Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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Contents

Index 4
ARENDSE v VAN DER MERWE N.O. 7
SOUTHERN VALUE CONSORTIUM v TRESSO TRADING 102 (PTY) LTD 8
ERAVIN CONSTRUCTION CC v BEKKER N.O. 10
JVJ LOGISTICS (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD 11
DE SOUSA v TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD 13
ABSA BANK LTD v NAUDE NO 15
REMGRO LIMITED v UNILEVER SOUTH AFRICA HOLDINGS (PTY) LIMITED 16
CONSTANTIA INSURANCE CO LTD v MASTER OF THE HIGH COURT, JOHANNESBURG 18
EDWARDS v FIRSTRAND BANK LIMITED 19
FIRSTRAND BANK LTD v ZWANE AND TWO OTHER CASES 20
GERSTLE v CAPE TOWN CITY 22
ABSA LTD v MOORE 23
LANCELOT STELLENBOSCH MOUNTAIN RETREAT (PTY) LTD v GORE N.O. 25
MONYETLA PROPERTY HOLDINGS (PTY) LIMITED v IMM GRADUATE SCHOOL OF MARKETING (PTY) LIMITED 26
NEDBANK LTD v STEYN 27
BALISO v FIRSTRAND BANK LTD 28
FIRSTRAND BANK LTD v KRUGER 30
THOMANI v SEBOKA N.O. 32
STANDARD BANK OF SOUTH AFRICA LTD v GAS 2 LIQUIDS (PTY) LTD 33
COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA v VAAL ENVIRONMENTAL JUSTICE ALLIANCE 35
JORDAAN v TSHWANE CITY 36
UNIQON WONINGS (PTY) LTD v CITY OF TSHWANE METROPOLITAN MUNICIPALITY 38
LYONS v SKYWAYS BODY CORPORATE 40
VAN DEN HEEVER v MINISTER OF MINERALS AND ENERGY 42
MASSTORES (PTY) LTD v PICK N PAY RETAILERS (PTY) LTD 43
TRANSNET SOC LTD v TOTAL SOUTH AFRICA (PTY) LTD 45
SPAR GROUP LTD v FIRSTRAND BANK LTD 47
ARGENT INDUSTRIAL INVESTMENT (PTY) LTD v EKURHULENI METROPOLITAN MUNICIPALITY 49
FLUXMANS INC v LEVENSON 51
DE FREITAS v JONOPRO (PTY) LTD 53
MOVE ON UP 104 CC v SAGEWISE 1018 CC 54
PREMIER FOODS (PTY) LTD v MANOIM N.O. 55
DU PLOOY N.O. v DE HOLLANDSCHE MOLEN SHARE BLOCK LTD 56
GIHWALA v GRANCY PROPERTY LTD 58
LEWIS GROUP LTD v WOOLLAM 60
KAIMOWITZ v DELAHUNT 62
NEDBANK LTD v JONES 64
TYRE CORPORATION CAPE TOWN (PTY) LTD v GT LOGISTICS (PTY) LTD 66
CITY OF TSHWANE METROPOLITAN MUNICIPALITY v MITCHELL 68
TRANSNET SOC LTD v GROUP FIVE CONSTRUCTION (PTY) LTD 69
NELSON MANDELA BAY MUNICIPALITY v AMBER MOUNTAIN INVESTMENTS 3 (PTY) LTD 70
AQUILA STEEL (SA) LTD v MINISTER OF MINERAL RESOURCES 72
DA CRUZ v CAPE TOWN CITY 74
BARRY v CLEARWATER ESTATES NPC 78
BOOYSEN v JONKHEER BOEREWYNMAKERY (PTY) LTD 80
DE KLERK v FERREIRA 82
ENERGYDRIVE SYSTEMS (PTY) LTD v TIN CAN MAN (PTY) LTD 84
LOEST v GENDAC (PTY) LTD 85
BODY CORPORATE OF EMPIRE GARDENS v SITHOLE 87
MINISTER OF JUSTICE v SA RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION 88
WISHART N.O. v BHP BILLITON ENERGY COAL SOUTH AFRICA (PTY) LTD 90

