FACTAPROPS 1052 CC

A JUDGMENT BY MSIMEKI J
GAUTENG DIVISION, PRETORIA
9 SEPTEMBER 2015

2016 (2) SA 477 (GP)

Prescription

A special notarial bond should be included in the definition of 'mortgage bond' in the Prescription Act (no 68 of 1969).

THE FACTS

In May 1999, the Land And Agricultural Development Bank of South Africa lent R250 000 to Factaprops 1052 CC. In terms of the loan agreement the indebtedness of Factaprops had to be discharged by way of five instalments. These became due on 15 June of each year commencing 2000 and ending 2004.

In terms of the loan agreement, should Factaprops fail to make payments of the amount due and owing on the various payment dates, the full amount due and owing under the loan agreement would immediately become due and payable. The amount lent and advanced by the bank to Factaprops, taking into consideration interest levied and payments received amounted to R491 203,05. This amount was subject to interest at the rate of 14% per annum calculated from 31 August 2010 to date of payment, the interest to be calculated and capitalized monthly.

In terms of a special notarial bond registered on 18 April 2000, Factaprops hypothecated certain moveable property in favour of the bank as continuing covering security for the benefit of the bank in respect of the indebtedness.

Factaprops did not make payment of the loan agreement when required. The bank claimed payment of R491 203,05 together with interest at 14% per annum from 31 October 2010 to date of payment with the said interest to be calculated and capitalized monthly.

The bank's summons was served on Factaprops on 3 November 2010. This was more than three years from the dates on which the debts arose as provided for on the 15th June of the relevant years. Factaprops defended the action on the grounds that the bank's claim had prescribed in terms of section 11(d) of the Prescription Act (no 68 of 1969). In the alternative, and to the extent that it is alleged that the claim arose from the special notarial bond Factaprops contended that the bank's summons was served on a date more than six years from the dates on which the debts arose.

THE DECISION

The question was whether the applicable period of prescription was thirty years in terms of section 11(a) of the Prescription Act (ie on the basis that the debt is secured by a mortgage bond) as contended by the bank, or as contended by the defendants, six years as provided for in section 11(c) (ie on the basis that the indebtedness is secured by a notarial contract) or three years as provided for in section 11(d) on the basis that the debt is one that arose from the loan agreement.

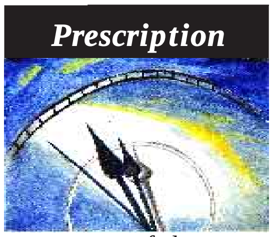
Section 11(a)(i) of the Prescription Act provides that the period of prescription of a debt shall be thirty years in respect of any debt secured by a mortgage bond. A special notarial bond should be included in the definition of 'mortgage bond' in the Prescription Act.

In *Land and Agricultural Development Bank of South Africa v Boeke* GP 12506/07 it was held that the period of prescription, in respect of a debt secured by a special notarial bond contemplated in section 1 of the Security Act, was 30 years. This is the correct interpretation of section 11(a)(i) in the Prescription Act, ie that special notarial bonds are included in the reference to 'mortgage bond'. A reading of section 11(a)(i), together with section 2 of the Insolvency Act, and section 1 of the Security Act,

makes this even clearer. The Boeke judgment was correct in finding that reference to a 'general' mortgage bond in the statutes referred to 'obviously refers to a mortgage bond relating to movables', and in finding that the period of prescription in respect of a debt secured by a special notarial bond contemplated in section 1 of the Security Act is 30 years.

Having regard to what I say above it is clear that the correct H interpretation of s 11(a)(i) in the Prescription Act seems to be that the legislature intended to include special notarial bonds in the reference to 'mortgage bond'. The reading of s 11(a)(i), together with s 2 of the Insolvency Act, and s 1 of the Security Act, makes it even clearer. Having said this in my view it also becomes clear that Rabie J in his judgment was correct when he found that reference to a 'general' mortgage bond in the statutes referred to herein 'obviously refers to a mortgage bond relating to movables' (para 17 of his judgment). He was also correct in finding that the period of prescription in respect of a debt secured by a special notarial bond contemplated in s 1 of the Security Act is 30 years. There is therefore no reason why his judgment ought not to be followed.

MIRACLE MILE INVESTMENTS 67 (PTY) LTD v STANDARD BANK OF SA LTD



A JUDGMENT BY GAIBIE J
GAUTENG LOCAL DIVISION, JOHANNESBURG
11 JULY 2014

2016 (2) SA 153 (GJ)

The date on which a debt is due determines the date on which prescription of the debt begins to run. In consequence, prescription in respect of a debt arising when a debtor defaults in paying a creditor on a specific date begins to run from that date, whether or not the creditor has demanded payment on that date.

THE FACTS

The Standard Bank of SA Ltd granted Mr Nicolas a 'liberator facility', pursuant to which an account was opened for him in the books of the bank and a line of credit was granted to him to the maximum amount of R13 984 600. In terms of the facility, the bank undertook, during the currency of the agreement, to lend and advance sums of money on behalf of Nicolas and it would for that purpose debit his account with such sums. It was a requirement of the facility that Nicolas' debt to the bank be secured by collateral or suretyships. Miracle Mile Investments 67 (Pty) Ltd and the second applicant executed suretyships in favour of the bank and they registered bonds as security pursuant to the suretyships they signed.

Nicolas agreed to pay the principal debt with interest in 240 monthly instalments. He accepted that the bank would be entitled to levy its usual and customary charges and to debit his account with such charges; and accepted liability to pay for all legal costs and expenses which the bank might incur in connection with the enforcement of its rights in terms of the agreement.

In paragraph 9 of the letter of grant, the primary obligation of Nicolas for the purposes of repayment was provided for as follows: 'The interest payable by you is calculated on a daily basis on the outstanding balance, is charged monthly on the last day of the month and is due and payable immediately. Any interest which is unpaid on the due date, will be capitalised on that date.'

In terms of clause 12.2 of their agreement, in the event of default, the bank had the right to terminate the facility and claim immediate repayment of the outstanding balance by giving written notice. It would be effective immediately or from a date stated in the notice. If the facility was cancelled any amounts owing would become payable immediately, if stated in the notice, or on the dates stated in the notice.

Nicolas did not draw on the liberator facility nor did he make any payments to the bank in consequence of the facility after 21 October 2008. Because no payments were made after that date and the bank failed to take action against Nicolas for a period in excess of three years, Miracle contended that the debt owed by Nicolas to the bank was extinguished by prescription. Consequently, the accessory debts owed as surety for Nicolas' facility had also been extinguished by prescription. Miracle contended that Nicolas' debt to the bank prescribed on 22 October 2011 by virtue of the provisions of section 11 of the Prescription Act (no 68 of 1969).

THE DECISION

Section 12(1) of the Prescription Act provides that prescription shall commence to run as soon as the debt is due.

Whether the debt incurred by Nicolas in terms of the liberator facility became prescribed depends on whether the debt became 'due' within the meaning of that word in section 12(1) of the Act. If the debt became due from the date of Nicolas' default on or about 22 October 2008, prescription would have commenced running from that date and the bank's claim would have prescribed on 22 October 2011.

Prescription runs from the date that the bank had the right to enforce payment of the full

amount due to it, even though it did not do so and was prepared to wait longer. To adopt the approach suggested by the bank would mean that the bank could effectively delay prescription from running, depending on whether or not it issued a written notice requiring the remedy of a breach or confirmation of the termination of the facility and the immediate claim for repayment of the outstanding balance. In this way prescription would be dependent on the bank's election and communication to Nicolas, rather than on an interpretation of the provisions of sections 11 and s 12 of the Act.

The bank also contended that the applicable period of prescription was thirty years because the period of prescription of a debt secured by a mortgage bond is thirty years in terms of section 11 of the Act.

It was apparent from the terms of the letter of grant and from Nicolas' obligations articulated in that letter that the suretyships and the mortgage bonds were collateral for the principal debt offered to Nicolas by the bank. In the absence of the principal debt, neither the suretyships nor the mortgage bonds would have existed. The applicants registered the bonds as security for their obligations as sureties and co-principal debtors. They clearly therefore did not undertake a separate independent liability as a principal debtor and their debt remained accessory to the principal debt. The bonds that were passed were essentially passed to secure their liability and to secure the liability of Nicolas as the principal debtor. In the circumstances, the prescriptive period of Nicolas' debt therefore remained three years in terms of section 11 of the Act.

Prescription runs from the date that the bank had the right to enforce payment of the full amount due to it, even though it did not do so and was prepared to wait longer.
To adopt the approach suggested by the bank would mean that the bank could effectively delay prescription from running, depending on whether or not it issued a written notice requiring the remedy of a breach or indeed confirmation of the termination of the facility and the immediate claim for repayment of the outstanding balance. In this way prescription would be dependent on the bank's election and communication to Nicolas, rather than on an interpretation of the provisions of s 11 and s 12 of the Act

NAIDOO v KALIANJEE N.O.

A JUDGMENT BY LEACH JA and MAYAT AJA
(MPATI P, PETSE JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
29 JUNE 2015

2016 (2) SA 451 (SCA)

Insolvency

As section 69 of the Insolvency Act (no 24 of 1936) only requires a warrant to be executed and not issued 'in a like manner as a warrant to search for stolen property', the provisions relating to the issue of warrants in criminal proceedings are of no relevance to a section 69 warrant.

THE FACTS

Naidoo was the sole member of M & M Hiring SA CC. He was also the sole member of two similarly named close corporations and a private company which shared the same business address. M & M was placed in liquidation.

On the strength of information forthcoming from Mr Naidoo's former business partner and at an insolvency inquiry, as well as reports from an employee of Naidoo and a private investigator appointed by the petitioning creditors, the liquidators suspected that the terms of certain interdicts obtained against Naidoo had been breached, as assets of M & M were either being used B by certain of Mr Naidoo's associated corporate entities or had been dissipated. The liquidators had a reasonable suspicion that assets of M & M had been concealed. On the strength of that suspicion they approached a magistrate for a warrant under section 69 of the Insolvency Act (no 24 of 1936). Subsection 2 provides that if the trustee has reason to believe that property, a book or document is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant. Subsection 3 provides that if it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or otherwise unlawfully withheld from the trustee concerned, within the area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document. Subsection 4 provides that such a warrant shall be executed in a like manner as a warrant to search for stolen property, and the person executing the warrant shall deliver any article seized thereunder to the trustee.

Naidoo challenged the issue of the warrant on the grounds that when the liquidators had applied for it, they did so without giving notice of their intention to do so.

THE DECISION

On the undisputed fact that Mr Naidoo dissipated M & M's assets, there was a reasonable suspicion that those assets had been concealed. That being so, the liquidator had been entitled to apply for the warrant without notice.

As far as Naidoo's contention that there had been an abuse of process was concerned, there was a reasonable suspicion that assets of M & M had been concealed. That being so, the liquidators were entitled to apply for a warrant. The magistrate had been fully entitled to issue it.

Naidoo contended that the issue of the warrant did not constitute administrative action but that it involved the exercise of a judicial discretion. That discretion, he submitted, was not akin to civil proceedings, so that it was neither proper to grant a costs order nor to issue a warrant provisionally. In these circumstances Naidoo contended that the warrant had been issued beyond the provisions of section 69 of the Act.

This could not be accepted. One had to accept that the warrant might have been awkwardly phrased, but it was clearly not issued in the process of civil litigation.

Relying upon the provisions of

section 69(4) of the Act, Naidoo argued that, as the section required the warrant to be ‘executed in a like manner as a warrant to search for stolen property’, the warrant was in fact one issued under the provisions of the Criminal Procedure Act (no 51 of 1977) and that had been envisaged by the magistrate who, in issuing the warrant, referred to section 69 ‘read together with section 21 of the Criminal Procedure Act’ as authority for doing so. On the strength of this Naidoo contended that the warrant did not match up to the strict requirements of a criminal warrant and should be set aside.

Accepting that a warrant issued under section 69 has, at the very least, the potential to infringe the rights of others, there is nevertheless a fundamental distinction between it and a criminal warrant. The underlying purpose of a seizure under section 69 of the Act is, as stated in *Cooper N.O. v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA), ‘to disable the insolvent and anyone else who may be physically in possession of such assets from alienating or encumbering them to the prejudice of creditors. That purpose is achieved by, inter alia, providing for the trustee to have physical possession of them in the case of movables or, in the case of movables under attachment or immovables, by having the relevant functionaries place caveats against the assets’.

In the light of these fundamental differences, a warrant under section 69 can neither be construed as being akin to a warrant issued under section 21 of the Criminal Procedure Act, nor necessarily subject to the same limitations and restrictions attendant upon criminal warrants. In any event, a distinction must be drawn between the issue of a warrant, on the one hand, and its execution, on the other. As section 69(4) only requires a warrant to be executed and not issued ‘in a like manner as a warrant to search for stolen property’, the provisions relating to the issue of warrants in criminal proceedings are of no relevance to a section 69 warrant.

The challenge was dismissed.

Section 21 of the Criminal Procedure Act requires a warrant issued under that section to ‘be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night’ and that H the police official executing the warrant shall, upon the demand of an affected person, hand over a copy of the warrant. Clearly, then, the reference to s 21 of the Criminal Procedure Act in the warrant issued by the magistrate meant no more than that it was to be executed in such a manner, and not that it was a warrant issued under the provisions of the Criminal Procedure Act or fell to be regarded as such.

UNICA IRON AND STEEL (PTY) LTD v MIRCHANDANI

A JUDGMENT BY LEACH JA
(LEWIS JA, SHONGWE JA, ZONDI JA and BAARTMAN AJA concurring)
SUPREME COURT OF APPEAL
1 OCTOBER 2015

2016 (2) SA 307 (SCA)

Contract

An agreement which is prefaced with the words 'subject to agreement' may be construed as indicating that its terms will form the subject of the agreement when the parties sign it. The fact that the parties proceed to implement an agreement indicates that they considered the agreement to be final and binding upon them.

THE FACTS

Mirchandani was employed by Unica Iron and Steel (Pty) Ltd, and was also a director of the company. The company had been established by Mirchandani and the second appellant for the purpose of conducting a steel-manufacturing and smelting operation involving the production of certain steel products from the recycling of metallic waste.

As a result of a breakdown in personal relations, the parties agreed to record the terms of Mirchandani's termination of employment. After having done so in documentary form, the parties signed the agreement. The agreement provided that it was 'subject to signing of agreement'. It also provided that Mirchandani would receive a golden hand shake of 'R1 420 000 (net)' upon signing of agreement. The amount had been recorded after it was agreed that Unica and not Mirchandani would pay any applicable tax on the payment.

Unica later determined that the tax liability applicable to the termination agreement was approximately R1m. It proposed that a termination agreement be drafted by attorneys. Mirchandani refused to sign that agreement as it deviated from the terms already recorded. He brought an action for specific performance of the original agreement.

Unica defended the action on the grounds that the original agreement contained a suspensive condition that had never been fulfilled, that it did not constitute a binding agreement and that as Mirchandi had failed to perform his reciprocal obligations, he could not claim specific performance.

THE DECISION

There was no reason to conclude that the phrase 'subject to' necessarily connoted that a further agreement needed to be signed before it became binding. The agreement was written by a businessman, not a lawyer skilled or trained in the drafting of contracts, and allowance had to be made for that in construing its terms. This was especially so in the present case where the language in which the document was drafted was not their mother tongue. In these circumstances the phrase 'the agreement' could readily be understood as meaning no more than 'this agreement', particularly in the light of it having been signed by the parties. Had the agreement been intended to be no more than a memorial of what was later to be incorporated in a formal agreement, signature by the parties would have been entirely superfluous. But it was so signed by all of the relevant role players. This was a clear indication that they intended it to be binding.

Importantly, immediately after the agreement was signed, Unica proceeded to implement its terms. This indicated that Unica regarded the agreement as binding on it. This was irreconcilable with the agreement having been conditional upon a subsequent, formalised agreement being concluded and signed. The inference was irresistible that it was only once Unica realised that it had underestimated the respondent's tax liability that it sought to evade its contractual obligations.

The agreement was therefore not subject to a suspensive condition and was binding between the parties.

HALSTEAD-CLEAK v ESKOM HOLDINGS LTD

A JUDGMENT BY BAQWA J
GAUTENG DIVISION, PRETORIA
1 JUNE 2015

2016 (2) SA 141 (GP)

In terms of section 61(1) of the Consumer Protection Act (no 68 of 2008), Eskom Holdings Ltd may be held liable for injuries sustained as a result of the supply of electricity.

THE FACTS

On 11 August 2013 Halstead-Cleak, whilst riding a bicycle, came into contact with a low-hanging live power line spanning a footpath adjacent to Bokmakierie Road in the Nooitgedacht area, Gauteng. During the incident he sustained severe full-thickness electrical burns to the right forehead and burn wounds to the chest, arms and both thighs. Upon learning of the incident Eskom rectified the situation by causing the electricity to be switched off and the lines dismantled.

Eskom Holdings Ltd was a licensee in terms of and for purposes of the Electricity Regulation Act (no 4 of 2006) and was responsible for the power line in question, through which it conducted electricity. In terms of the Consumer Protection Act (no 68 of 2008), Eskom was both the producer and the distributor of the electricity generated through the power line.

In an action brought by Halstead-Cleak, the court determined whether or not Eskom was strictly liable in terms of the provisions of section 61 of the Consumer Protection Act.

Section 61(1) provides the producer or importer, distributor or retailer of any goods is liable for any harm caused wholly or partly as a consequence of (a) supplying any unsafe goods, (b) a product failure, defect or hazard in any goods, or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods, irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be. Section 61(2) provides that a supplier of services who, in conjunction with the performance of those services, applies, supplies, installs or provides access to any goods, must be regarded as a supplier of those goods to the consumer, for the purposes of the section.

THE DECISION

Eskom contended that the Consumer Protection Act concerned consumerism and the protection of consumers and that, had Halstead-Cleak suffered the electrical burns that he did in the course of utilising the supply of electricity to his home, or otherwise in the course of his use of electricity, then the Act might well have applied. Section 61 was not intended to apply to circumstances such as the present case.