BP SOUTHERN AFRICA (PTY) LTD v INTERTRANS OIL SA (PTY) LTD 92
FIRSTRAND BANK LTD v KJ FOODS CC 94
BRODSKY TRADING 224 CC v CRONIMET CHROME MINING SA (PTY) LTD 96
JACOBS v COMMUNICARE NPC 98
JIGGER PROPERTIES CC v MAYNARD N.O. 100
MOBILE TELEPHONE NETWORKS (PTY) LTD v BEEKMANS N.O. 101
KAKNIS v ABSA BANK LTD 103
FACTAPROPS 1052 CC v LAND AND AGRICULTURAL DEVELOPMENT BANK OF SOUTH AFRICA 105
OFF-BEAT HOLIDAY CLUB v SANBONANI HOLIDAY SPA SHAREBLOCK LTD 106
HUYSER v QUICKSURE (PTY) LTD 108
MOHAMED'S LEISURE HOLDINGS (PTY) LTD v SOUTHERN SUN HOTEL INTERESTS (PTY) LTD 110
PHEPENG v ESTATE COMBRINCK 112
BRAYTON CARLSWALD (PTY) LTD v BREWS 113
MAN FINANCIAL SERVICES SA (PTY) LTD v PHAPHOAKANE TRANSPORT 114
VENTER JOUBERT INC v DU PLOOY 115
MOKONE v TASSOS PROPERTIES CC 117
EX PARTE WHITFIELD* 119
MORAITIS INVESTMENTS (PTY) LTD v MONTIC DAIRY (PTY) LTD 121
PRIMAT CONSTRUCTION CC v NELSON MANDELA BAY METROPOLITAN MUNICIPALITY 123
SAHARAWI ARAB DEMOCRATIC REPUBLIC v OWNERS 125
AND CHARTERERS OF THE CHERRY BLOSSOM 125
SWART v STARBUCK 127
WALLACE N.O. v WCP HOTEL PROPERTY (PTY) LTD 129

Index

A

Address for service
  notice, requirement of under National Credit Act 19
Alienation of Land Act
  right of pre-emption 117
Authority
  agent failing to have 121

B

Bank
  duty of care to customer 47
Body corporate
  default in payment of levies 87
Building
  approval of buiding plans 74
  approval of plans 101
  temporary or permanent 101
Business rescue
  amendment of plan 80
  assets over which creditor has security 84
  grounds for, contrasted with liquidation 66
  joinder of other creditors 15
  leave to sue company under business rescue 7
  legal proceedings brought during 80
  no enforcement of debt arising after commencement 10
  property repossessed by creditor 11
  reciprocity of obligations 92
  service of application on liquidator 33
  setting aside vote by creditor 94
  unlawful occupation of property 8

C

Cession
  ineffective when made after debt paid 113
Companies
  claim under s 252, Companies Act 106
  delinquent director 58, 60
  related person 82
  unfairly prejudicial conduct 106
Company
  access to company information 85
  director, right to be present at meetings 62
  private, compelled to provide information 35
  proxy, validity of 78
  shareholder rights 56
  shareholders agreement 16
  unfairly prejudicial conduct 13
  unregistered, effect of 32
Competition
  competitor breading licence conditions 54
  corporate leniency policy 55
  referrals not including complanit against party 55
Constitution
  contract enforcement of 110
Construction
  approval of buiding plans 74
  dispute resolution, adjudicator 69
Contract
  breach, by repudiation 123
  cancellation, due to repudiation 123
  constitutional values and 110
  interference in contractual relations 43
  reciprocity of obligations 92
  remaining in force after legislative changes 45
  suspensive condition 112
Credit Transactions
  default judgment, unregistered company 32
  evidential basis for default judgment 30
  home loan 20
  Magistrates court order reducing debtor's obligation 64
  notice, requirement of under National Credit Act 19
  notice to debtor 28
  prescribed debt 103
  property declared executable 20
  settlement agreement subject to National Credit Act 114