In terms of section 5(1) the Act applies to every transaction occurring within the Republic and the promotion of any goods or services, or the supplier of any goods or services, within the Republic There could be no doubt that electricity constitutes ‘goods’ for purposes of the Act, as it is clear from sub-section (e), which includes goods, water and electricity as part of the definition. It could therefore be accepted that the electricity which caused Halstead-Cleak’s injuries were ‘goods’ for purposes of section 61 of the Act.

Section 53(1) provides that defect, ‘when used with respect to any goods, component of any goods, or services’, refers to any aspect ‘that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances; . . .’. In the context of electricity being conducted along a line which is not required or used to supply any other consumer, this constitutes ‘goods or results of

the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances'.

It was common cause that Eskom allowed the presence of electricity in the lines spanning the footpath used by Halstead-Cleak on the day of the incident. Upon learning of the incident Eskom rectified the situation by causing the electricity to be switched off and the lines dismantled. Its actions after the incident reinforced the notion that it had introduced the source of danger which led to Halstead-Cleak's injuries, for which it should be held liable.

EX PARTE CONCATO

A JUDGMENT BY BOZALEK J
WESTERN CAPE HIGH COURT
18 SEPTEMBER 2015

2016 (3) SA 549 (WCC)

Insolvency

An application for voluntary surrender must disclose that the applicant intends to re-purchase estate assets on instalment sale following the acceptance of such an application.

THE FACTS

An application for voluntary surrender was brought by Concato and other applicants. Each application as similar in many respects, including in the expectation of the dividend to be received (16% or 17%) by creditors.

In each case, the applicant had entered into an arrangement in which he or she would purchase back the estate assets on instalment sale, after acceptance of the voluntary surrender application. The same valuer was used to value estate assets and these were valued on the assumption of a forced sale of the asset.

The court raised the question whether the applications were acceptable.

THE DECISION

It was by no means clear that 'buy-back' arrangements were in the interests of the body of creditors. Many creditors would not trouble to prove a claim. There were other reasons why the 'buy-back' arrangements raised doubt as to whether they served the interests of creditors. The assets were valued on a forced-sale basis and yet, without any auction being held, the insolvent invariably purchased them back at this value and, in most instances, by way of instalment payments over an extended period. Life proceeded virtually unchanged for the insolvent. None of his household goods were removed and he/she continued to utilise and enjoy all his/her household goods and assets, until, in due course, he reached an arrangement with the trustee to purchase them back, almost always by way of instalments. During this period the debtor was immune from his existing creditors by virtue of the voluntary-surrender order which had been granted.

One of the primary requirements for a voluntary-surrender application to be successful is that it must be made bona fide. The facts which had been brought to light led to the conclusion that the buy-back arrangements were largely preordained. In none of the applications was any mention of such an arrangement made by the applicant. On this ground alone it could be concluded that the bona fides of the applications was open to serious doubt. At the least an applicant could be expected to disclose that he had been advised of the likelihood of such an arrangement and that he intended to take advantage thereof, if circumstances permitted. Such disclosure, together with an explanation of how the applicant would finance such a repurchase, would afford the court an opportunity to realistically consider whether an order was in the interests of creditors or whether the application for voluntary surrender was merely a self-serving exercise.

In the present matters it also did not inspire confidence that the same valuator was used in each instance and that his valuations follow the same format, namely a pro forma affidavit, a table of the household goods and furniture, their estimated value and their condition being described as either 'average', 'fair' or 'good'.

The most likely outcome, should orders of voluntary surrender be granted, would be that the applicants would purchase back their assets at the forced-sale valuation. Where they are unable to pay off this sum in one payment they would be afforded an opportunity to do so by way of instalments. The probabilities were overwhelming that the

applications were brought by the applicants with just such an outcome in mind. The result, in all likelihood, would then be that the applicants would continue to enjoy the possession and use of their assets, but they would divest themselves of their creditors. In each case a substantial portion of each applicant's patrimony would be reduced by the fees which the attorneys will earn in each such application, together with the fees of the other professional parties involved, including the valuator.

Whether this outcome would serve the interests of the creditors was most unlikely. The applications were neither bona fide nor would orders of voluntary surrender be to the advantage of creditors.

It is by no means clear to me, however, that such 'buy-back' arrangements are always, or even in the majority of cases, in the interests of the body of creditors. Firstly, many creditors will not trouble to prove a claim. This is borne out by Mr Genis' report, which in 3 instances reveals that, of the moneys recovered, portions thereof were paid into the Guardian's Fund because an 'insufficiency of claims' was proved.

In another 5 cases, the entire proceeds recovered, in many cases quite substantial, were paid into the Guardian's Fund because no claims at all were proved.

There are other reasons why these 'buy-back' arrangements, carried out on the scale revealed in these applications, raise serious doubt as to whether they serve the interests of creditors. The assets are valued on a forced-sale basis and yet, without any auction being held, the insolvent invariably purchases them back at this value and, in most instances, by way of instalment payments over an extended period. Life goes on virtually unchanged for the insolvent. None of his household goods are removed and he/she continues to utilise and enjoy all his/her household goods and assets, until, in due course, he reaches an arrangement with the trustee to purchase them back, almost always by way of instalments. During this period the debtor is immune from his existing creditors by virtue of the voluntary-surrender order which has been granted.

GRIFFITHS v JANSE VAN RENSBURG N.O.

A JUDGMENT BY GORVEN AJA (SHONGWE JA, PILLAY JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
26 OCTOBER 2015

2016 (3) SA 389 (SCA)

A disposition is not made in the ordinary course of business if such disposition is made in terms of an illegal and void agreement.

THE FACTS

Griffiths lent a total of R200 000 to the Ushapho Trust. The loans were repaid, with interest totaling R24 000. Within six months, the estate of the trust was sequestrated.

The parties accepted that the payments were dispositions by the trust, and had the effect of preferring Griffiths above other creditors. After each of the payments was made, the liabilities of the trust exceeded its assets.

It was also accepted that the business being carried on by the trust prior to its sequestration was that of a pyramid scheme. The investments were occasioned by the false and fraudulent representations of persons who acted on behalf of the trust. These included representations to the effect that the scheme was viable, lawful, not in contravention of any statutory or regulatory provisions, not a pyramid scheme and that the deposits would be utilised by the trust to purchase from certain estate agents their rights to commissions which had been earned but not yet paid. These rights would be purchased from the estate agents at a premium relative to the commissions to be earned. The trust would thus earn sufficient profits to enable it to repay the investments and the agreed interest at rates which were, in certain cases, usurious. Those controlling the trust were aware that the investments would be used to fund repayment to other investors together with interest thereon. It was admitted that the scheme was unlawful as being a pyramid scheme, that the business contravened the provisions of section 11(1) of the Banks Act and that it constituted a harmful business practice as envisaged in para 2 read with para 1.1 of the notice 6 in terms of s 12(6)(iii) of the Consumer Affairs (Unfair Business Practices) Act.

The trustees in insolvency brought an action for repayment of the amounts paid to Griffiths on the grounds that this was required by section 29(1) of the Insolvency Act (no 24 of 1936). The section provides that every disposition of his property made by a debtor not more than six months before the sequestration of his estate which has had the effect of preferring one of his creditors above another, may be set aside by the court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

Griffiths defended the action on the grounds that he was a creditor with an enrichment cause of action against the Usapho Trust for repayment of capital moneys paid to such trust in terms of an illegal and void agreement, and that the repayment had been made to him in the ordinary course of business.

THE DECISION

Assuming that a payment under the condictio would qualify as one which was made in the ordinary course of business, had Griffiths made claims under the condictio, they would have been enforceable. Such claims would have arisen at the time that he made each of the investments.

If the capital and interest had been paid together in a single payment, a single disposition would have been made which would not have been enforceable

under the condictio. However, it was not open to Griffiths to argue that, if he had invoked the condictio, the payments would have been made in the ordinary course of business. On a factual level he did not do so. He demanded the full amounts due under the void investments, which happened to be paid in four, rather than two, sums. The payments, and hence the dispositions, were made by the trust as payments due in respect of the repayment of the investments, not under the condictio.

If, immediately before the payments were demanded and made, Griffiths had become aware of the illegality and demanded and received payment of only the capital on the basis of the condictio, he would have been in a different position. The business relationship between him and the trust would then have been one arising from the condictio. But it is impermissible to apply an ex post facto, theoretical overlay to the dispositions. The 'transactions' arising from the business relationship between Mr Griffiths and the trust at the time arose from the void agreements, not from the condictio.

Applying the broad, objective test to the facts of this matter, the repayments of the capital amounts did not take place in the ordinary course of business. Therefore, not only the dispositions relating to interest, but also those relating to capital, were correctly set aside. The appeal had to fail.

If, immediately before the payments were demanded and made, Mr Griffiths had become aware of the illegality and demanded and received payment of only the capital on the basis of the condictio, he would have been in a different position. The business relationship between him and the trust would then have been one arising from the condictio. But it is impermissible to apply an ex post facto, theoretical overlay to the dispositions. The 'transactions' arising from the business relationship between Mr Griffiths and the trust at the time arose from the void agreements, not from the condictio.

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

A JUDGMENT BY LEACH JA (NAVSA JA, CACHALIA JA, TSHIQI JA and WILLIS JA concurring)
SUPREME COURT OF APPEAL
21 DECEMBER 2015

2016 (3) SA 143 (SCA)

A South African court has a discretion whether or not to recognise a foreign trustee in insolvency, and whether or not to grant an interim interdict to preserve assets in respect of which the trustee has established a prima facie right.

THE FACTS

In 2013, when Mr S Dunne was resident in the United States of America, he was declared bankrupt in that country by a court order obtained at his instance. Later that year, the Dublin High Court appointed Lehane as the official assignee in bankruptcy of Mr S Dunne's estate.

Some eight years earlier, Dunne had concluded agreements with his wife in which he undertook to transfer certain of his property to her, including his interest in the Lagoon Beach Hotel (Pty) Ltd. That company owned property in Cape Town.

Lehane's investigations led him to believe that Mr Dunne had been insolvent both at the time he concluded these agreements and made the dispositions to which they refer to his wife. He also heard that a third party, later identified as Great Africa 999 Investment (Pty) Ltd was in the process of acquiring the Lagoon Beach Hotel. On learning of this Lehane applied ex parte to the Cape Town High Court for relief, including an order recognising him as the official asssignee and interdicting the proposed transaction. Lehane also sought a declaration in the High Court of Ireland that the purported transfer of Dunne's interest in the Lagoon Beach Hotel made pursuant to the agreement between Dunne and his wife was void and of no effect.

Lagoon appealed the confirmation of these orders.

THE DECISION

Lagoon's argument was that no right had been established and that Lehane had also failed to show that he had locus standi. It contended that Dunne's bankruptcy fell to be dealt with by the trustee appointed in the United States and in accordance with the bankruptcy laws of that country, rather than pursuant to the laws of Ireland, the standard position being that the insolvent estate will fall into the jurisdiction of the first court which grants a sequestration order.

While it could be accepted that ordinarily a foreign trustee seeking recognition in South Africa must establish that the insolvent party was domiciled within the jurisdiction of the foreign court that appointed him, this is not a law set in stone. It has been accepted that in exceptional circumstances the requirement of domicile will not be insisted upon. South African courts have recognised a foreign trustee at times where the order pursuant to which the trustee was appointed was issued by a court other than that of domicile, but have added the proviso that those cases 'are certainly not authority for the contention that a South African court may simply on the basis of comity and convenience, grant recognition to a foreign trustee, regardless of any consideration given to the insolvent's domicile.

In the present case, even though there appeared to be a prima facie case that Dunne was domiciled in Ireland, there was a degree of uncertainty about the issue. But because of that uncertainty, and the fact that the American courts had invoked the justice system of Ireland to assist in tracing assets and administering bankruptcy proceedings, there were in any event exceptional circumstances present that justifed a South African court also rendering assistance by taking the necessary steps to recognise the Irish Official Assignee in order to protect the interests of Dunne's creditors. This was not simply a matter of comity and convenience

but was also intimately bound up with the prima facie case made out against Dunne for his being domiciled in Ireland.

In the light of these considerations there was no reason to interfere with the court's recognition of Lehane. It had the discretion to exercise whether or not to do so, and such discretion was properly exercised. It also properly exercised its discretion to grant an interim interdict to preserve assets in respect of which Lehane had established a prima facie right.

In the present case, even though there appears to be a prima facie case that Mr Dunne must be domiciled in Ireland, the other allegations mentioned are such that there is a degree of uncertainty about the issue. But because of that uncertainty, and the fact that the American courts have invoked the justice system of Ireland to assist in tracing assets and administering bankruptcy proceedings, there are in any event exceptional circumstances present that justify a South African court also rendering assistance by taking the necessary steps to recognise the Irish Official Assignee in order to protect the interests of Mr Dunne's creditors. But it is not simply a matter of comity and convenience to do so. It is also intimately bound up with the prima facie case made out against Mr Dunne for his being domiciled in Ireland.

In the light of these considerations I see no reason to interfere with the court a quo's recognition of Mr Lehane. It had the discretion to exercise whether or not to do so, and in my view such discretion was properly exercised. It also properly exercised its discretion to grant an interim interdict to preserve assets in respect of which Lehane had established a prima facie right. In broad terms, then, the appeal must fail.

SAFARI THATCHING LOWVELD CC v MISTY MOUNTAIN TRADING 2 (PTY) LTD

A JUDGMENT BY DAVIS AJ
GAUTENG HIGH COURT, PRETORIA
11 DECEMBER 2015

2016 (3) SA 209 (GP)

A court may exercise its discretion to grant a final order winding up a company despite the fact that business rescue proceedings have commenced, when there is no evidence that anything would maximise the likelihood of the company continuing in existence on a solvent basis.

THE FACTS

Safari Thatching Lowveld CC as employer and Misty Mountain Trading 2 (Pty) Ltd as contractor entered into a principal building agreement for the construction of a luxury safari camp. The initial contract price amounted to some R15 m but later escalated to some R19m. Construction took some time to commence, but from 7 February 2014 onwards some 15 payment certificates were issued and certified in respect of the lodge itself and another three in respect of the construction of staff quarters. At the time when the winding-up application was launched, the last of each of the two series of payment certificates was outstanding, in the amount of R1 533 533,70 and R274 156,53, respectively.

Failures to make payment occurred when the construction was approximately 82% complete and principally as a result of an apparent irreconcilable dispute between the two intervening parties, directors and major co-shareholders of Misty Mountain. The dispute centred around a director, Mr Jeroldi's failure or refusal to make payment of an alleged balance subscription price for shares in an amount of approximately R8m. Significantly, Jeroldi refers to himself as the 'financier' of the safari lodge.

As a result, construction halted, other creditors of Misty Mountain remained unpaid, and, as Misty Mountain had no business or assets other than the proposed luxury safari lodge, it became unable to meet its current financial liabilities. The deadlock between its directors and shareholders also resulted in an impasse, which continued to exist.

Safari applied for the liquidation of Misty Mountain on the basis that it was both factually and commercially insolvent and that it was just and equitable that it be wound up. Jeroldi brought an application to begin business rescue proceedings in respect of Misty Mountain.

THE DECISION

Section 131(1) of the Companies Act allows an affected person to apply to a court 'at any time' for an order placing a company under supervision and commencing business rescue proceedings. Business rescue proceedings begin, in terms of section 132(1)(b), when such an 'affected person applies to the court for an order placing the company under supervision in terms of section 131(1)' or when a court makes an order placing a company under supervision during the course of liquidation proceedings in terms of section 132(1)(c)).

The operative provision for purposes of the present case was section 131(6), which provides that if liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until (a) the court has adjudicated upon the application; or (b) the business rescue proceedings end, if the court makes the order applied for. With reliance on this, it had been suggested that the winding-up application be postponed yet again.
Howeer, there was no basis for the proposition that an application for the requisite leave of the court to continue with such already commenced proceedings could not be made during such proceedings. There was no evidence placed before the court indicating a 'reasonable prospect

of rescue' of Misty Mountain which could lead a court to accede to the default position of the moratorium imposed by section 131(6) without considering the timing and process of granting of leave to proceed with pending proceedings as contemplated in section is an unpaid creditor of the respondent.

In the present case, there were numerous similar unpaid creditors, Misty Mountain appeared to be both factually and commercially insolvent, there was an insurmountable deadlock between the directors and shareholders of the company, Safari had commenced winding-up proceedings on 6 July 2015, all the formal requirements pertaining to winding-up applications had been complied with, both the directors and principal shareholders of the company were parties to the proceedings, an earlier application for the commencement of business rescue proceedings of the company by one of the directors was struck off the roll of this court, withdrawn and not proceeded with, only days prior to the postponed hearing of the winding-up application, the same aforementioned director launched a second application for the commencement of business rescue proceedings, there was no application for postponement of the winding-up application on behalf of the director who had launched the aforementioned second application for the commencement of business rescue proceedings, and there was no separate or fresh application to yet again intervene in the winding-up application based on the second application for the commencement of business rescue proceeding, no evidence was placed before the court indicating that whatever might have been proposed in the second application for the commencement of business rescue proceedings would be more beneficial to the creditors than proceeding with the pending winding-up application, no evidence was placed before the court that any of the problems or the financial distress which the company faced, as set out in the applicant's founding affidavit or in the letter of its attorney relied on by the attorney for the director in his second application for the commencement of business rescue proceedings, had been addressed, ameliorated or would 'maximise the likelihood of the company continuing in existence on a solvent basis'.

In these circumstances there was no reason why Safari's request for leave of the court to proceed with the winding-up application should not be granted. The requirements for the granting of a winding-up application had been met. The court could justifiably exercise its discretion to grant a final order.

ABSA BANK LTD v DE BEER

A JUDGMENT BY LOUW J
GAUTENG DIVISION, PRETORIA
18 DECEMBER 2015

2016 (3) SA 432 (GP)

Credit Transactions

A loan given by a creditor which amounts to reckless credit may be set aside in terms of section 83 of the National Credit Act (no 34 of 2005).

THE FACTS

During 2003, De Beer started borrowing from Absa Bank Ltd, and a bond in the amount of R100 000 was registered over his farm property in June of that year. A second bond in the amount of R200 000 was registered on 11 April 2005. De Beer was not farming profitably. At the end of 2005 he had a cash-flow problem, for he had to make further small improvements on the plot and buy equipment. He had no income, except for some from lucerne. He therefore approached the bank for a loan which was granted in the amount of R651 000 and secured by a bond registered on13 February 2006. The pre-existing loans were consolidated and the bonds of R100 000 and R200 000 were cancelled. In respect of the 2006 loan he saw one Ms Du Plooy at the Pretoria North branch of the plaintiff and stated to her that he had no fixed income. He was not asked for any statement of income and expenses.

De Beer was 65 years old when the total loan of R1 150 000 was granted. This meant the loan was to be repaid at the age of 85. De Beer was then on pension when the loan was granted. He had no income except a monthly annuity of R650.

De Beer entered into a written mortgage loan agreement on 14 January 2008. To acquire the property and to keep the farming operation going, De Beer required —

- 2002, R640 000 — his pension lump sum;
- 2003, R100 000 — first loan from the bank;
- 2004, R200 000 — lump sum from his wife's pension;
- 2005, R200 000 — second loan from the bank;
- 2006, R651 000 — third loan from the bank;
- 2008, R500 000 — fourth loan from the bank.

The bank sued for repayment of its loans. De Beer defended the action on the grounds that the bank had given reckless credit.

THE DECISION

Section 81 of the National Credit Act (no 34 of 2005) provides that when applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment required by this section. A credit provider must not enter into a credit agreement without first taking reasonable steps to assess (a) the proposed consumer's (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement, (ii) debt re-payment history as a consumer under credit agreements, (iii) existing financial means, prospects and obligations, and (b) whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement. A credit provider must not enter into a reckless credit agreement with a prospective consumer.

The first requirement was that 'reasonable steps' had to be taken to assess the proposed consumer's existing means, prospects and obligations. This also meant that the assessment had to be done reasonably, ie not irrationally. Only a reasonable assessment will comply with the following phrase in the preamble to the Act — 'to promote

responsible credit granting and use and for that purpose to prohibit reckless credit granting'.

It was irrational to have taken the surety's, income into account in coming to the conclusion that the 'existing financial means' existed to pay the instalments. A surety does not fall within the definition of a consumer in s 1 of the Act. Furthermore, the surety remains totally out of the picture until the principal debtors have failed to comply with their obligations.

It was impossible to see how, on the figures provided, an employee of the bank could conclude that the farming might prove to be successful. It seemed that money was just being poured into a bottomless pit. De Beer was surely idealistic to believe he could produce the necessary income for survival and service of the ever mounting debt from small-scale farming, that is, farming with lucerne and poultry on approximately five hectares. Apart from filling in the application form, the bank never required proper income/ expenditure accounts supported by the necessary source documents, not to even mention audited accounts.

On these two grounds the loans could be seen as reckless. Consequently the court's discretion to either set aside the agreement or to suspend the force and effect of the agreement arose. The following factors weighed in favour of exercising the first option, namely the extent of the recklessness, De Beer's age, and the fact that the property which thebank sought to be declared executable was the only and thus primary home of De Beer and his wife.

How, on these figures, an employee of the bank could conclude that the farming may prove to be successful is beyond me. It seems that money was just being poured into a bottomless pit. The first defendant was surely idealistic to believe he could produce the necessary income for survival and service of the ever mounting debt from small-scale farming, that is, farming with lucerne and poultry on approximately five hectares. Furthermore, we have the first defendant's evidence that, apart from filling in the application form, the plaintiff never required proper income/expenditure accounts supported by the necessary source documents, not to even mention audited accounts. On these two grounds I declare the agreement as reckless.

ABSA LTD v MOORE

A JUDGMENT BY LEWIS JA (PONNAN JA, PILLAY JA, SALDULKER JA and VAN DER MERWE AJA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2015

2016 (3) SA 97 (SCA)

If the agreement upon the basis of which property is transferred is invalid because it is vitiated by lack of consent, then ownership of the property does not pass to the transferee. Any mortgage bond then passed by the transferee in favour of a creditor is equally invalid.

THE FACTS

In response to a newspaper advertisement offering a loan, Moore made inquiries, and was offered a loan. Moore and his wife, to whom he was married in community of property, owned fixed property. The lender gave them three documents to sign. The first was an 'Offer to Purchase' in terms of which a person offered to buy the Moores' home for R686 000, payable on transfer of the property to him. The second was a 'Deed of Sale' in terms of which the purchaser, a certain Mr Kabini, sold the property back to the Moores, the price to be paid in instalments. The third was a 'Memorandum of Agreement' between Brusson Finance (Pty) Ltd, the Moores and Mr Kabini, that regulated their tripartite relationship.

An amount of R157 651 was paid into the Moores bank account. They believed this to be the loan from Brusson that would tide them over their financial plight. Brusson informed them that this amount would be repayable in monthly instalments of R6907 that would include interest.

On 30 June 2009 Kabini applied to Absa Bank Ltd for a home loan, secured by a mortgage bond over the property. The loan was granted, the property was transferred to Kabini and a mortgage bond over it was registered in favour of the bank. Five bonds, all in favour of the bank where the Moores were the mortgagors, were simultaneously cancelled. The Moores were unaware that the property was transferred and that a new bond was registered in favour of the bank.

In July 2010 the Moores received a letter from an attorney written on behalf of Brusson, advising that they were in breach of their obligation to pay to Brusson the monthly instalment of R6907. The attorney advised that the instalments were payable in terms of the 'Offer to Purchase and Instalment Sale Agreement' with Kabini. The arrears said to be owing to Brusson at that stage amounted to R43 597.

The Moores stated that they had approached Brusson when they experienced financial difficulty, and were under the impression that Kabini would lend them money and that the property would be the security for the loan. They stated that when they received the letter from the attorney this was the first time that they became aware they had sold their property to Kabini.

Kabini defaulted in his obligations under the bond. The bank issued summons against Kabini, and took judgment by default on 12 July 2011 for payment of R500 067 plus interest and costs. The court declared the property specially executable. On 3 August 2011 the bank issued a writ of execution, and a notice of attachment of the property was served at the property of the Moores.

The Moores applied for declaratory orders that the three agreements be declared invalid, that they were entitled to restitution of the property and that the mortgage bond over the property was invalid and should be set aside.

THE DECISION

A valid underlying agreement to pass ownership of property is not required for the effective passing of ownership, but there must be a genuine intention to transfer ownership. This principle was unanimously approved in *Commissioner of Customs and Excise v Randles Brothers & Hudson Ltd* 1941 AD 369

and has been followed consistently since then.

However, if there is an underlying agreement, and it is tainted by fraud or obtained by some other means that vitiates consent then ownership does not pass. The fundamental legal principle is that where the transferor does not intend to transfer ownership the registration of transfer has no effect. Therefore, Kabini did not acquire ownership of the property. The question that remained was whether the mortgage bond registered to secure the bank's loan to him was also invalid. The answer was that the bond also had no effect. Kabini was not the owner. He had no property to bond. It followed that the bond was also invalid.

The bank argued that even if Kabini was not the owner of the property he had nonetheless intended to register a bond over the property. But that held no relevance. He did not have the legal capacity to register that bond over that property. He could not grant a real right in property that he did not own.

The Moores were the owners of the property and they were entitled to restitution of it.

If the underlying agreement is tainted by fraud or obtained by some other means that vitiates consent (such as duress or undue influence) then ownership does not pass: Preller and Others v Jordaan [1956 (1) SA 483 (A) at 496].'
I referred also to Meintjes NO v Coetzer and Others 2010 (5) SA 186 (SCA) para 9 and Gainsford and Others NNO v Tiffski Property Investments (Pty) Ltd and Others 2012 (3) SA 35 (SCA) paras 38 and 39. To these must be added Quartermark Investments (Pty) Ltd v Mkhwanazi and Another 2014 (3) SA 96 (SCA) ([2013] ZASCA 150) paras 21 – 25. These cases all confirm the same fundamental legal principle: where the so-called transferor does not intend to transfer ownership the registration has no effect.
The court a quo thus correctly held that Mr Kabini had not acquired ownership of the property. The question that remains is whether the mortgage bond registered to secure the bank's loan to him is also invalid. It is clear from the decisions referred to above that the I bond also has no effect. Mr Kabini was not the owner. He had no property to bond. And the court a quo correctly held that the bond was also invalid.

NEDBANK LTD v NORRIS

A JUDGMENT BY GOOSEN J (BESHE J concurring)
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH
1 MARCH 2016

2016 (3) SA 568 (ECP)

A debt-rearrangement order has as its purpose the rescheduling or rearrangement of the obligations of the consumer in such a manner as to enable the consumer to meet its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A rearrangement order does not, and cannot, extinguish the underlying contractual obligations.

THE FACTS

Nedbank Ltd advanced an unsecured personal loanof R120 000 to Norris in terms of a credit agreement. It was agreed that Norris would be charged an initiation fee, a monthly service fee, interest on the outstanding balance of the loan amount at a fixed rate of 17,5% per annum, calculated daily on the outstanding balance and capitalised, and an amount for credit life insurance in a monthly sum of R529,80. The total loan amount, inclusive of charges and interest, would be R220 669,40, repayable by Norris by way of 60 equal instalments in the amount of R3674,49. The credit agreement would terminate on 1 December 2016.

In August 2013 Norris applied to a registered debt counsellor, to be declared over-indebted in terms of section 86(1) of the National Credit Act. In due course the debt counsellor, havingmade a determination of overindebtedness, applied in terms of section 86(7)(c)(ii)(aa) and (bb) for a debt-restructuring order. This application, brought in terms of rule 55 of the magistrates' courts rules, culminated in a debt-restructuring order. The evidence placed before the magistrate was the assertion that 'the consumer's repayments exceed his income'. The order granted by the magistrate held that Norris was found and declared to be over-indebted in terms of the National Credit Act 34 of 2005, that his obligations toward the bank be rearranged in accordance with the debt rearrangement payment proposal. The rearrangement of Norris' obligations were set out in an annexure to the order. In relation to the bank, it was confirmed that the outstanding balance of the loan was R105 612,15. Provision was made for payment of a distributable amount to the bank of a monthly instalment of R289,15. The rearranged period was to expire 260 months after the date of the order, with interest to be charged at 0 %.

The bank brought an application to rescind this order.

THE DECISION

An application for debt rearrangement can only be made if the debt counsellor makes a determination that the consumer is over-indebted. A finding that the consumer is over-indebted can only be made if the preponderance of all of the information available indicates that the consumer will be unable to satisfy all of his or her obligations. In the first instance it is the obligation of the debt counsellor to make such a determination. Once that is made, application may be made in terms of section 86. This determination is therefore a prerequisite and must be established as a jurisdictional fact before a debt-rearrangement order can be made in terms of section 87(1).

In the present case, the evidentiary material placed before the magistrate was such that the magistrate could not reasonably have come to the conclusion that Norris was indeed over-indebted. In this regard, the evidence placed before the magistrate was inadequate. An application for debt relief must be in accordance with rule 55. This means that the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action. In this instance the evidentiary material placed before the magistrate was woefully inadequate. On the basis of the evidence placed before the magistrate the jurisdictional fact

upon which the magistrate was entitled to exercise his discretion in terms of section 87 was not established. Accordingly the order granted was unlawful.

The difficulty with the order, however, did not end there. The magistrate rearranged theNorris affairs in such manner as to require payment of a monthly amount of R289,15 over a 260-month period and ordered that interest would be reduced to 0 %. It was obvious from those figures that the rearranged payments would not satisfy the amount outstanding to the bank as at the date of restructuring. The clear effect of the rearrangement order was that Norris, as consumer, would not meet all of his obligations to the bank in terms of the credit agreement. Not only would Norris not be obliged to make payment of the full outstanding loan, the monthly payments did not even meet the requirement to reimburse the bank for the monthly payment it was obliged to make on behalf of Norris in respect of credit insurance cover. The order plainly did not meet the essential purposes of the Act. Apart from this, the magistrate also ordered that Norris' contractual obligations to pay interest on the outstanding balance of the loan be reduced from the fixed 17,5% to 0%. Section 86(7)(c)(ii) confers no such power upon the magistrates' court. A debt-rearrangement order has as its purpose the rescheduling or rearrangement of the obligations of the consumer in such a manner as to enable the consumer to meet his/her/its obligations to the credit provider. It serves to mitigate the effect of over-indebtedness by making provision for payments within the existing means of the consumer and over an extended period. A rearrangement order does not, and cannot, extinguish the underlying contractual obligations.

An application for debt rearrangement can only be made if the debt counsellor makes a determination that the consumer is overindebted. A finding that the consumer is overindebted can only be made if the preponderance of all of the information available indicates that the consumer will be unable to satisfy all of his or her obligations. In the first instance it is the obligation of the debt counsellor to make such a determination. Once that is made, application may be made in terms of s 86. This determination is therefore a prerequisite and must be established as a jurisdictional fact before a debt-rearrangement order can be made in terms of s 87(1)

FREE STATE PROVINCE v TERRA GRAPHICS (PTY) LTD

A JUDGMENT BY NAVSA JA (PONNAN JA, LEACH JA, SALDULKER JA and ZONDI JA concurring)
SUPREME COURT OF APPEAL
10 SEPTEMBER 2015

2016 (3) SA 130 (SCA)

Contract

A Province's inability to pay a contractor as a result of it not having properly budgeted for such a payment is no ground for withholding payment from that contractor.

THE FACTS

During 2009/2010 the Free State Province represented by the Member of the Executive Council: Free State Provincial Government: Department of Police, Roads and Transport (the MEC), embarked on a road-infrastructure programme, the purpose of which was to promote accessibility, mobility and a safe road-infrastructure network in the Province that would be environmentally sensitive and would stimulate socioeconomic growth. The programme encompassed 23 roads located throughout the Province. In accordance with its own procurement policy and the applicable regulatory statutory provisions, the Department called for tenders to be submitted to it for the provision of, amongst others, engineering-related services. The secondrespondent, SSI/Tshepega Joint Venture (SSI), submitted a tender and, subsequently, on 19 April 2010, the Department concluded a written agreement in terms of which SSI was to render services.

The services were to assist the Department to manage the implementation of the road repairs and rehabilitation programme for the Free State road network.. SSI was the engineering firm that was appointed the project manager for the road-repair and rehabilitation programme set out in the agreement. The total contract value was approximately R69 million.

The main agreement contemplated the appointment, with the approval of the Province, of subconsultants. Environmental services were specifically mentioned in the main agreement. When the services of an environmental subconsultant were required the approval of the Province was obtained and tenders to that end were invited. Terra Graphics (Pty) Ltd submitted a bid, and subsequently a written agreement with the approval of the Province was concluded between TW and SSI. This was a subconsultancy agreement.

The contract value of the subconsultancy agreement was R1 593 997,75. Both SSI and TW performed their obligations in terms of the aforesaid written agreements. TW received two payments from SSI in the amounts of R80 925,94 and R76 191,60. A total of approximately R13,7 million was paid by the Department to SSI. However, it refused to make any further payments. TW and SSI sued for payment of the balance.

THE DECISION

In relation to the merits of TW's claim, first, it was contended on behalf of the MEC that the claim for payment for services rendered lay against SSI and not against the Province. It was submitted that this was so because in terms of both the main and subconsultancy agreements SSI undertook to pay TW. There was thus no contractual obligation on the part of the Province to make such or any payment to TW. TW's claim was also resisted on the basis that the Province had made no budgetary allocation for the road-rehabilitation programme in respect of which the written agreements were concluded. As a consequence, the Province was unable to withdraw the requisite funds from the Provincial Treasury to meet the financial obligations it had undertaken in terms of the agreement with SSI. Reliance was placed by the Province on sections 21(1)(b)(i) and 24(1)(a)(i) of the Public Finance Management Act (no 1 of 1999) (the PFMA).

It was clear that both written agreements were approved by the Department. If in fact the funds appropriated in terms of the Appropriation Act were insufficient to meet the totality of the Province's obligations in relation to its roads infrastructure programme and it was therefore unable to pay SSI, it did not mean that it would be free to simply avoid its contractual obligations. The outstanding commitment would then fall to be treated as unauthorised expenditure in terms of the PFMA and not irregular expenditure.

In the present case the stance adopted by the Province was that it had acted contrary to statutory prescripts, more particularly, that it had failed to appropriate funds. However, this was not the case. The Province failed to take any subsequent remedial steps and it completely ignored the hardships it had caused for those with whom it had contracted. It accepted and retained the advantages it gained through the work done and services rendered by those contractors and steadfastly refused to take any steps to ensure that they received the compensation that was their due.

The Province had shown no grounds on which it was entitled to withhold payment.

In the present instance TW performed work for the benefit of the Department, for which it invoiced SSI, which, in turn, invoiced the Department for the same amount in respect of the same work. It is perhaps necessary to reiterate that the Province knew that environmental services could only be provided by a subconsultant. It approved the appointment of that particular subconsultant. In terms of clause 5.1.3 of the main agreement, the Province had undertaken to SSI to pay the subconsultant's fees in addition to its (SSI's) own fees. It received the benefit of the services of TW. It is also not without significance that the MEC represents a government department which, in terms of constitutional prescripts, is required to be accountable. SSI has been joined in these proceedings, which it has chosen not to oppose. All interested parties were therefore before this court. The MEC has failed to raise any justification for its failure to pay TW through the conduit of SSI. The court below ordered the MEC to effect payment of the sum of R 1 540 123,54 to TW (para 1 of its order). And, in para 2 (albeit wrongly couched as an alternative to para 1) it ordered that such payment be effected via SSI. There is therefore no reason in principle to interfere with those orders of the High Court.