D

Director
  delinquent 58

E

Environment
  provision of information 35
Estate agent
  invalid certificate 96
Eviction
  tenant protected by statute 98

I

Insolvency
  debt disputed on bona fide reasonable grounds 129
  disposition made after liquidation 10
  proof of claim, time period for 90
  rejected claim 18
Interest
  mora, distinguished from fault 115

L

Lease
  extension of 117
  tenant's obligation to continue payment 26
Legislation
  retrospectivity 103
Liquidation application
  whether debt disputed on bona fide reasonable ground 129
Loan
  terms of 25
Local authority
  approval of buiding plans 74
  clearance certificate 68
  property rates, determination of 38

M

Mandament van spolie
threatened removal of right 100
Mandate
commission, invalid certificate 96
sale of business 96
Mineral rights
old order rights 72
Mining right
abandonment of 42
Mortgage bond
meaning of 105
Municipality
service agreements 36

N

National Credit Act
Magistrates court order reducing debtor's obligation 64
retrospectivity, s 126B 103

P

Pre-emption
right of, not subject to Alienation of Land Act 117
Prescription
claim under s 252, Companies Act 106
creditor failing to ascertain quantum of debt 49
date on which debt falls due 25
effect of s 126B, National Credit Act 103
facts from which claim arises 51
interruption of by joinder 108
legal defect in claim 51
of conjoined debts 129
of debt secured by special notarial bond 105
when debt arises 26
Property
building development 22
eviction of protected tenant 98
historic debts due to municipality 36
mineral rights 72
municipal charges and 68
rates clearance certificate 70
rates, determination of 38
right of access 100
sectional title, body corporate's duties 40
zoning scheme 22

S

Sale in execution
municipal charges 68
Sectional title
body corporate's duties 40
Sequestration
advantage to creditors 87
Shareholder
access to company information 85
Shareholder
minority, protection of 16
Special notarial bond
prescription of debt secured by 105
State immunity
no defence for state-owned company 125

T

Title deed
restrictive conditions, removal of 119

U

Unlawful competition
wrongfulness requirement 43

W

Words and phrases
harmonious entity 22
if and when 69
mortgage bond 105
related person 82
security 84
title interest 84

ARENDSE v VAN DER MERWE N.O.

A JUDGMENT BY
BORUCHOWITZ J
GAUTENG HIGH COURT,
JOHANNESBURG
8 JULY 2016

2016 (6) SA 490 (GJ)

Companies

An applicant seeking to obtain leave under section 133(1)(b) of the Companies Act (no 71 of 2008) must as a minimum requirement establish a prima facie case against the company in business rescue.

THE FACTS

Arendse wished to institute action against African Bank Investments Ltd (ABIL), as co-defendants, with Ellerine Furnishers (Pty) Ltd (in business rescue) (EF); and Ellerine Holdings Ltd (in business rescue) (EHL), citing them as alternative defendants. There was uncertainty as to which of them was liable in the circumstances of the case.

The case against EF was that it was the contractual employer liable for the Arendse's remuneration at the time that an offer was made on an EF letterhead and signed by its chief executive officer. The case against EHL is that the document bore EHL's logo and was signed by EHL's chief executive officer. The case against ABIL was based on the assertion that the scheme was conceived primarily for ABIL's benefit. ABIL's duly authorised remuneration committee approved the scheme. Its subsidiaries, EHL and EF, contended that it was the intention of the parties that ABIL would pay out the awards.

Arendse applied in terms of section 133(1)(b) of the Companies Act (no 71 of 2008) for leave to commence legal proceedings against the company placed under business rescue. The section provides that during business rescue proceedings, no legal proceeding may be commenced or proceeded with in any forum, except with the leave of the court.