JOROY 4440 CC v POTGIETER N.O.

A JUDGMENT BY REINDERS J
FREE STATE DIVISION,
BLOEMFONTEIN
28 JANUARY 2015

2016 (3) SA 465 (FB)

A consumer must exhaust all other remedies available to it before proceeding to sue in court in terms of the Consumer Protection Act (no 68 of 2008).

THE FACTS

Joroy 4440 CC brought an application for a refund of the full purchase price of a motor vehicle that it bought from a trust represented by Potgieter. The application was based on sections 55 and 56 of the Consumer Protection Act (no 68 of 2008) dealing with the consumer's right to good-quality goods.

Potgieter objected to the application on the grounds that the court did not have jurisdiction because of section 69 of the Act. It provides that a person may seek to enforce any right in terms of this Act or in terms of a transaction or agreement, or otherwise resolve any dispute with a supplier, by (a) referring the matter directly to the Tribunal, if such a direct referral is permitted by this Act in the case of the particular dispute, (b) referring the matter to the applicable ombud with jurisdiction, if the supplier is subject to the jurisdiction of any such ombud, (c) if the matter does not concern a supplier contemplated in paragraph (b) (i) referring the matter to the applicable industry ombud, accredited in terms of section 82(6), if the supplier is subject to any such ombud, or (ii) applying to the consumer court of the province with jurisdiction over the matter, if there is such a consumer court, subject to the law establishing or governing that consumer court, (iii) referring the matter to another alternative dispute resolution agent contemplated in section 70, or (iv) filing a complaint with the Commission in accordance with section 71, or (d) approaching a court with jurisdiction over the matter, if all other remedies available to that person in terms of national legislation have been exhausted.

Potgieter contended that as Joroy had not exhausted all other remedies as referred to in sub-section (d) the court could not hear the application brought by Joroy.

THE DECISION

The wording of the section was clear and unambiguous. It was specifically stated that the consumer could approach the court if all the aforementioned avenues of redress had been exhausted. The legislature was very specific in prescribing the redress that a customer has in terms of this section. No other interpretation could be given to the word 'if'.

The dispute resolution mechanisms available to an aggrieved consumer in terms of section 69(a), (b) and (c) of the Act included referring the matter directly to the Tribunal, to the applicable ombud with jurisdiction, to the applicable industry ombud, accredited in terms of section 82(6), to the consumer court, alternative dispute resolution and filing a complaint with the Commission. In the case of the motor industry an ombud in terms of s 82(6) had been accredited. The Motor Industry Ombudsman of South Africa deals specifically with dispute resolutions between consumers and the motor industry.

It was held in Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) that where a specialised framework has been created for the resolution of disputes, parties must pursue their claims primarily through such mechanisms. Accordingly, it was incumbent on Joroy to have done so before approaching the court of relief.

The application was dismissed.

TSHWANE CITY v MITCHELL

JUDGMENT BY BAARTMAN AJA (MPATI P, BOSIELO JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
29 JANUARY 2016

2016 (3) SA 231 (SCA)

Property

A municipality may 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

In holding that the council's security over the property (the stautory hypothec) had been extinguished by the sale in execution and subsequent transfer of the property, the court a quo distinguished the present matter from the decision in City of Tshwane v Mathabathe 2013 (4) SA 319 (SCA) on the basis that in that case the property was sold, 'not at a sale in execution, but by public auction on behalf of the mortgagor'.

The distinction was not justified. If a limited duration of the hypothec created by section 118(3) was ever contemplated in respect of property purchased at a sale in execution, the legislature would have made provision for it. It did not do so and the exception contained in Voet 20.1.13 could not be read into that section. No distinction could therefore be drawn between property sold either at a sale in execution or in a private sale when considering the question whether the statutory hypothec created by section 118(3) survives transfer. It followed that the court below erred in concluding that the council's statutory hypothec had been extinguished by the sale in execution.

VAN DEVENTER v NEDBANK LTD

A JUDGMENT BY ROGERS J
(NUKU AJ concurring)
WESTERN CAPE HIGH COURT
30 MARCH 2016

2016 (3) SA 622 (WCC)

Prescription

The reference to a company in section 13(1)(g) of the Prescription Act (no 68 of 1969) includes a reference to a close corporation.

THE FACTS

In August 2006 Van Deventer and the other appellant signed suretyships in favour of Nedbank Ltd for the debts of J and B Biltong CC (JBB). During March 2008 JBB was placed in liquidation. Nedbank issued summons against the sureties in July 2012. The summons was duly served at the domicilium citandi et executandi on 13 July 2012. Because the sureties had left that address they were unaware of it. The bank obtained default judgment on 13 December 2012 on claims of R65 249,70, R294 788,89 and R163 277,08, together with interest from 5 March 2012.

The sureties alleged that they learnt of the default judgment during a meeting between Van Deventer and a representative of the bank on 17 September 2013. On 30 September 2013 they delivered a rescission application.

They alleged that the debts against them had arisen more than three years prior to 14 November 2008, so that section 13(1)(g) of the Prescription Act (no 68 of 1969) did not avail the bank. They also alleged that more than one year had elapsed since the relevant impediment had ceased as contemplated in section 13(1)(i) of the Prescription Act.

Section 13(1)(g)(i) of the Prescription Act provides that if the debt is the object of a claim filed against a company in liquidation, the relevant period of prescription would, but for the provisions of the subsection, be completed before or on, or 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.

To render section 13(1)(g) inapplicable, the sureties had to show that prescription began to run against JBB, and thus against them, prior to 26 October 2006. They did not allege any facts in support of such a conclusion. However, the question arose whether or not in the light of the authority of *Shackleton Credit Management (Pty) Ltd v Scholtz* [2011] ZAWCHC 494, the section does not apply to close corporations.

THE DECISION

Shackleton held that the section does not apply to close corporations. Close Corporations as entities did not exist before the enactment of the Close Corporations Act in 1984. They therefore did not exist as entities at the time when the Prescription Act was passed.

At this time, the legislature could not rationally have intended to exclude corporate entities such as close corporations from the scope of section 13(1)(g). This conclusion was possible having regard to the lawmaker's intent and purpose as they appear from section 13(1)(g) and to the absence of any material distinction between the sequestration of individuals and liquidation of companies, on the one hand, and the liquidation of close corporations, on the other. Close corporations fell within 'the same genus of facts' as those to which the lawmaker's expressed policy has been formulated. The filing of claims against liquidated close corporations is not 'different in kind or dimension' from the filing of claims against sequestrated individuals and liquidated companies.

In order to avoid irrational and thus unconstitutional differentiation, section 13(1)(g) should be construed as being applicable to close corporations if its language reasonably permits. 'company' in section 13(1)(g) is indeed capable of being interpreted liberally so as to include a close corporation.

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

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

2015 SACLR 338 (SCA)

Companies

A binding offer made in terms of section 153(1)(b)(ii) of the Companies Act (no 71 of 2008)

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.

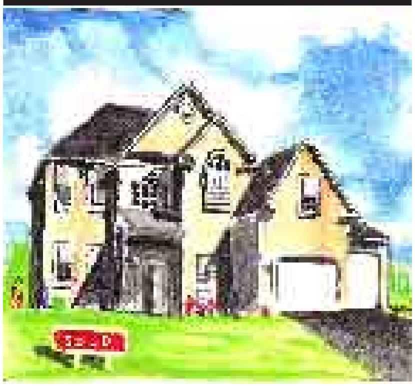
In the present case, the offer fell short of providing the information required in terms of section 150 of the Act. There was a failure to provide updated financial statements. The true state of Kariba's affairs as at January 2012 and its anticipated operations could not be established without an update 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.

BSB INTERNATIONAL LINK CC v READAM SOUTH AFRICA (PTY) LTD

A JUDGMENT BY PONNAN JA and SWAIN JA (VICTOR AJA and KATHREE-SETILOANE AJA concurring)
SUPREME COURT OF APPEAL
13 APRIL 2016

2016 (4) SA 83 (SCA)

Property



A court has a discretion to order partial demolition of a building constructed in contravention of a town planning scheme. When making such an order, the court should be satisfied that the illegality in question is capable of being addressed by such an order and that it is practically possible to do so.

THE FACTS

BSB International Link CC commenced the construction of a building comprising new retail and office space on its property. The property was subject to the Sandton Town Planning Scheme, 1980. In respect of the development, the maximum coverage of the property by a building could not exceed 60%.

Readam South Africa (Pty) Ltd alleged that BSB had not obtained building plans and the coverage of the building exceeded 60%. It based the allegation inter alia on the evidence of a town planner that the coverage of the property by the building as at April 2013 was at least 80%. BSB responded to this in its answering affidavit by denying the allegation and asserting that the evidence was inadmissible.

Readam's evidence was also that of a land surveyor who measured the coverage of the site by the building as at October 2013 and found this to be 853,58 square metres or 86,13% of the total area of the property.

Readam brought an application reviewing and setting aside any approval of building plans by the City of Johannesburg Metropolitan Municipality inconsistent with the Sandton Town Planning Scheme.

The High Court granted an order that the building was being erected without the prior approval of building plans by the City of Johannesburg Metropolitan Municipality in terms of section 7 of the National Building Regulations and Building Standards Act (no 103 of 1977). It also gave an order that BSB be directed to partially demolish the building erected on the property so as to ensure that such building shall be fully compliant with the coverage limit of 60% imposed by the Scheme. It also dismissed a counter-application brought by BSB in which it claimed it was prejudiced in its defence of the main application, by the inadequate record furnished by the municipality. The counter-application was dismissed.

On appeal, BSB contended that the order of the High Court should be set aside and replaced with one compelling discovery by the municipality, and the matter thereafter enrolled when the municipality had complied with that order.

THE DECISION

BSB submitted that it did have approved building plans. But, if the municipality had purported to approve the plans despite the fact that the scheme had not been complied with in respect of either coverage or parking, the approval would contravene section 7(1)(a) of the Act, and Readam would have been entitled to an order reviewing and setting aside the approval. It followed that the purported approval of the plans by the municipality should be reviewed and set aside.

In response to the evidence presented by Readam, nothing had prevented BSB from accessing and placing the record before the court. No basis was given as to why it was contended that the evidence, which was confirmed by Wilkens in a supporting affidavit, was inadmissible. The record, such as it was, must have been available to BSB, consisting, as it must have, in the main, of documents that it would have supplied to the municipality. It would therefore amount to an exercise in futility to accede to BSB's request that the order of the High Court be set aside and that the municipality be compelled to make discovery.

Given the fact that BSB was

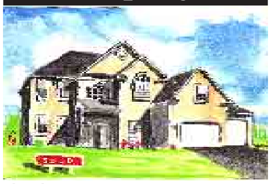
warned that it was acting illegally and, in spite of such warning, deliberately persisted, and attempted to delay finalisation of the litigation while pressing ahead with its illegal conduct, the order granted by the High Court, which directed that the property be demolished to the extent necessary to ensure compliance with the scheme, could not be faulted.

In a case such as the present one, a court has a broad general discretion to be exercised after affording due consideration to all the relevant circumstances. Before granting a partial demolition order a court would have to be satisfied that the illegality complained of is capable of being addressed by such an order and that it is practically possible to do so. Depending on the circumstances, this may require evidence to be given by experts such as engineers and architects to ensure that the structural integrity and safety of the building are not compromised when partially demolished. Accordingly para 4 of the order of the High Court, which declared that no partial demolition of the building was to take place unless and until building plans had been approved by the municipality, should be amended to include a further requirement that an engineer must certify that partial demolition will not impair the structural integrity and safety of the building or adjacent buildings.

What tips the scales against BSB is that it was warned that it was acting illegally and, in spite of such warning, it deliberately persisted. If anything, it engaged in obfuscatory behaviour to delay finalisation of this litigation while pressing ahead with its illegal conduct. Such conduct can hardly be countenanced by a court. To do so will make a mockery of ordered town planning and by extension the law. The order granted by the court a quo, which directed that the property be demolished to the extent necessary to ensure compliance with the scheme, can accordingly not be faulted.

That conclusion notwithstanding, it is nonetheless necessary to observe that if the municipality had properly performed its functions and approached the court in terms of s 21 of the NBSA, the court would, on the strength of Lester, have been obliged to grant an order of total demolition. If Lester is correct, a stark dichotomy would exist between our common law and our statutory law in respect of substantially the same remedy. For, in terms of the former, a court would have a broad general discretion, whilst, in terms of the latter, a court would have no discretion. Several important factors appear not to have received due consideration in the interpretive exercise undertaken in Lester.

PA PEARSON (PTY) LTD v ETHEKWINI MUNICIPALITY



A JUDGMENT BY MARKS AJ
KWAZULU NATAL LOCAL DIVISION, DURBAN
2 DECEMBER 2015

2016 (4) SA 218 (KZD)

A municipality is entitled to credit an account for the provision of services relating to one property from money received in another account for the provision of such services which is held by the same account holder in respect of another property.

THE FACTS

PA Pearson (Pty) Ltd owned a property which was occupied by Microfinish Manufacturing (Pty) Ltd. Microfinish held an account with the Ethekwini Municipality for the supply of utilities to this property. It held a second account with the municipality for the supply of utilities to another property which was owned by Cherokee Rose 164 CC.

As at 17 November 2011 Microfinish was indebted to the municipality in the sum of R1 700 000 in respect of Pearson's property and R1 400 000 in respect of the property owned by Cherokee Rose. The municipality credited payments made by Microfinish in respect of the Pearson property to the indebtedness of Microfinish in respect of the property owned by Cherokee Rose, thereby extinguishing the indebtedness of Microfinish in respect of electricity services on the property owned by Cherokee Rose.

The debt owed by Microfinish in respect of the account for the Pearson property was still due and owing. However, Microfinish was unable to make payment due to its liquidation. On 12 March 2012 Pearson made payment to the municipality in the sum of R2 742 191,02. This included the amount of R1 431 442,88 that had been previously transferred to the account of the Cherokee Rose property. It paid this amount under protest. Pearson sought reimbursement.

The municipality contended that it had been entitled to credit the account relating to the Cherokee Rose property with the money paid in respect of the Pearson property.

THE DECISION

The crisp issue between the parties was whether section 102(1)(b) of the Municipal Systems Act (no 32 of 2000) empowered the municipality to credit payments made by an individual account holder to any other account of that account holder held with the municipality.

Section 102(1)(b) of the Municipal Systems Act provides that a municipality may credit a payment by a person liable for payments to a municipality against any account of that person.

Section 102 read together with the other provisions of chapter 9 of the Act undoubtedly gives powers to municipalities to enable them to collect all moneys that are due and payable to them in the most cost-effective manner. There is a clear legislative need for the municipality to efficiently collect moneys due to it by means of the powers afforded to it.

On a plain reading of the provisions of section 102(1) of the Act the municipality has the power to consolidate separate accounts as envisaged by sub-section (a) and to credit a payment made by a person to any other account held by that person, as envisaged by sub-section (b). The section is not ambiguous and the meaning of the words used is clear. The municipality is entitled to credit payments made to any account held by a customer to another account of the customer.

Pearson argued that the power conferred upon the municipality in terms of sub-section (b) could not have been intended to allow the municipality to change credits as it chooses. However, the contention that the ordinary meaning of sub-section (b) does not authorise the municipality to

reallocate amounts or chop and change credits as it chooses is directly contradicted by the provisions of the sub-section. If the municipality is entitled to credit payments made, that would by necessity involve the movement of a payment from one account to another account. That is precisely what the Municipality had done in the present matter.

Having regard to the language of s 102 of the Act, the following is clear from a plain linguistic interpretation: section 102(1)(a) deals with the consolidation of any separate account of any persons liable to pay the municipality. The effect of consolidation is that the various accounts of an individual are consolidated into a single account. The account holder is then presented with an account which has various components, such as electricity, water and rates. The account holder is not permitted to pay part of the account but is required to pay the whole account subject to s 102(2) of the Act. In other words the account holder cannot choose or opt to pay part of an account.

SINGH v MOUNT EDGECOMBE COUNTRY CLUB ESTATE MANAGEMENT ASSOCIATION (RF) NPC

Property

A JUDGMENT BY TOPPING AJ
KWAZULU NATAL LOCAL DIVISION, DURBAN
4 FEBRUARY 2016

2016 (5) SA 134 (KZD)

A property owner's membership of a property association involves its agreement to abide by the rules made by the directors of that association in accordance with the association's memorandum of incorporation.

THE FACTS

Singh owned property on the Mount Edgecombe Country Club Estate. The Mount Edgecombe Country Club Estate Management Association was an association of all the homeowners on the estate and the management association which regulated the affairs of the estate. Being a property owner, Singh was a member of the Association and had agreed to be subject to the conditions set out in its memorandum of incorporation. The memorandum empowered the directors to make rules applicable within the estate in relation to such matters as the use and maintenance of land, common open spaces, recreational areas, roads, and the design and development rules for the erection of all buildings and other structures.

The directors made rules empowering nominated persons to carry out the functions of traffic officers or peace officers as defined in the National Road Traffic Act (no 93 of 1996) on public roads within the estate and empowering the Association to enforce the provisions of that Act. Secondly, they made rules restricting which contractors owners and residents could utilise in effecting building alterations, additions and repairs to their unit, the landscaping of their gardens and the ordinary garden maintenance thereof. Thirdly, they made rules restricting the hours of work that the domestic workers employed by the owners and residents of units within the estate had to adhere to as well as preventing domestic employees from freely walking on the public roads within the estate. Fourthly, they restricted the right of access to the estate by owners and residents.

Singh challenged each of these rules. He contended that the Association had not been authorised to reduce the speed limit on the public roads within the estate to one lower than the general speed limit as prescribed by the Minister of Transport. He also submitted that the Association's alteration of the speed limit would only be valid if an appropriate traffic sign has been erected and that no such traffic signs had been put up on the roads servicing the estate. In consequence, the issuing fines to persons caught travelling at a speed in excess of the prescribed 40 kilometres per hour limit within the estate, was unlawfully usurping the functions of traffic and other peace officers under the National Road Traffic Act.

As far as the second challenge was concerned, Singh contended that these rules effectively excluded a resident or owner from choosing his or her service providers, as they were not allowed to utilise contractors who did not appear on the Association's list of accredited contractors.

As far as the third challenge was concerned, Singh contended that conduct rules provided that domestic employees are only allowed to walk on the roads of the estate when the bus service provided for domestic employees is not available. This bus service was provided from Monday to Saturday at set times in the morning and afternoon. In consequence, domestic employees could not otherwise walk on the public roads within the estate.

THE DECISION

The objects of the Association, as contained in its memorandum of incorporation were to 'promote, advance and protect the interests' of its members, to 'provide a united voice for which such interest may be expressed',

to ‘accept the conservation areas, communal facilities and open spaces on the Estate and to make and enforce regulations governing the use thereof’, to ‘preserve the natural environment, vegetation and fauna within the conservation area’, to ‘provide security within the Estate and make and enforce regulations in this regard’ and to ‘enforce adherence to the Design and Development Rules and Landscaping Philosophy for the Estate’.

There was nothing in the rules which provided for any consequence flowing from non-compliance with the rules by a third party who had gained access to the estate in a manner other than through the authority of a resident. The control of the speed limit within the estate therefore fell squarely within the provisions of the contract concluded between the Association and the owners of the properties within the estate. It followed that the Association was not endeavouring to control the conduct of all persons entering the estate or to impose the provisions of the National Road Traffic Act upon those persons. The rules themselves provided that the roads within the estate in fact fell within the jurisdiction of the National Road Traffic Act. It followed that the authority of the peace officers, within whose exclusive domain the enforcement and prosecution of any contraventions of that Act are entrusted, was also recognised.

Given the objects of the Association, it could not be said that the prescribing of a lower speed limit within the estate than that prescribed by national legislation went beyond promoting, advancing and protecting the interests of the Association’s members or was unreasonable. This was especially so considering the presence of children, pedestrians and animals in the immediate vicinity of the roads themselves.

The directors were given the authority to make reasonable rules for the management, control, administration, use and enjoyment of the estate. Every aspect of construction or landscaping undertaken on the estate was controlled by and undertaken with the prior approval of the Association. The obvious reason for this was to give effect to the residents’ professed desire to ‘live together, reasonably and harmoniously, without interfering with others’ lawful use and enjoyment of the environment’ within the estate. This control by the Association ensured that the buildings and gardens on the estate were aesthetically harmonious and that any alterations or new construction will not run counter to what had gone before. With this concept in mind there was no reason why the Association would not seek to ensure that the standard of construction and landscaping that took place on the estate conformed to the agreed standard. The only way to ensure that the required standard was met was to ensure that the contractor or landscaper concerned was competent and able to carry out the works approved by the Association in a proper manner. The only way to do this was to ensure that the contractor or landscaper was either accredited by a recognised authority or had, through prior conduct, shown that it was so competent.

As far as access by employees was concerned, the rules merely prescribed a set of procedures to ensure an orderly ingress and egress of domestic employees onto and off the estate and efficient transportation to and from their places of employment. Given the interpretation placed on the rules under consideration, they could not be considered to be unlawful. They were there to regulate conduct between neighbours and in so doing must, of necessity, be restrictive in nature so as to always take into account the cumulative rights of use and enjoyment of the estate by all its residents. The rules had been agreed upon by all the residents of the estate in order to ‘maintain a structure within which residents could feel secure as regards the environment into which they had bought.

The rules were not unlawful and had to be given effect to.

BUSINESS PARTNERS LTD v TSAKIROGLOU

A JUDGMENT BY LE GRANGE J
WESTERN CAPE DIVISION
17 SEPTEMBER 2015

2016 (4) SA 390 (WCC)

Suretyship

The main purpose of the moratorium in section 133(2) of the Companies Act (no 71 of 2008) is to allow business practitioners to formulate a business rescue plan to achieve the purpose of the process in restructuring the affairs of the company or close corporation. The fact that the benefits thereof are not available to a natural person is therefore constitutionally unobjectionable.

THE FACTS

Tsakiroglou was indebted to Business Partners Ltd, under a deed of suretyship concluded by him, for the debts of Target Shelf 284 CC. Target Shelf was the subject of a business rescue plan which had been rejected by Business Partners.

Tsakiroglou's estate was placed under provisional sequestration. Tsakiroglou resisted the granting of a final order by bringing a counter-application in which he claimed an order that the provisions of section 133 of the Companies Act (no 71 of 2008) be declared to be unconstitutional and in conflict with the provisions of the Constitution of the Republic of South Africa, 1996, in that the section precludes legal proceedings against a company or close corporation during business rescue proceedings, but does not preclude legal proceedings, alternatively insolvency proceedings, against a guarantee or surety of the same company or close corporation during such business rescue proceedings

Tsakiroglou contended that as a surety he was entitled to the benefit of the statutory moratorium afforded under section 133(2) of the Companies Act. The section provides that during business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

THE DECISION

The first enquiry was whether section 133(2) did differentiate between people or categories of people. If it did differentiate, then in order not to fall foul of the provisions in section 9 of the Constitution there had to be a rational connection between the differentiation in question and the legitimate governmental purpose it was designed to achieve.

There was indeed differentiation, albeit between natural persons and juristic persons, in a sense that the moratorium in section 133(2) was available only to companies and close corporations and not to natural persons. However, the differentiation bore a rational connection to a legitimate government purpose. The main purpose of the moratorium was to allow business practitioners, in conjunction with the creditors and other affected parties, to formulate a business rescue plan to achieve the purpose of the process in restructuring the affairs of the company or close corporation. The differentiation between natural persons and juristic persons clearly served a legitimate government purpose. The criteria applied by the legislature to achieve this differentiation were not arbitrary but served a particular purpose.

This expressed purpose could not find any application insofar as natural persons were concerned, because the statutory moratorium in favour of the company undergoing business rescue proceedings was a defence in personam and as such the statutory moratorium in favour of the company did not avail the surety.

In any event in terms of the suretyship, Tsakiroglou bound himself in favour of Business Parnters as surety and a co-principal debtor in solidum with Target Shelf. It was therefore entitled to proceed against Tsakiroglou the moment that Target Shelf defaulted. Tsakiroglou's liability had nothing to do with the moratorium imposed by section 133(2) of the Act.

CHILIZA v GOVENDER

A JUDGMENT BY TSHIQI JA
(PILLAY JA, SWAIN JA,
DAMBUZA JA and TSOKA AJA
concurring)
SUPREME COURT OF APPEAL
31 MARCH 2016

2016 (4) SA 397 (SCA)

Insolvency

It is necessary to serve a provisional order of sequestration on the South African Revenue Service prior to applying for a final order, although a court may exercise its discretion to require such service prior to granting such an order.

THE FACTS

On 17 February 2012 Govender obtained a provisional order of sequestration against Chiliza, returnable on 15 March 2012. A copy of the petition was served on the South African Revenue Service on 16 February 2012 in compliance with the provisions of s 9(4A) of the Insolvency Act (no 24 of 1936). On 9 July 2012 a final order of sequestration was granted.

Chiliza then brought an application for the rescission of the final order on the basis that the provisional order of sequestration was not served on SARS as contemplated in terms of section 11(2A)(c) of the Act. The section provides that a copy of the rule nisi must be served on the South African Revenue Service.

THE DECISION

The provisions of section 11(2A) are couched in peremptory terms. The Act prescribes the filing of an affidavit as the most effective way to satisfy a court that the petition has been ‘made available in a manner reasonably likely to make [it] accessible’ to the listed parties. It is not surprising that section 11(2A) does not contain a similar requirement because the term ‘serve’ usually denotes personal service or ‘legally delivered, ie delivered in accordance with the law so as to notify the person on whom it is served of its contents’ to the party itself or its representative, and is usually easy to prove through a return of service, a stamp or a signature of the recipient. It is only in rare circumstances, usually when proof of service is not apparent on the face of the document, that a court would require an affidavit to prove service. The import of the requirement of an affidavit in s 9(4A) therefore is to provide conclusive proof of compliance with the provisions of the Act, and the fact that s 11(2A) does not require an affidavit to be filed, whilst s 9(4A)(b) does, has no bearing on the peremptory nature of the two provisions.

Section 12 deals with factors to be taken into account before the court grants a final order of sequestration and thus deals with the substance of the application and not the procedural requirements. However, it does not set out an exhaustive list of all the relevant factors, and the fact that it does not explicitly state that the court should take into account the non-service of a provisional order of sequestration when it exercises its discretion whether to grant a final order does not alter the peremptory nature of section 11(2A). The only relevant connection between section 11(2A), and its interpretation, to section 12 is that section 12 requires the court to consider, as one of the factors, whether it is to the advantage of the creditors that a final order of sequestration should be granted. Whether a provisional order was served on SARS, which is a preferential creditor in terms of the Act, must be one of those factors. This must be so because any tax for which the insolvent was liable for, in respect of any period prior to the date of sequestration of the estate, is due. And if a provisional order of an impending sequestration is not served on SARS, there is a risk that any amounts due would remain uncollected.

The final order of sequestration was set aside. The estate was placed under provisional sequestration and a rule nisi was issued.

GRAINCO (PTY) LTD v VAN DER MERWE

A JUDGMENT BY PLASKET AJA (PONNAN JA, WALLIS JA, MBHA JA and MATHOPO JA concurring)
SUPREME COURT OF APPEAL
30 MARCH 2016

2016 (4) SA 303 (SCA)

Competition

An interdict cannot be granted prohibiting a party from trading with former customers of a competitor who have already switched their business to that party, even if the switch occurred pursuant to unlawful canvassing of the customers by that party.

THE FACTS

Van der Merwe and Kitshoff established an agricultural trading and logistics business in May 2000 through a company known as Old GrainCo. In terms of an agreement signed on 15 February 2007, Old GrainCo sold its business and all its assets to BKB Ltd with effect from 1 October 2006 (the effective date of the agreement). The sale included the businesses conducted as divisions of Old GrainCo as well as Old GrainCo's shares in a subsidiary. Goodwill was one of the assets listed in the schedule of assets sold. The purchase price was R28 450 430.

BKB immediately on-sold the business and assets to GrainCo (Pty) Ltd on loan account for the same price. Van der Merwe and Kitshoff took up employment with GrainCo, although this was not mentioned in the amalgamation agreement and was not a condition to which it was subject. Service contracts were executed and Van der Merwe was employed as GrainCo's managing director and Kitshoff as the head of its trading division. They were both appointed as directors of GrainCo.

In terms of clause 12.2 of the agreement, Old GrainCo, Van der Merwe and Kitshoff agreed with BKB that none of them would during any of the years of the restraint period be interested in any entity which is interested in any competitive activity in the territory or themselves be interested in any competitive activity in the territory, during any of the years of the restraint period do anything outside the territory which had the effect of causing BKB prejudice in the territory, during any of the years of the restraint period canvass any customer and/or client of BKB for or on behalf of any entity in which they are interested, or on their own behalf, or at any time disclose the confidential information.

The service contracts concluded by Van der Merwe and Kitshoff made clause 12 of the amalgamation agreement applicable to their employment.

On 30 April 2013 Kitshoff and others gave notice of their resignations. They all joined a new trading venture established by Van der Merwe, which began business on 1 June 2013. The vehicle for the new business was Perdigon.

Grainco sought an order restraining Van der Merwe and Kitshoff and Perdigon from soliciting its customers, passing off Perdigon as being associated with GrainCo, unlawfully interfering in GrainCo's contractual relations and publishing injurious falsehoods.

THE DECISION

The seller of goodwill is prohibited from taking it back by canvassing for the old business's customers was accepted as correct in Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A). In that case Becker, in his personal capacity and as a director of his company, A Becker & Co (Pty) Ltd, sold the business of the company, inclusive of the goodwill, and bound himself to a restraint of trade. In terms of the sale agreement, the purchaser acquired the right to the use of the name of the company (as happened with GrainCo in the present case) and the original seller changed its name, while the purchaser became A Becker & Co (Pty) Ltd. When the restraint of trade had expired, Becker began to approach former customers with a view to soliciting their business. It was there held that if

a seller disposes of the goodwill of a business he may not thereafter act contrary to the sale.

This principle can only be invoked in relation to a seller of a business. It was clear from the amalgamation agreement that the only parties to the sale of old GrainCo were it and BKB. Unlike in the Becker matter, in which Becker was a party to the sale of the business, both personally and in a representative capacity, Van der Merwe and Kitshoff were not parties to the sale in this case. They could accordingly not be bound by an implied term of the agreement. The appeal had to fail.

During the course of the proceedings in the court below, the implied prohibition against the canvassing of clients was referred to as the Trego prohibition. This was a reference to the leading English case of
Trego and Another v Hunt in which Lord Macnaghten set out the basis for the prohibition and its contours when he stated:

'And so it has resulted that a person who sells the goodwill of his business is under no obligation to retire from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But, then, how far may he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage-ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not I think to be excused by any maxim of public policy.'

MAKATE v VODACOM LTD

A JUDGMENT BY JAFTA J (MOGOENG CJ, MOSENEKE DCJ, KHAMPEPE J, MATOJANE AJ, NKABINDE J and ZONDO J concurring, WALLIS AJ (CAMERON J, MADLANGA J and VAN DER WESTHUIZEN J dissenting in part)
CONSTITUTIONAL COURT
26 APRIL 2016

2016 (4) SA 121 (CC)

Prescription

A claim that a party comply with its obligation to negotiate in good faith cannot be considered to be a debt due by that party, and accordingly the claim cannot prescribe in terms of the Prescription Act (no 68 of 1969).

THE FACTS

Makate and Mr P Geissler, the director of product development and management at Vodacom Ltd, negotiated and agreed that Vodacom would use Makate's idea to develop a new product which would be put on trial for commercial viability. If the product was successful then Makate would be paid a share in the revenue generated by it. The parties deferred their negotiations on the amount to be paid to Makate to a later date. However, they agreed that in the event of them failing to agree on the amount, Vodacom's chief executive officer would determine the amount.

Based on Makate's idea Vodacom developed a new product called *Please Call Me*. This product enabled a cellphone user with no airtime to send a message to the other cellphone user, asking her to call him. The new product elicited excitement at Vodacom and the inventor of the idea on which it was built was praised for his innovative thinking. The new product was regarded by Vodacom to be the first of its kind in the world, and declared its success.

Approximately two and a half years after the launch of the product, Makate left Vodacom's employ. Vodacom denied that he was the originator of the *Please Call Me* product. Makate instituted action to enforce his agreement with Vodacom, some four years after the launch of the *Please Call Me* product. He sought an order directing Vodacom to comply with its obligations under the parties' oral agreement, alternatively the development of the common law in terms of section 39(2) of the Constitution and to infuse it with constitutional values of ubuntu and good faith. Flowing from the alternative claim, the applicant , Makate sought an order directing Vodacom to enter into good-faith negotiations with him, to determine a reasonable remuneration payable to him for the use of his idea in developing the *Please Call Me* service.

Vodacom contended that Makate's claim had prescribed in terms of section 11(d) of the Prescription Act. It also contended that in terms of Makate's employment contract, the Please Call Me idea was Vodacom's property for which Makate was not entitled to compensation. Vodacom disputed the existence of the agreement, and contended that Geissler did not have actual or ostensible authority to enter into the agreement on its behalf.

THE DECISION

When account is taken of Geissler's position as a member of the board, it appeared that he had authority to negotiate all issues relating to the introduction of new products at Vodacom. Those issues included agreements under which the new products would be tested before approval by him and, once approved, the agreement in terms of which the new product would be acquired by Vodacom and the amount to be paid for it. Owing to his technical skills, he was best placed to determine the worth of a new product.

Makate had established that Geissler had apparent authority to bind Vodacom. This finding made it unnecessary to consider whether the common law should be developed.

As far as the prescription issue was concerned, section 10(4) of the Prescription Act (no 68 of 1969) provides that a debt shall be extinguished after the lapse of the relevant prescriptive period,

which in the present case was three years. The term ‘debt’ is not defined in the Act, but in the context of section 10(1) it has a wide and general meaning, and includes an obligation to do something or refrain from doing something. On this construction, it could be held that every obligation, irrespective of whether it is positive or negative, constitutes a debt as envisaged in section 10(1). This in turn means that any claim that requires a party to do something or refrain from doing something, irrespective of the nature of that something, amounts to a debt that prescribes in terms of s 10(1). Under this interpretation, a claim for an interdict would amount to a debt.

It could not be disputed that section 10(1) read with sections 11 and 12 of the Prescription Act limits the rights guaranteed by section 34 of the Constitution. Therefore, in construing those provisions, a court is obliged to follow section 39(2) of the Constitution, irrespective of whether the parties had asked for it or not. This is so because the operation of s 39(2) does not depend on the wishes of litigants. The section provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

The Constitution in plain terms mandates courts to invoke the section when discharging their judicial function of interpreting legislation. That duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights. In the present circumstances it was not necessary to determine the exact meaning of ‘debt’ as envisaged in section 10 because the claim fell beyond the scope of the word as understood to be an obligation to pay money, deliver goods or render services. Here, Makate did not ask to enforce any of these obligations. Instead, he requested an order forcing Vodacom to commence negotiations with him for determining compensation for the profitable use of his idea. It followed that a debt contemplated in section 10 of the Prescription Act did not cover Makate’s claim. Therefore, the claim did not prescribe.

MONEYWEB (PTY) LTD v MEDIA 24 LTD

A JUDGMENT BY BERGER AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
5 MAY 2016

2016 (4) SA 591 (GJ)

Copyright

Section 12(8)(a) of the Copyright Act (no 98 of 1978) does not apply to original works, even if these constitute news of the day.

THE FACTS

Moneyweb (Pty) Ltd published seven articles on the internet. The content of the articles was based on press releases, statements made at press conferences, and media visits to and interviews with parties who were the subject of the articles.

Moneyweb alleged that Media 24 Ltd had copied the articles and published them on its own internet web site.