THE DECISION

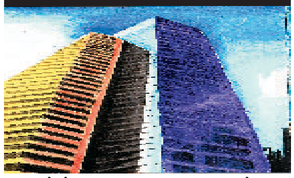
An applicant seeking to obtain leave under the section must as a minimum requirement establish a prima facie case against the company in business rescue. Arendse proposed to institute action against EF, EHL and ABIL, citing them as alternative defendants as there was uncertainty as to which of them was liable to effect payment. It is permissible for a plaintiff to sue defendants in the alternative where there is uncertainty as to which of the defendants is in law liable, especially in circumstances where the defendants deny liability and reciprocally point to one another as being the party responsible for the plaintiff's claim All that a plaintiff is required to do in such circumstances is to lay the necessary foundation of showing, prima facie, that one or other of the defendants is legally liable.

There was no justification why an applicant for leave under s 133(1)(b) should be obliged to establish a prima facie case with a higher degree of proof than would ordinarily be required in a summons or founding affidavit. It is sufficient if it be shown that the averments made, if unchallenged, establish a cause of action or demonstrate the existence of a triable issue. The fact that the averments made are contradicted or the probabilities are against the version advanced, would not disentitle an applicant to relief.

In the present case, the quantum of proof required to establish a prima facie case was even less onerous as Arendse was unable to say with certainty which of EF, EHL and ABIL was liable to effect payment.

Based on the averments set out in the founding affidavit and those facts in the answering affidavit which Arendse was unable to dispute, there was at the very least a prima facie claim against either EF, EHL or ABIL, or a combination of one or more or all of them, jointly and severally.

The applicants were justified in approaching this court for leave to institute legal proceedings against the respondents.



SOUTHERN VALUE CONSORTIUM v TRESSO TRADING 102 (PTY) LTD

A JUDGMENT BY BLIGNAULT J
23 NOVEMBER 2015
WESTERN CAPE HIGH COURT

2016 (6) SA 501 (WCC)

A company under business rescue cannot depend on sections 133(1) and 134(1)(c) of the Companies Act (no 71 of 2008) to resist a claim for ejectment from premises which it unlawfully occupies.

THE FACTS

Southern Value Consortium leased certain business premises to Tresso Trading 102 (Pty) Ltd. Tresso fell into arrears with the rent.

On 29 May 2015 the Southern Value Consortium obtained an order in terms of section 32 of the Magistrates' Courts Act (no 32 of 1944) which directed the sheriff to attach so much of the movables at the premises as should be sufficient to satisfy the sum of R381 455,69. Pursuant to this order the sheriff attached all the movables at the premises.

Tresso was placed under business rescue and business rescue practitioners were appointed to Tresso.

Southern applied for an order ejecting Tresso from the premises. It contended that it had cancelled the lease agreement and that it was entitled to eject Tresso from the property.

The business rescue practitioners opposed the application on the grounds that Southern was precluded by the provisions of sections 133(1) and 134(1)(c) of the Companies Act from pursuing the application.

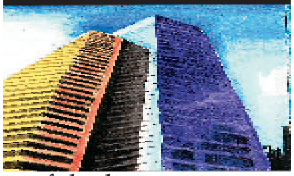
THE DECISION

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. Section 134(1)(c) provides that during business rescue proceedings, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective of whether the property is owned by the company, except to the extent that the practitioner consents in writing.

The concept 'legal proceedings' in s 133(1) of the Companies Act draws an express distinction between two categories of legal proceedings, ie (i) against the company, and (ii) in relation to any property belonging to the company, or lawfully in its possession. This distinction corresponds with the difference between a personal right and real right. The first category of proceedings comprises actions which are intended to enforce personal rights. The second category comprises actions which are intended to enforce real rights. Southern's cause of action in the present case was the rei vindicatio. It sought to recover property in respect of which it had a real right, namely ownership. It did not seek to enforce any contractual or other personal right against Tresso.

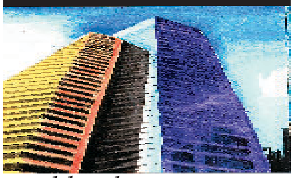
The word 'belong', if read in isolation, could have a wide meaning but applying the presumption that a reference to conduct is a reference to lawful conduct, it could only mean 'belong' in a legally valid sense. It cannot refer to belonging which is unlawful. The same interpretation applied to the meaning of the concept possession. Section 133(1) of the Companies Act refers expressly to lawful possession.