Media 24 denied the allegation and contended that the articles were not original. It contended that if they were found to have been original, it had not copied a substantial portion of them. It also contended that Moneyweb could not assert copyright in the articles because section 12(8)(a) of the Copyright Act (no 98 of 1978) applied. The section provides that no copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.

THE DECISION

Three of the articles were original in that they were not slavish copies of their sources. As far as section 12(8)(a) was concerned, the exemption it provides for is not limited to official texts of a legislative, administrative or legal nature. It covers also speeches of a political nature [and] speeches delivered in the course of legal proceedings, thus extending to literary works not produced by government. ‘Speeches’ in this context means speeches that have been reduced to material form.

‘news of the day’ means current news. There is no reason why the phrase should be limited to a 24-hour news cycle. However, it is clear from the words used that s 12(8)(a) is not intended to apply to all ‘news of the day’ but only to ‘mere items of press information’. The subsection does not exempt from copyright protection all current news articles. Section 12(1)(c)(i) of the Act deals with that issue.

The use of the word ‘mere’ does not qualify the ‘items of press information’. According to The Concise Oxford Dictionary of Current English, the word ‘mere’ is an adjective meaning ‘that is solely or no more or better than what is specified’. On this view the word does not add or take away anything; it simply underlines that which is specified.

these ‘items of press information’ that are exempted from copyright protection? In my view this includes all information communicated to the media in material form or subsequently reduced to E material form. This would include, but not be limited to, press statements and press interviews concerning ‘news of the day’ which journalists, and anyone else, would be free to use, in whole or in part, without restriction and without authorisation being required from anyone.

Anyone who communicates information to the media intends that information to be put into the public domain. It is in the public interest that the general public be easily aware of information communicated to the media that is either already in the public domain or soon will be. In all of the articles except one, the items of information were given to the media with full knowledge that the information would be put into the public domain. The fundamental issue was whether any of the Moneyweb articles could be regarded as ‘news of the day that were mere items of press information'. The answer depended on whether the article was an original work or not. If it was, then the article would contain more than 'mere items of press information' because the author's contribution would have constituted more than mere copying. Section 12(8)(a) would not apply. On the other hand, if the Moneyweb article was not an original work, the article would be no more than a repetition of the 'news of the day that are mere items of press information'. Section 12(8)(a) would then apply. Accordingly, section 12(8)(a) of the Act did not apply to the three original articles.

Although Moneyweb could get no direct evidence from Ms Schnehage, it has put up more evidence in relation to Moneyweb 4 than in relation to the three previous articles. It is undisputed that the source of the article was a press release issued by Sotheby's International on 13 September 2012, the day before the article was published, a copy of which has been put up. Ms Schnehage also interviewed Ms Nina Smith of Sotheby's and sourced additional material. Ms Seggie wrote the headline and subheadline, and also edited the article.

[39] Although Moneyweb 4 contains more information than the press release, the difference is insubstantial. Indeed, it is quite trivial. The article is largely a copy of the press release. In my view, Ms Schnehage has not contributed enough to produce an original work. Accordingly I find that Moneyweb has not established that Moneyweb 4 is an original work.

ATTACHMATE CORPORATION v MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

A JUDGMENT BY BRAND JA (BOSIELO JA, MAJIEDT JA, PETSE JA AND MBHA JA concurring)
SUPREME COURT OF APPEAL
20 MAY 2015

2015 SACLR 367 (SCA)

An audit clause entitling the provider of software to determine the number of computers on which its software is installed as a means to obtain evidence

THE FACTS

Attachmate Corporation and Minister of Water and Environmental Affairs concluded two agreements, a license agreement and a maintenance agreement. In terms of the license agreement, the Department was given the capability, by means of software, for its employees to access data on a mainframe computer. In return, the Department was obliged to pay Attachmate a fee which was related to the number of computers on which its software was installed. In terms of the maintenance agreement, Attachmate undertook to provide maintenance and support required by the Department in respect of all licensed units, until the end of April 2006, at which point the agreement could, and was, renewed.

It came to Attachmate's attention that the Department made and installed additional copies of Attachmate's software without its consent. Attachmate then asserted its rights in terms of clause 11 of the license agreement. The clause provided that at Attachmate's request, an Attachmate representative could inspect and audit the Department's computers and records for compliance with the license agreement. If an audit revealed that the Department possessed unlicensed copies of the software, it would be obliged to pay Attachmate the applicable license fee for such unlicensed copies.

As a result of the inspection which took place in terms of this clause, Attachmate determined that there were unlicensed copies of its software on the Department's computers. It claimed payment of its fee in relation to these, as well as payment of a maintenance fee in respect of all the unlicensed copies, ie 1564, at the rate of R1 237 per copy, over a four-year period. This rate was in excess of that applicable to the licensed copies because Attachmate contended that it would have been entitled to the list price applicable to purchasers of its software, and not a discounted rate which applied to the licensed copies.

THE DECISION

The purpose of clause 11 was to provide Attachmate with a procedure to obtain evidence so as to determine whether unlicensed copies of its software had been made and, if so, how many. The exact number of unlicensed copies would in most cases be peculiarly within the knowledge of the licensee. Without a remedy in the nature of clause 11, Attachmate would potentially have great difficulty in establishing a claim for damages based on unlawful copying. Once the number had been established, the licensee would then have to pay the fee applicable to it. Attachmate need not prove any damages at all. That, I believe, was the purpose of clause 11. It was not intended to introduce a penalty. Thus understood, the clause was intended as a means in favour of Attachmate to facilitate proof of its claim for the damages it had suffered through unlicensed copying. It was not intended to enhance the quantum of its damages claim.

As far as the claim based on the maintenance agreement was concerned, this was in essence a claim for damages, not a claim for specific performance. Accordingly, Attachmate was entitled to payment in respect of the computers on which the unlicensed software was installed, as much as it was entitled to payment in respect of the computers on which the licensed software was installed. If the Department had complied with its obligations under the license agreement, it would have paid for not only the licensed copies, but the unlicensed copies as well. In terms of the maintenance agreement, maintenance fees were to be calculated on the basis of each licensed copy. Had the Department complied with the obligations under both agreements, the unlicensed copies would have become licensed copies, for which Attachmate would have received a maintenance fee at the agreed rate.

In order to place Attachmate in the position it would have occupied, in terms of both contracts, if the Department had complied with its contractual obligations, damages would have to be awarded to it which would be calculated on the basis of 1 564 at the agreed rate over a four year period. This entitled it to payment of R7 744 302.40.

According to the court a quo’s understanding, the whole purpose of clause 11 was to provide Attachmate with a procedure to obtain evidence so as to determine whether unlicensed copies of its software had been made and, if so, how many. I agree with this interpretation. The exact number of unlicensed copies would in most cases be peculiarly within the knowledge of the licensee. Without a remedy in the nature of clause 11, Attachmate would potentially have great difficulty in establishing a claim for damages based on unlawful copying. Once the number had been established, the licensee would then have to pay the fee applicable to it. Attachmate need not prove any damages at all. That, I believe, was the purpose of clause 11. It was not intended to introduce a penalty. Thus understood, the clause was intended as a means in favour of Attachmate to facilitate proof of its claim for the damages it had suffered through unlicensed copying. It was not intended to enhance the quantum of its damages claim. There is no evidence at all in this instance of deliberate dishonesty on the part of the Department, and Attachmate did not contend otherwise.

NOVA PROPERTY GROUP HOLDINGS LTD v COBBETT

A JUDGMENT BY KATHREE-SETILOANE AJA (MAYA AP, MAJIEDT JA, MBHA JA and PLASKET AJA concurring)
SUPREME COURT OF APPEAL
12 MAY 2016

2016 (4) SA 317 (SCA)

Companies

The right of access to information provided for in section 26(2) of the Companies Act (no 71 of 2008) is unqualified. Accordingly, it is not necessary to show compliance with the Promotion of Access to Information Act (no 2000 of 2000) in order to obtain such information, and the motives of the party seeking such information are irrelevant.

THE FACTS

Moneyweb (Pty) Ltd commissioned Cobbett to investigate the shareholding structures of Nova Property Group Holdings Ltd and three other associated companies. Cobbett sent requests to the companies for access to their securities registers and to make copies thereof, in terms of section 26(2) of the Companies Act (no 71 of 2008). The section provides that a person without a beneficial interest in a company has the right to inspect or copy the securities register of a profit company or the register of directors of a company, upon payment of a prescribed maximum fee for any such inspection.

Cobbett's requests were met with refusals. Moneyweb then brought an application to compel the companies to provide access to it for inspection and making copies of the securities registers. The companies issued notices, in terms of rule 35(12) and rules 35(11) – (14) of the Uniform Rules of Court, in which they sought documents referred to in Moneyweb's founding affidavit and copies of different sets of documents from Moneyweb. They sought these documents for purposes of interrogating the 'real motives' of Moneyweb, as they believed that Moneyweb was acting in furtherance of a 'sinister agenda' directed against Nova and its subsidiaries, including certain members of its executive, and that Moneyweb had embarked upon a vendetta for the sole purpose of discrediting the companies and undermining their integrity. The companies contended that the documents sought would enable them to prove that Moneyweb intends publishing articles in the media not for any journalistic motive, but rather in furtherance of the 'sinister agenda'. They asserted that the documents sought were relevant to the anticipated issues in the main application, as they would provide them with a defence to that application.

The companies then brought an application to compel compliance with the notices.

THE DECISION

The issue was whether the documents sought by the companies were relevant to a reasonably anticipated issue in the main application. This issue concerned the proper interpretation of section 26(2) of the Companies Act and, in particular, whether it confers an unqualified right of access to the securities register of a company contemplated in the section.

The companies contended that section 26(2) conferred a qualified right as access may be refused, on the grounds set out in Promotion of Access to Information Act (no 2000 of 2000) and on the grounds of the motive of the requester. Moneyweb contended that an unqualified right is conferred on any person who meets the requirements of section 26(2).

Section 26(4) provides that a person may exercise the rights set out in subsection (2) (a) for a reasonable period during business hours, (b) by direct request made to a company in the prescribed manner, or (c) in accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000).' This showed clearly that this Act (PAIA) provides an alternative to requesting access to a company's share register in terms of the provisions of section 26 of the Companies Act, and did not create a qualification. The companies however, contended that the right of access in section

26(2) must be qualified by, and subject to, the provisions of PAIA, and that the person requesting the information must demonstrate that the information is required for the purpose of exercising or protecting a right. But this requirement could not be imported into section 26(2) without doing violence to a right which is expressly intended by the legislature to be unqualified. Moreover, this reliance on PAIA could not be sustained in light of the clear language of section 26(4). Accordingly, the their reliance on PAIA was unsustainable as it certainly did not render the documents sought in the rule 35(14) application relevant to the main application.

Section 26(2) expressly confers a right of access in respect of the securities registers. Section 26(5) then goes further and provides expressly, and in unqualified terms, that where a company receives a request in the prescribed form, the company 'must within 14 business days comply with the request'. There is nothing in either sub-section which, in any way, qualifies this right. Nor is there any reference in these sections to the reasonableness of either the request or the response.

When a company fails or refuses to provide access, that person is entitled, as of right, to an order compelling access. The question of the motive or purpose is simply irrelevant. The companies had failed to demonstrate that the documents sought in the rule 35(14) notice were relevant to a reasonably anticipated issue in the main application. The companies' belief, in relation to what they will purportedly achieve through access to those documents, did not give rise to a defence to the main application, as Moneyweb's 'motive' for seeking access to the Companies' securities registers was simply irrelevant.

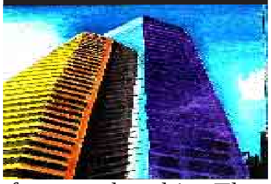
The application was dismissed.

This means that when a company fails or refuses to provide access, that person is entitled, as of right, to an order compelling access. The question of the motive or purpose is simply irrelevant. The Companies have, therefore, failed to demonstrate that the documents sought in the rule 35(14) notice 'are relevant to a reasonably anticipated issue in the main application'. The Companies' belief, in relation to what they will purportedly achieve through access to those documents, does not give rise to a defence to the main application, as Moneyweb's 'motive' for seeking access to the Companies' securities registers is simply irrelevant.

The Companies' construction of s 26(2) would have a negative impact on openness and transparency

SMYTH v INVESTEC BANK LTD

Companies



A JUDGMENT BY RABIE J
GAUTENG DIVISION, PRETORIA
17 SEPTEMBER 2015

2016 (4) SA 363 (GP)

A person whose name is not registered in the register of members of a company has no right to participate as an applicant in an application brought in terms section 252 of the Companies Act (no 71 of 1973).

THE FACTS

Smyth and the other applicants brought an application against Investec Bank Ltd and Randgold Ltd in terms of section 252 of the Companies Act (no 71 of 1973) complaining of unfairly prejudicial conduct on behalf of those who had some control over the majority shares in Randgold. They sought the purchase of shares by Investec at a particular price.

Section 252 of the Act provides that any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may make an application to the court for an order under the section.

Seven of the applicants were not registered shareholders but beneficial shareholders whose shares in Randgold were registered in the names of nominees. The main issue in dispute was whether a beneficial holder of shares in a company which has chosen to have those shares held through a nominee, is entitled to bring an application under section 252 for equitable relief.

THE DECISION

It was necessary to decide whether or not the words ‘member of a company’ in section 252(1) of the Act mean only the person in whose name the shares are registered or whether they are also capable of meaning the person who has rights in the shares, ie the person who is the beneficial owner of the shares.

The Act requires registration in the company register as a prerequisite for membership. The question was therefore whether the Act contained an exhaustive definition of the term ‘member’ for all purposes under the Act. The main thrust of the applicants’ argument was that a beneficial holder is included in the term ‘member’ in section 252. In support of this contention it was submitted that the terms ‘member’, ‘shareholder’ and ‘registered shareholder’ were used indiscriminately in the Act, and that if the legislature intended to define ‘member’ in section 103 and furthermore intended that it should mean ‘registered shareholder’ consistently throughout the Act, it would hardly have employed the word ‘shareholder’ when it meant ‘member’ and vice versa. This contention could not be supported. The terms ‘member’, ‘shareholder’ and ‘registered shareholder’ are interchangeable and mean ‘member’ as defined in section 103 wherever they appear in the Act. It was clear that the company recognises only its registered shareholders and that it is the policy of the law that the company should concern itself only with the registered owner of the shares.

It was clear that the word ‘member’ as referred to in section 252 is not capable of being read so as to include a beneficial shareholder whose shares are registered in the name of a nominee. Only a registered member has locus standi to approach the court in terms of section 252 and not the person who owns the ultimate economic interest in shares registered in somebody else’s name. A person whose name is not registered in the register of members has no right to participate as an applicant in section 252 proceedings.

SHERIFF, JOHANNESBURG NORTH v YELLOW DOT PROPERTY INVESTMENTS

A JUDGMENT BY SIWENDU AJ
GAUTENG LOCAL DIVISION,
JOHANNESBURG
4 MARCH 2016

2016 (5) SA 107 (GJ)

Contract

A failure to cancel a contract within a reasonable time after the breach may provide evidence of an election to abide by the contract.

THE FACTS

Yellow Dot Property Investments purchased a property at a sale in execution. The conditions of sale concluded by the parties required that it pay a deposit of 10% of the purchase price, and provide the Sheriff with a guarantee to secure the purchase price within 21 days of being called upon to do so. The conditions of sale obliged Yellow Dot to pay all costs and charges for conveyance and transfer of the property.

The conditions of sale provided that all amounts required by the municipality for the issue of a clearance certificate in terms of section 118(1) of the Local Government Municipal Systems Act (no 32 of 2000), to the effect that all amounts due in connection with immoveable property or municipal services fees, surcharge on fees, property rates and other municipal taxes, levies and duties during the 2 years preceding the date of the application for the certificate were payable within seven days of being requested from Yellow Dot. However, the conditions of sale did not reflect amounts due in respect of these arrear rates, taxes and charges payable in terms of the Sectional Titles Act (no 95 of 1986), or arrears payable to the homeowners' association. The amounts were entered as a R0,00 (nil) estimate.

Yellow Dot paid the deposit due. However, the guarantee to secure the purchase price, the interest payable, the municipal rates clearance amounts as well as the transfer costs, were outstanding. The guarantee was lodged approximately six months after the sale.

Payment of the rates clearance amounts was not made within the seven-day period stipulated in the conditions of sale, but a month later. The Sheriff alleged that there were subsequent and additional breaches by Yellow Dot which supported a claim for cancellation of the sale. In addition it was submitted that Yellow Dot had subsequently failed to pay the further interest on the purchase price and additional municipal rates clearance figures presented to it, notwithstanding demand for payment having been made.

Yellow Dot disputed theSheriff's right to cancel the sale and raise two interrelated defences. The first was that applying Sheriff, Johannesburg East v Chetty [2014] ZAGPJHC 352, estimated amounts were not sufficient, having regard to the provisions of section 118. The second was the defence of exceptio non adimpleti contractus.

THE DECISION

The issue for determination was whether or not the Sheriff was entitled to cancellation of the sale.

The legal principle is that a failure to cancel a contract within a reasonable time after the breach may provide evidence of an election to abide by the contract. In this case this failure was first evident in the Sheriff's reluctance to enforce the time periods provided for in the conditions of sale and the attitude of latitude afforded to Yellow Dot. By failing to strictly enforce the time periods provided for in the conditions of sale, and instead accepting inconsistent and/or partial compliance, the Sheriff's conduct led to the inference and conclusion that it waived the right to rely on Yellow Dot's failure to comply with the time clauses of the conditions of sale.

Viewed in the context of the conditions of sale and against the long-standing principle that where a defence is raised against

a party it is incumbent on the applicants to prove that they have complied with their obligations the Sheriff had been obliged to demonstrate compliance.

As far as the rates clearance figures were concerned, given the indemnity that the first applicant, it was imperative that the amounts payable in respect of the rates amounts be clearly stated in the conditions of sale.

In the current circumstances, the Sheriff was not entitled to cancellation.

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

A JUDGMENT BY PONNAN JA (MBHA JA, ZONDI JA, MATHOPO JA and FOURIE AJA concurring)
SUPREME COURT OF APPEAL
27 MAY 2016

2016 (6) SA 1 (SCA)

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. Cochrane contended that M-Systems' action amounted to passing off.

THE DECISION

Not having any registered right in the name ClearVu, it was for Cochrane to show that the name had acquired such a reputation in relation to its business that it could be said to have become distinctive thereof. Assuming that Cochrane succeeded in establishing a reputation in the name ClearVu, there remained doubt as to whether it established the second leg of its cause of action, ie that M-Systems' conduct caused, or was calculated to cause, the public to be confused or deceived.

The use of keyword advertising would only be considered to be passing of, and hence prohibited, if it caused confusion. The critical question to be answered in a keyword-bidding case is whether the Google advertisement which appears in response to the search using the keyword gives rise to the likelihood of 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.

FISHER v NATAL RUBBER COMPOUNDERS (PTY) LTD

A JUDGMENT BY MATHOPO JA
(LEWIS JA, WALLIS JA, WILLIS JA and SALDULKER JA concurring)
SUPREME COURT OF APPEAL
24 MARCH 2016

2016 (5) SA 477 (SCA)

Prescription

Cession of a debt does not have the effect of changing the underlying debt. Any interruption of prescription against the debt persists irrespective of the cession having taken place.

THE FACTS

On 18 November 2010 Beaton served a combined summons on Fisher, claiming payment of the sum of R1 077 377 for goods sold and delivered to a company for which Fisher had stood surety. Fisher filed a plea. On 22 October 2013 Beaton ceded to Natal Rubber Compounders (Pty) Ltd (NRC) 'all of its right, title and interest in and to the claims' in relation to its right of action against Fisher. In terms of clause 2.3 of the deed of cession, it was agreed that NRC would apply for its substitution in the stead of Beaton as the plaintiff and that it would thereafter prosecute the case until its final determination.

On 9 December 2013 Beaton amended the summons and particulars of claim by substituting NRC as the plaintiff. On 22 January 2014 Fisher amended his plea in response to the amended particulars of claim by raising a special plea, contending that, upon cession to NRC after its substitution as the plaintiff, Meranti's interruption of prescription against Fisher had lapsed and that the claim had been extinguished by prescription in terms of section 15(2) and (6) of the Prescription Act (no 68 of 1969).

Subsection 15(2) provides that unless the debtor acknowledges liability, the interruption of prescription in terms of subsection (1) shall lapse, and the running of prescription shall not be deemed to have been interrupted, if the creditor does not successfully prosecute his claim under the process in question to final judgment or if he does so prosecute his claim but abandons the judgment or the judgment is set aside.

THE DECISION

This question was whether the substitution of NRC for Beaton amounted to the institution of fresh proceedings, so that the interruption of prescription in terms of section 15(2), effected by service of the summons, ceased to be effective. A positive answer depended on the proposition that NRC's action against Fisher only commenced when it was substituted as plaintiff in December 2013.

By the cession, a claim vested in one legal entity passed by operation of law to another, and that party was substituted as plaintiff in the action. There was an essential continuity in pursuing the claim. It followed that, since the underlying debt was not altered, the cessionary was entitled to proceed with the claim. As the cessionary, NRC, stepped into the shoes of the cedent,

The debt remained the same throughout. When the cessionary sues on a ceded claim the underlying debt does not change. All that happens is that the identity of the person entitled to enforce the debt changes, but not the debt itself. It was clear that the process under which the debt was being pursued remained the same throughout. To suggest that the summons operated to interrupt the running of prescription when it was initially served but ceased to fulfil that function when there was a notice of amendment or substitution was clearly not consistent with the Act. Any judgment that is granted in favour of NRC in this case will be granted in terms of the original summons and particulars of claim, not in terms of the application for

substitution. In the result the original process that interrupted prescription will have been prosecuted successfully. This is what is required by section 15(2) of the Act.

Only the identity of the party changed. The debt remained the same and unaffected by prescription.

'At the heart of Silhouette Investments lies the notion that the legal effect of a cession after litis contestatio is to terminate the proceedings instituted by the cedent, with the corollary that the substitution of the cessionary as the plaintiff must be regarded as the institution of new proceedings. As to whether that underlying notion is correct in respect of cessions, is not necessary to consider in this case. I say that because Sojitz does not rely on a transfer of rights by means of a cession. What it relies upon is a universal succession of all Nissho Iwai's rights and obligations by operation of Japanese law.'

That case was no different from the present one. A claim vested in one legal entity passed by operation of law to another, and that party was substituted as plaintiff in the action. Central to the court's rejection of the argument that the claim had prescribed was the finding that there was an essential continuity in pursuing the claim.

[15] It follows that, since the underlying debt was not altered, the cessionary was entitled to proceed with the claim. As the cessionary, NRC, stepped into the shoes of the cedent

KLD RESIDENTIAL CC v EMPIRE EARTH INVESTMENTS 17 (PTY) LTD

Prescription

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

2016 (5) SA 485 (WCC)

The rule that without-prejudice communications are inadmissible in evidence also applies where the communication is alleged to constitute an interruption of prescription.

THE FACTS

KLD Residential CC sued Empire Earth Investments 17 (Pty) Ltd for payment of commissions it alleged it had earned in property transactions. It alleged that in terms of a written mandate it had been authorised to market erven in a development and to receive commission on sales of which it was the effective cause, such commission to be regarded as earned once the relevant purchaser took transfer. KLD was the effective cause of 99 sales set out in a schedule to the particulars of claim. It was thus entitled to commissions totalling R2,147 million, which commissions were earned on the registration dates specified in the schedule.

Save in one instance, the registration dates specified in KLD's schedule ranged from October 2008 to November 2009. KLD issued summons in June 2013, and service was effected on 26 June 2013

On 29 July 2011 Empire's attorneys wrote a letter to KLD's attorneys, in which Empire acknowledged that, pursuant to the mandate as extended, KLD had become entitled to commissions totalling R2 105 960. KLD alleged that this was an acknowledgment interrupting prescription in terms of section 14 of the Prescription Act (no 68 of 1969).

The letter stated that KLD's indebtedness to Empire amounted to R1 023 625,45, and stated 'accordingly we include undercover hereof a cheque for R1 082 334,55 including VAT (being R2 105 960,00 commission less the total indebtedness of R1 023 625,45) in full and final settlement of any and all claims that [KLD] may have against our client'.

The letter was written without prejudice. KLD accepted that the effect of the concluding paragraph of the letter was that KLD could not have presented the tendered cheque for payment and sued for the balance of the commission, ie that presentation of the cheque would have resulted in a compromise.

KLD contended that the letter was admissible in evidence and as such supported the proposition that its effect was to interrupt the running of prescription against its claim.

THE DECISION

KLD's contention was based on the proposition that the shield of inadmissibility afforded without-prejudice communications is limited to evidence relevant to the merits of a matter. However, there were no sound considerations of public policy for the protection to be confined in that way. The law's policy of encouraging full and frank discussions without fear of prejudicial disclosure would be hampered by limiting protection in this manner. KLD's case was that without-prejudice protection does not apply where the communication is relied upon as an interruption of prescription. However, the law does not recognise such an exception.

The letter undoubtedly contained an acknowledgment of liability. The acknowledgment could not however, be regarded as wholly unconnected to the settlement proposal. The acknowledgment was not an independent admission because it was clear from what followed that Empire did not admit that it had a present liability to pay commissions in the amount there recorded (R2 105 960) but a lesser amount after deducting its own claims. If Empire 'admitted' anything, it was a residual liability of R1 082 334,55, being

the amount offered in full and final settlement. One could only know this, however, by having regard to the asserted deductions and the actual settlement offer. And the manner in which the settlement offer was arrived at could not be understood if one excluded from consideration the opening amount of R2 105 960.

An admission of part of a liability is sufficient to interrupt prescription, but before a creditor can rely on an acknowledgment of part of the liability as an interruption of prescription there must be admissible evidence of the partial acknowledgment. The rule that a partial acknowledgment suffices naturally does not mean that one can cherry-pick parts of a without-prejudice communication.

It followed that the letter was not admissible in evidence.

The letter undoubtedly contains an acknowledgment of liability. The acknowledgment cannot, however, in my view be regarded as wholly unconnected to the settlement proposal. The acknowledgment in para 4 was not an independent admission because it is clear from what follows that Empire did not, despite the way in which KLD framed its replication, admit that it had a present liability to pay commissions in the amount there recorded (R2 105 960). The letter continued by asserting various deductions which reduced that amount by way of set-off. Certain of the amounts so deducted would almost certainly not have qualified in law to be deducted by way of set-off since they were not liquidated (the estimated legal costs of R284 666,71 and expenses totalling R35 889), but this does not detract from the stance Empire was adopting. Empire also left out of account, for settlement purposes, its further claim, which was still advanced on the pleadings, for damages exceeding R15 million. Be that as it may, if Empire 'admitted' anything, it was a residual liability of R1 082 334,55, being the amount offered in full and final settlement. One can only know this, however, by having regard to the asserted deductions and the actual settlement offer. And the manner in which the settlement offer was arrived at cannot be understood if one excludes from consideration the opening amount of R2 105 960

EX PARTE FULS *

JUDGMENT BY VAN NIEKERK AJ
GAUTENG HIGH COURT,
PRETORIA
23 JUNE 2016

2016 (6) SA 128 (GP)

Insolvency

It is necessary for an applicant in an application for voluntary surrender to illustrate advantage to creditors. The applicant must therefore provide disclosure of whether or not the applicant availed itself of the procedures afforded in the National Credit Act (no 34 of 2005) for debt review prior to the application being proceeded with, and a comprehensive report of the debt counsellor involved, explaining what procedures were followed, and whether or not the applicant complied with any debt restructuring arrangements.

* The judgment considered the application of Fuls together with three other similar applications

THE FACTS

In these applications, the founding affidavits were virtually identical and the same valuator was employed to value furniture and household goods at values which were unrealistically optimistic and intended to achieve a minimum dividend requirement of 20 cents in the rand. In all of the applications, the only realisable assets consisted of movable assets with minimal value. Lists of creditors were furnished, the nature and extent of which objectively illustrated that the reason for each of the applicants' financial situation was the fact that they too readily availed themselves of credit on offer and did not balance their budgets.

Each of the applicants listed creditors which prima facie appeared to have entered into credit agreements with the respective applicants which fell under the provisions of the National Credit Act (no 34 of 2005). No allegations were made in any of the applications to indicate that, in the circumstances, section 3 of the Insolvency Act (no 24 of 1936) was to be preferred to the benefit of the creditors instead of a proper application of debt relief in terms of the National Credit Act.

THE DECISION

Some 80 years after commencement of the Insolvency Act, the National Credit Act (NCA) was enacted to promote inter alia a fair marketplace for access to consumer credit, to regulate consumer credit generally and to provide for debt reorganisation in cases of over-indebtedness.

In terms of the NCA, a debtor is afforded various remedies when faced with a situation where the NCA applies and the consumer is unable to pay his/her debts. A consumer may even be completely relieved from his/her obligations in terms of a credit agreement if it were to be found that the credit was granted recklessly. Most importantly, when a consumer is unable to comply with his/her obligations in terms of a credit agreement due to over-indebtedness, a mechanism is provided for in the NCA in terms whereof the consumer may apply for a remedy referred to in the NCA as 'debt review'. In terms of this procedure, should it be found that a consumer is indeed over-indebted, a rearrangement of the debtor's obligations may be effected. This includes inter alia a postponement of obligations in terms of a credit agreement, a restructuring of payments, or even an order that a credit agreement is reckless, thereby exonerating the consumer therefrom.

This procedure in terms of the NCA is clearly in the interest of the debtor and the creditor, and to be preferred over the remedy in terms of section 3 of the Insolvency Act because the debtor is relieved from financial strain but is still required to meet his/her contractual obligations, wholly or in part, and the creditor on the other hand has a better prospect of receiving at least a substantial portion of the outstanding liabilities owed to it by the debtor, if not all, albeit at a later stage. This is clearly a situation which is objectively far more advantageous to a creditor than the situation where the creditors often would not even consider to file a claim against the insolvent estate for fear of the risk of having to eventually contribute to costs.

It is therefore incumbent on an applicant in an application for

voluntary surrender, where it is required to illustrate advantage to creditors, to provide: (i) full disclosure of at least whether or not the applicant availed himself/ herself of the procedures afforded in the NCA for debt review prior to the application being proceeded with, and if not, full reasons for such failure, (ii) a comprehensive report of the debt counsellor involved, explaining what procedures were followed, and whether or not the applicant complied with any debt restructuring arrangements.

If an application of this nature lacks averments in this respect, it does not comply with the requirement that the applicant should satisfy the court that it is in the interest of his/her creditors that the estate should be surrendered, and should accordingly be dismissed.

The applicants failed to do so in the present case, and so failed to satisfy the requirement of proving an advantage to creditors.

In my opinion, it is difficult to foresee how an applicant in an application for voluntary surrender of his/her estate would be able to convince a court that the proper application and adherence to arrangements in terms of ss 86 – 88 of the NCA are not to be preferred in the interest of creditors, compared to the surrender of his/ her estate.

Where an application of this nature lacks averments in the respect as set out supra, it does not comply with the requirement that the applicant should satisfy the court that it is in the interest of his/her creditors that the estate should be surrendered, and should accordingly be dismissed.

BUTTON N.O. v AKBUR

JUDGMENT BY MBATHA J
KWAZULU NATAL LOCAL DIVISION, DURBAN
23 SEPTEMBER 2015

2015 SACLR 421 (KZD)

Dispositions made by a close corporation which are alleged to have been made in the ordinary course of business will be set aside if the party making the disposition is unable to prove they were made in the ordinary course of business.

THE FACTS

As at 28 February 2013, Golden Rewards 698 CC's liabilities exceeded its assets by some R4m. By 1 June 2013, the close corporation had stopped trading. In the following months, a member of Golden Rewards, Akbur, effected payments from the close corporation totalling R2 493 000.00. These were made to GSC Trading CC and Akbur, and were alleged by Akbur to be repayments of loans and made in the ordinary course of business.

In September 2013, Golden Rewards was placed under business rescue. In October 2013, it was placed in liquidation. Button and the other applicants were appointed the liquidators. They contended that the transfers made constituted voidable preferences as they were made six months before commencement of the liquidation, they preferred Akbur above Golden Rewards' creditors and that such payments were made at the time when the liabilities of the corporation exceeded its assets and when it was deemed unable to pay its debts in terms of section 69(1)(a) of the Close Corporation Act (no 69 of 1984). They also submitted that these were collusive dealings between Golden Rewards and Akbur and GSC because all such dealings were concluded by Akbur in his personal capacity, that these withdrawals also had the effect of preferring one of its creditors above another proved creditor, Aveng Trident Steel (Pty) Ltd.

Akbur contended that as the payments were made in the ordinary course of business, they were not voidable preferences.

THE DECISION

There was no compelling reason for Akbur to have made the payments at a time when he was fully aware of the status of Golden Rewards.

It was clear from the circumstances of the case that, at the time of the disposition, that Akbur paid himself and GSC with the intention of preferring himself and GSC and that these transactions were not made in the ordinary course of business of Golden Rewards. By 13 September 2013, Golden Rewards had been placed under business rescue and Akbur was aware that the corporation was struggling to meet its obligations. Despite his knoweldge, he nevertheless makes payments to GSC. No other intention could be inferred from these facts, other than that he intended to prefer himself or GSC.

Akbur had not discharged the onus of proving that the payments were made in the ordinary course of business.

GRIESSEL v LIZEMORE

A JUDGMENT BY SPILG J
GAUTENG HIGH COURT,
JOHANNESBURG
26 AUGUST 2015

2016 (6) SA 236 (GJ)

Companies

A director's resolution under section 129(1) of the Companies Act (no 71 of 2008), must be taken in good faith. It will not be considered to have been so taken if it is done without the knowledge of shareholders.

THE FACTS

Mining and Slurry Technologies (Pty) Ltd, a company which manufactured pumps, experienced certain financial difficulties. As part of a restructuring of the company, it was agreed that Griessel would take up a directorship of the company instead of his father. The effect of the change was that Griessel and Mr R Zeman held 67% of the shares in the company, and Lizemore held the remaining 33% of the company's issued share capital.

On taking over, Griessel discovered a number of irregularities relating the company. This included the removal of all drawings relating to the manufacture of the pumps and their transfer to a portable hard drive which was taken off site.

On 2 July 2015 Lizemore passed a resolution on behalf of the board of directors placing the company under business rescue. Mr M Schlechter, was appointed the business rescue practitioner. Lizemore passed the resolution without the knowledge of the other shareholders and despite a meeting of shareholders, held three days earlier which rejected his suggestion that business rescue proceedings be considered. Lizemore contended that he did not have to notify the other shareholders of his intention to pass the directors resolution, since because he had omitted to sign the resolution appointing Griessel a director, at that time he was the sole director of the company and could unilaterally resolve to begin business rescue proceedings and place the company under supervision in terms of section 129(1) of the Companies Act (no 71 of 2008).

After becoming aware that the company had been placed under business rescue Griessel and Zeman brought an application for an order (a) declaring that the resolution to begin business rescue proceedings and to place the company under supervision has lapsed and was a nullity, and (b) setting aside the resolution passed by Lizemore in terms of which the company would begin rescue and be placed under supervision.

THE DECISION

The primary objective of the introduction of business rescue proceedings was to afford a company that is in financial difficulties a period of time to regain viability by being allowed to formulate and implement a rational plan to rehabilitate itself. However the Act also contemplates business rescue if the company cannot continue in existence but can obtain a better return for creditors or shareholders than if the company were immediately liquidated. The primary objective is to prevent a viable company from closing down by allowing it an opportunity to regain solvency through the mechanism of business rescue provided it can be achieved within a reasonable time.