Southern claimed to be the lawful owner of the property. The business practitioners did not refute this claim. It followed that the property never belonged to Tresso. Following the cancellation of the lease agreement Tresso was no longer in lawful possession of the property. The business practitioners could therefore not rely on the provisions of section 133(1) of the Companies Act as a defence to the claim.



Similar reasoning applied to the interpretation of section 134(1)(c) of the Companies Act. The key concept is the lawful possession of the company. After the cancellation of the lease agreement Tresso was no longer in lawful possession of the property.

There is a well-established presumption in the interpretation of statutes that a reference to conduct is a reference to lawful conduct. See Du Plessis 25(1) Lawsa 2 ed para 343 and Steyn Die Uitleg van Wette 5 uitg 127 and the cases cited in fn 251. In the present context the word belong, if read in isolation, may have a wide meaning but if the presumption referred to above is applied, it can only mean belong in a legally valid sense. It cannot in my view be construed to include a case where the belonging is unlawful. The same interpretation applies to the meaning of the concept possession. Section 133(1) of the Companies Act indeed refers expressly to lawful possession.



ERAVIN CONSTRUCTION CC v BEKKER N.O.

A JUDGMENT BY PLASKET AJA (LEWIS JA, TSHIQI JA, SWAIN JA AND DAMBUZA JA concurring)
SUPREME COURT OF APPEAL
23 MARCH 2016

2016 (6) SA 589 (SCA)

Section 154(2) of the Companies Act (no 71 of 2008) precludes the recovery of a disposition made which is void in terms of section 341(2) of the Companies Act (no 71 of 1973).

THE FACTS

On 20 October 2010 an application was brought for the winding-up of Ditona Construction (Pty) Ltd. A final order was made. The effective date of the winding-up, in terms of section 348 of the Companies Act (no 71 of 1973) was 20 October 2010. Bekker and two others were appointed as Ditona's liquidators.

On 21 October 2010 R389 593,49 was paid by Ditona to Eravin Construction CC.

On 24 September 2012 Eravin's board resolved to place it under business rescue in terms of section 132 of the Companies Act (no 71 of 2008). Notice to commence business rescue proceedings was filed in the offices of the Companies and Intellectual Property Commission (CIPC) on 26 September 2012, a business rescue practitioner was appointed and a business rescue plan was later adopted. The business rescue was terminated on 31 May 2013 and a notice was filed to the effect that substantial compliance with the business rescue plan had been achieved.

The liquidators claimed repayment of the R389 593,49 paid on 21 October 2010, on the grounds that section 341(2) of the Act applied. This section provides that every disposition of its property by any company being wound-up and unable to pay its debts made after the commencement of the winding-up, shall be void unless the court otherwise orders.

Eravin contended that section 154(2) of the 2008 Act precludes the liquidators from recovering the debt. This section provides that if a business rescue plan has been approved and implemented, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan.

THE DECISION

Eravin argued that the debt was not a pre-business rescue debt owed by Eravin to Ditona as it only arose — or became due — after the commencement of the business rescue proceedings. It followed that its recovery was not barred by section 154(2) of the new Act.

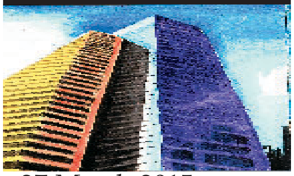
The question to be answered was when the debt was owed. That had to be answered in the first instance with reference to section 341(2) of the 1973 Act. It states expressly that a disposition in the terms contemplated by it 'shall be void'. The recipient has no right, on this account, to retain it. Consequently, it owes a debt to the body which made the prohibited disposition, and that debt is owed as soon as the disposition was received.

Section 154(2) of the 2008 Act is as clear: if a debt was owed by a company 'before the beginning of the business rescue process' — before, in other words, the filing of the resolution when a company places itself under business rescue — then the creditor 'is not entitled to enforce' that debt.

In this case, the payment was made on 21 October 2010 and, being void, its repayment was immediately owed by Eravin. Its business rescue proceedings began on 26 September 2012, being the date on which the resolution was filed with the CIPC. As the debt was owed prior to 26 September 2012, the debt could not be recovered.