The words 'or, if it is not possible for the company to so continue in existence' qualify when the alternative objective of providing a better return may be relied upon. In other words it is for the person who wishes to place a company under business rescue on this alternative ground to satisfy three criteria: (a) that the company is financially distressed as required under section 129(1)(a), (b) that it is not reasonably likely for the company to be rehabilitated and continue in existence on a solvent basis as contemplated in section

128(1)(b)(iii), and
(c) that the development and implementation of a plan to rescue the company would result in a better return for creditors or shareholders than would occur from its immediate liquidation.

The various requirements for placing a company under business rescue and when it will be taken out of business rescue presuppose, in the case of a directors resolution under section 129(1), that the resolution is taken in good faith. It was evident that the section 129 resolution was taken behind the backs of the co-shareholders and when Lizemore knew that they, as majority shareholders, were entitled to have a director on the board and would not have approved business rescue.

In all the circumstances it was just and equitable to set aside the resolution. Each of the requirements to set aside the resolution in terms of section 130(5)(a) read with s 130(1)(a) had been met.

The application succeeded.

The primary objective of the introduction of ch 6 was to afford a company that is in financial difficulties (and satisfies the threshold I requirement of being 'financially distressed') a period of time to regain viability by being allowed to formulate and implement a rational plan to rehabilitate itself. However the Act also contemplates business rescue if the company cannot continue in existence but can obtain a better return for creditors or shareholders than if the company were immediately liquidated.

KYTHERA COURT v LE RENDEZ-VOUS CAFE CC

Companies

A JUDGMENT BY
BORUCHOWITZ J
GAUTENG HIGH COURT,
JOHANNESBURG
22 JUNE 2016

2016 (6) SA 63 (GJ)

The general moratorium in section 133(1) of the Companies Act (no 71 of 2008) does not encompass legal proceedings for ejectment where a lease has been validly cancelled and the company in business rescue is an unlawful occupier.

THE FACTS

Kythera Court and Le Rendez-Vous Cafe CC concluded a written lease. In terms of the lease certain premises were leased to the cafe for a period of six years, commencing in May 2010.

After it had fallen into arrears with the payment of three monthly rentals and municipal charges, the cafe placed itself in business rescue. Kythera cancelled the lease agreement on 7 March 2016, but the cafe refused to vacate the premises.

Kythera alleged that the café was misusing the business rescue process by unlawfully remaining on the premises and operating its business without making any rental payments or paying any other charges. Furthermore, it had failed to file a business rescue plan as required under the Act and had reneged on an undertaking to pay rental. It brought an application to evict the café on the ground that the lease agreement between the parties had been cancelled, alternatively that the lease had expired

The cafe opposed the application inter alia on the grounds that the moratorium envisaged in section 133(1) of the Companies Act (no 71 of 2008) precluded Kythera from cancelling the alleged lease and bringing the application.

THE DECISION

Section 133(1) of the Act provides that during business rescue proceedings, no legal proceedings may be commenced or proceeded with in any forum, except (a) with the written consent of the practitioner, or (b) with the leave of the court. The question which arose was whether leave was necessary in terms of section 133(1)(b) for Kythera to bring the eviction application.

The moratorium is not an absolute bar to legal proceedings being instituted or continued against a company under business rescue. It is intended to be of a temporary nature only and cannot be utilised to indefinitely delay satisfaction of the claims of creditors; or result in the extinguishment of the claims of creditors. Section 133(1) lists five exceptions when legal or enforcement proceedings may be continued with or initiated.

It is trite law that on the termination of a lease, it is the duty of the lessee to vacate the property subject only to the lessee's right to compensation for improvements. The failure to vacate properties when there is an obligation to do so renders the lessee an unlawful occupier. But, in the context of business rescue proceedings, the right to cancel a lease may be affected by the provisions of section 136(2)(a) of the Act. The section provides that the business practitioner may — despite any provision of an agreement to the contrary — entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings. By invoking this section, the business practitioner may prevent a landlord from cancelling a lease and from instituting eviction proceedings.

There was sufficient reason to conclude that the general moratorium in section 133(1) does not encompass legal proceedings for ejectment where a lease has been validly cancelled and the company in business rescue is an unlawful occupier. The section presented no bar to enforcement of Kythera's rights.

SHERIFF, PIKETBERG v LOURENS

A JUDGMENT BY MAHOMED AJ
WESTERN CAPE HIGH COURT
1 AUGUST 2016

2016 (6) SA 110 (WCC)

Property

A purchaser at a sale in execution is obliged to pay VAT on the sale in circumstances where the conditions of sale state this to be the purchaser's obligation and the purchaser was in a position to determine that this obligation rested on him.

THE FACTS

Lourens purchased property as a sale in execution. Clause 4.7 of the conditions of sale placed the obligation to pay 'transfer duty or VAT attracted by the sale' on the purchaser.

Lourens did not respond to demands for payment of the VAT, an amount of R88 200. He alleged that the obligation to pay VAT was not disclosed to him prior to the sale in execution and contended that as a material condition of the contract of sale, ie that VAT was payable on the transaction, was not brought to his attention, the seller was guilty of misrepresentation by failing to informhim beforehand that VAT had to be paid on the transaction.

The sheriff then brought an application for an order that the sale be cancelled.

THE DECISION

The two issues in dispute were whether the sheriff had a duty to establish the VAT status on the property and disclose this information to Lourens, and whether the sheriff failed to comply with the provisions of the Consumer Protection Act (no 68 of 2008) and regulations under which the sale was conducted.

Since the first defendant, as judgment debtor, was unable to pay the VAT to Sars this obligation fell on the second applicant (judgment creditor), as holder of rights over the property, to raise the money to pay the VAT over to Sars. The second applicant therefore demanded the VAT amount of R88 200 from Lourens in order to effect transfer of the property.

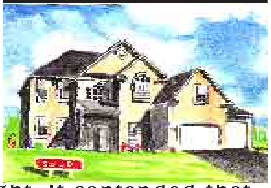
The question arose whether there was a general duty on the applicants to establish the VAT status of the owner of the property and disclose this information to Lourens. These were issues which Lourens ought to have investigated and fully apprised himself of prior to the auction. The sheriff was not required in law to extend its enquiries beyond what the real rights attached to the property that was the subject of the sale in execution were. The sheriff acted in good faith by declaring that VAT would be payable on the sale transaction, because the conditions of sale clearly stipulated that VAT would be payable by the purchaser.

Lourens was made aware of the conditions of sale at the time of the auction but did not query them or raise any concerns. In these circumstances there was no material basis for Lourens to suggest that the conditions of sale were not binding on the parties to the transaction or that he was not liable for the VAT amount. There was accordingly no basis for the conclusion that the sheriff violated any of the consumer protections afforded Lourens by the Act and regulations.

All the parties were properly sensitised to the issue of pricing in regard to the property, and particularly Lourens who carried the liability for the VAT amount. Accordingly, the sheriff was entitled to the cancellation of the sale in execution, in view of Lourens' failure to comply with his obligations and pay the VAT.

MINISTER OF MINERAL RESOURCES v MAWETSE (SA) MINING CORPORATION (PTY) LTD

Property



A JUDGMENT BY MAJIEDT JA (NAVSA ADP, LEACH JA, ZONDI JA AND MEYER AJA concurring)
SUPREME COURT OF APPEAL
28 MAY 2015

2015 SACLR 380 (SCA)

The Minister of Mineral Affairs may require compliance with Black Economic Empowerment requirements as conditions for the grant of prospecting rights. A prospecting right subsists from the time that it is granted and lapses after the period of its effectiveness expires regardless of whether or not compliance with such requirements has been achieved.

THE FACTS

In September 2009, Mawetse (SA) Mining Corporation (Pty) Ltd applied for a prospecting right for various minerals in respect of various farms, including one named Driekop. This application was rejected in terms of section 16(2)(b) of the Mineral and Petroleum Resources Development Act (no 28 of 2002) because that prospecting right had already been granted to Dilokong Chrome Mine (Pty) Ltd.

Dilokong's application for a prospecting right on this farm had been made some three years earlier. On 18 July 2007, the Deputy Director General: Mineral Development, Department of Mineral Resources had written to Dilokong to confirm that it had been granted a prospecting right for a four-year period in respect of Driekop. The approval was subject to Dilokong submitting before notarial execution of the right, all outstanding documentation, including a shareholder agreement with a Black Economic Empowerment entity holding not less than 26% of the equity in the operation. Dilokong did not comply with this requirement and, as a result, its prospecting right could not be notarially executed.

On 16 August 2011 the Minister of Mineral Resources upheld the award of the prospecting right to Dilokong and dismissed an appeal brought against it by Mawetse. Mawetse brought a review application.

THE DECISION

The primary dispute was whether Dilokong could lawfully have been required to be BEE compliant.

Dilokong contended that, once the requirements in section 17(1) of the Act had been met, the Minister was legally obliged to grant the right. It contended that compliance with the BEE requirements in section 2(d) was not a precondition for the granting of a prospecting right, as opposed to a mining right, and it could not be lawfully imposed.

These contentions could not be accepted. The Deputy Director General had plainly and unequivocally attached BEE compliance as a condition in granting the prospecting right. Furthermore, the draft notarial deed in terms of which the prospecting right was to be executed, envisaged that Dilokong had to be BEE compliant.

Dilokong contended that an applicant for a prospecting right could not in law be compelled to be BEE compliant and that the Mining Charter does not apply to prospecting rights. This contention could no be accepted: section 100(2)(a) of the Act provides for the development of the Mining Charter in order to 'ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution.'

In any event, the period for which Dilokong's prospecting right endured had to be calculated from the date on which it was informed of the granting of the right, ie 18 July 2007. On that date Dilokong became the holder of a valid prospecting right, subject to compliance with the request to prove BEE compliance. It did not matter, for purposes of computing the period of the duration of the right, that the right still had to be executed and that the right had not yet become effective. Therefore, Dilokong's prospecting right had expired due to the effluxion of time on 17 July 2011, ie four years after the date on which Dilokong had been notified of the granting of the right.

HAIGH FARMING (PTY) LTD v E.G. ELLIOT REAL ESTATE CC

Property

JUDGMENT BY MBATHA J
KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
2 OCTOBER 2015

2015 SACLR 451 KZP

A company which acts as an estate agent is entitled to commission on property sales concluded at a time when it so acted.

THE FACTS

Haigh Farming (Pty) Ltd entered into an oral agreement with E.G. Elliot Real Estate CC in terms of which Haigh would provide consultancy services in respect of various agricultural properties that had been listed with Elliot. Elliot would pay Haigh a consultancy fee in respect of any consultancy services rendered by Haig in respect of such properties. It would also pay a 'spotting' or 'listing' fee in respect of properties that had been referred by the Haigh to Elliot and in respect of which a successful sale had been concluded.

Pursuant thereto, Haigh rendered the consultancy services in respect of a property known as the 'Von Pletzen' property and listed a building known as the 'Stockowners' building with Elliot. The two properties were subsequently sold, and Elliot received commission in respect of the two sales. The business relationship between the parties then terminated. The sale of the property was later amended, and an addendum to the agreement recorded the substitution of another party as purchaser.

Haigh contended that though the addendum was signed when he no longer had a relationship with Elliot, the consultancy work was done and it was still entitled to the consultancy fee of 50%.

Elliot raised a special plea that at all material times, Mr Brad Haigh acted as the estate agent and not Haigh Farming (Pty) Ltd, that he did so without a Fidelity Fund Certificate as required by the Estate Agency Affairs Act, and that as a result, even if Haigh Farming (Pty) Ltd proved that it performed such acts, it was not entitled to a commission.

THE DECISION

There was no evidence indicating that Mr Haigh was employed by Elliot. This had never been raised before by Elliot, which customarily paid the company its consultancy fees. Elliot had not given any explanation why only one person would work for him for so many years without being in possession of a Fidelity Fund Certificate. Whether an addendum to the sale agreement was signed later on, it was still on the same terms as previously negotiated and brought into fruition by Haigh, the company.

The prohibition on remuneration as envisaged in section 34A of the Act is not a blanket prohibition, but one 'in respect of or arising from the performance by such person of any act' of selling or purchasing immovable property or letting or hiring of immovable property. The question was whether the company acted as an estate agent in respect of the two properties. In so far as the Stockowners property was concerned, the supplying of a listing was not defined as an act performed by an estate agent in the definition of an agent. Haigh would therefore not be barred from receiving any remuneration in supplying the identity of the immovable property which was up for sale to Elliot or referring the seller to Elliot.

It was clear from the evidence that at all times, Mr Brad Haigh represented the company. Haigh the company, successfully proved that it was a contracting party, that Mr Haigh was not in the employment of Elliot and did not act as an agent of Elliot.

The claim succeeded.

FERRARI v GUNNER

A JUDGMENT BY LEWIS JA
(CACHALIA JA, MAJIEDT JA,
PILLAY JA AND MEYER AJA
concurring
SUPREME COURT OF APPEAL
9 MARCH 2015

UNREPORTED

Contract

If a party is shown to have expressly acceded to the provisions of an agreement to which his attention is specifically drawn, there will be no grounds for that party to allege and prove that a fraudulent misrepresentation has been made to him in respect thereof.

THE FACTS

Gunner concluded an agreement with Ferrari and van der Molen for the purchase of 20 per cent of the member's interest in a close corporation. The close corporation was the formal owner of a family business in which Ferrari and van der Molen were members. They also concluded an association agreement. Both contracts were signed on 23 July 2012. Gunner was employed as a design director by Budget and he commenced working for it on 1 September 2012.

Gunner paid the full purchase price of R4.67 million for the member's interest. In February 2013 the close corporation was converted to a company, Budget Sheetmetal (Pty) Ltd..

The agreements necessary for their implementation, the Memorandum of Incorporation (MOI) of the company and the shareholders' agreement were drafted by Gunner's wife, D'Amico, who was an attorney. D'Amico made it clear she was acting on behalf of Gunner, and suggested that the other parties consult their own attorney should they so wish to do so.

A meeting was scheduled to discuss the MOI and the shareholders' agreement on 6 March 2013. At the meeting, Ferrari informed Gunner and D'Amico that he and other members of the close corporation did not wish to proceed with the implementation of the sale agreement and would not appoint Gunner as a director. The reason they gave was that, as Gunner would enjoy certain rights as a minority shareholder under the Companies Act (no 71 of 2008) and the family would have to give up control of the business, which they did not want to do. They proposed that the investment made by Gunner be converted to a loan to the company.

Gunner rejected the proposal. He applied for an order directing the implementation of the agreements. Ferrari and the other appellants opposed the application on the grounds that D'Amico had fraudulently misrepresented the meaning of clause 3.7 in the sale agreement, thus rendering the agreement void. The clause provided that upon the conversion of the close corporation to a company, the parties could reflect their shareholding in trusts. They alleged that D'Amico misrepresented to them that the clause meant that there had to be unanimous consent of all shareholders for any one of them to hold their shares in a trust, but in fact asa the clause stood, each shareholder has the right unilaterally to transfer his shares to a trust. In an earlier draft, the purchaser had been stated to be a trust but Ferrari had objected to this on the grounds that they did not want the shareholding to fall into the hands of a third party. D'Amico had amended the clause and submitted it to Ferrari for perusal before the agreement was signed.

THE DECISION

It was unlikely that Ferrari and the other appellants as experienced business people, would have let clause 3.7 stand had he objected to Gunner acquiring the shareholding in a trust. The issue of a trust had been raised earlier and its significance considered.

Furthermore, when advised that Gunner wished to register his shares in a trust Ferrari and the other appellants did not object. At a later stage when D'Amico referred to the implementation of the agreement involving trusts,

there was no objection to this.

It was also significant that when Ferrari and the other appellants first indicated they did not wish to abide by the agreement, no mention was made of the alleged fraudulent misrepresentation as to the meaning of clause 3.7. The defence was raised for the first time in the answering affidavit.

If there was any truth in the allegation that D'Amico had misrepresented the meaning of clause 3.7, and if the appellants had really thought that unanimous consent was required for any of Ferrari, Van der Molen or Gunner to hold their shares in trusts, then the proper remedy was for them to apply to rectify the agreement to state that — to reflect their continuing common intention.

ELLIS v CILLIERS N.O.

Contract

JUDGMENT BY BLOMMAERT AJ
WESTERN CAPE HIGH COURT
9 OCTOBER 2015

2015 SACLR 436 (WC)

A sale agreement may be cancelled if the seller fails to disclose defects concerning the thing sold which the sellers knows the purchaser would have an interest in knowing about.

THE FACTS

Ellis bought a house from Cilliers. The sale agreement contained a voetstoots clause which provided that the seller would not be liable for any defects in the house, whether latent or patent, nor would the seller be answerable for any warranties either express or implied. The purchaser confirmed having satisfied himself with the condition of the property by personal inspection.

The house had certain defects, one of which was that one of the floors was not level. Cilliers had made the floor level by adding to it a concrete screed and covering this with a fitted carpet. A false ceiling had also been added.

After Ellis had taken occupation of the house, she discovered that the floor was not in fact level. She determined that the foundations were rotten and would have to be repaired. She contended that this constituted a defect and claimed that the defect had been known to Cilliers at the time of the sale and had not been disclosed to her. She claimed that she was entitled to cancel the sale.

THE DECISION

Cilliers must have known, or at least have anticipated, that had she informed Ellis of the unlevel floor, Ellis would not have bought the house. At the very least Ellis would have inspected the foundation which would have revealed the defect. Even if Cilliers did not think uneven floors were a defect, it was such an unusual feature that she should have revealed it. It was a most unusual feature which made renovation of the house exceptionally difficult. Ellis had an interest in knowing about the cement screed on the floors and the false ceiling.

The admitted knowledge of the unlevel floor by Cilliers, and the failure to inform Ellis of the remedial treatment was a latent defect. The fact that, as a result of the discovery of the remedial treatment, it was found that the foundation was rotten, did not change the fact that an unlevel floor was a latent defect. In order to rectify the defect the evidence established that repairs had to be done to the foundation under the house.

Ellis was therefore entitled to cancellation of the sale.