The liquidators were not entitled to recover the payment.

JVJ LOGISTICS (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD



A JUDGMENT BY OLSEN J
KWAZULU NATAL DIVISION, DURBAN
22 JULY 2016

2016 (6) SA 448 (KZD)

Section 133(1) of of the Companies Act (no 71 of 2008) does not empower a court to overturn an order already given that property of a company under business rescue be surrendered to a creditor having rights to such property.

THE FACTS

JVJ Logistics (Pty) Ltd was a transport company which owned one vehicle. The vehicle was purchased under an instalment sale agreement concluded with Standard Bank of South Africa Ltd. JVJ fell into arrears with its instalments owed to the bank. As a result, the bank cancelled the instalment sale agreement and instituted proceedings against JVJ seeking an order confirming the validity of the cancellation and an order for the immediate return of the vehicle. These orders were granted by the court on 27 March 2015.

JVJ's business rescue commenced on 9 April 2015 following a resolution taken on 31 March 2015, and a Mr A. Vengadesan, was appointed to oversee the company during business rescue. He prepared a business plan. This disclosed the existence of only two creditors, ie the South African Revenue Services and the bank. Annexed to the plan was a set of documents incorporating an income statement and balance sheet which sought to account for the forecast financial situation of JVJ under business rescue. The motor vehicle was valued at R900 000, approximately the amount which would have been owing to the bank in terms of the instalment sale agreement if it had not been cancelled. The business plan was based on the intention that JVJ would perform a contract in terms of which it would use the vehicle to transport steel products around the country.

At the meeting called for the approval of the business plan the bank voted against it. The bank notified JVJ that it intended to have served and implemented the 'warrant of delivery' issued pursuant to the order of this court granted on 27 March 2015 directing the return of the motor vehicle to it.

JVJ sought an order in terms of section 153(1)(a)(ii) of the Companies Act (no 71 of 2008) setting aside the vote of the bank against approval of the business plan on the ground that the vote was inappropriate; and an interdict restraining the service and implementation of the warrant under which the motor vehicle would be seized and returned to the bank.

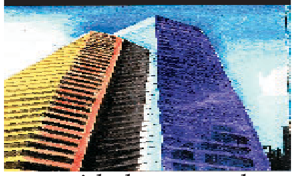
THE DECISION

The judgment pronounced by the court on 27 March 2015 was final and definitive with regard to the rights of the parties to possession of the motor vehicle.

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 in certain circumstances.

The question was whether the court had the power or jurisdiction in effect to vary its original order other than on the basis that section 133(1) of the Act constitutes a statutory injunction against the implementation or execution of the judgment under which the vehicle was to be restored to the possession of JVJ. If the applicant did not enjoy the protection of a moratorium imposed by section 133(1), then the interdict sought could not be granted in any terms.

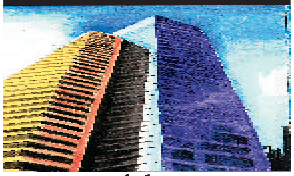
An interpretation of section 133(1) of the Act which would allow return of the vehicle to JVJ on the basis contended for was insensible and unbusinesslike. It would treat creditors and owners



of property possessed without right by the company unequally. The former are not obliged to assist the company any further whilst the latter would be obliged to do so by statutory injunction. The former have input into the design of the rescue plan, whilst there is no like provision empowering the latter to do so. Such an imbalance cannot have been intended and will in many cases result in an imbalance in the treatment of these different stakeholders in conflict with section 7(k) of the Act.

JVJ was not entitled to an order preventing the enforcement of the order of the court made on 27 March 2015 because section 133(1) of the Act does not empower the court to grant such an order.

One would think that if any element of unlawfulness attaches to someone's possession of property, then such property cannot be said to be in the 'lawful possession' of that person. However the temptation to regard that proposition as obvious and decisive of this case, and to close one's mind to other possibilities, must be sternly resisted especially when considering the meaning of the provisions of the Act dealing with business rescue. The approach to be followed in reaching a decision on the interpretation of the relevant words in s 133(1) of the Act is the one set out in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)



DE SOUSA v TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD

A JUDGMENT BY
BORUCHOWITZ J
GAUTENG LOCAL DIVISION, JOHANNESBURG
13 FEBRUARY 2014

2016 (6) SA 528 (GJ)

Allegations made that conduct is unfairly prejudicial, unjust or inequitable within the meaning of section 252 of the Companies Act (no 61 of 1973) are to be taken cumulatively. Section 252 may apply where prejudice is suffered by all members, as opposed to some members only.

THE FACTS

De Sousa and another minority shareholder in Technology Corporate Management (Pty) Ltd brought an action as plaintiffs against the company in terms of section 252 of the Companies Act (no 61 of 1973).

Section 252(1) 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, subject to the provisions of subsection (2), make an application to the court for an order under the section.

De Sousa alleged that during or about the period November 2007 to September 2008, Cornelli, the managing director of the company and a shareholder, registered a company called TCM Printing Solutions (Pty) Ltd and wrongfully and intentionally caused the business of TCM conducted by means of its supplies division to be over to TCM Printing Solutions at no value. Alternatively, it was alleged that Cornelli procured that the business of TCM's supply division be conducted and accounted for as if it were a separate and distinct entity from TCM, and caused all income and profits arising therefrom to accrue solely to certain other shareholders.

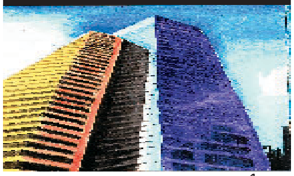
It was also alleged that Cornelli wrongfully caused loss to TCM of its business conducted under its supplies division and the value thereof, thereby in turn jeopardising the value of the plaintiffs' shares in TCM.

The company excepted to the claim on the ground that the complaints impacted, not on the plaintiffs or a part of the members of the company directly. The complaints were that the conduct complained of impacted on the company. The impact alleged upon the plaintiffs was a derivative impact resulting from the impact on the company. The exception was also based on the ground that the complaints were of an impact upon every shareholder of the company. In the circumstances, the complaints did not fall within section 252(1) because they were not unfairly prejudicial, unjust or inequitable to the plaintiffs or some part of the members of the company.

THE DECISION

There were principally three reasons why the exception could not be sustained.

First, the defendants fundamentally misconstrued the nature of the claim. They had erroneously misconstrued the particulars of claim as raising distinct causes of action. Although these identified particular acts or omissions, it was clear that the cause of action was not founded upon isolated acts or omissions but rather upon an allegation that the affairs of the company were being conducted in a manner which is unfairly prejudicial, unjust or inequitable to them within the meaning of section 252(1) of the Act. The allegations were to be taken cumulatively. A court is not required to consider each complaint in isolation but rather the evidence as a whole in order to determine whether the controllers of the company have embarked upon a course of conduct giving rise to the alleged unfair prejudice. It must be shown that the conduct objectively viewed is not only prejudicial but 'unfairly prejudicial'. To determine



unfairness the court has to have regard to the conduct complained of as a whole in order to determine whether its effect is unfairly prejudicial.

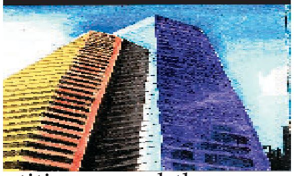
Second, there was no warrant for the proposition that section 252 does not apply where prejudice is suffered by all members. It was artificial to reason that there is no unfair prejudice to one shareholder since all shareholders are prejudiced equally. Notionally, all members of a company may be prejudiced but some may be prejudiced in a different manner. Conduct by controllers of a company which lacks probity, is inherently prejudicial to members and would entitle a member to approach the court for s 252 relief.

Third, there was no warrant for the proposition that a member is disentitled to relief if prejudice is inflicted on the company but not directly on a member or some part of the members. There is abundant authority to the effect that prejudice suffered derivatively by shareholders is justiciable under section 252.

The exception was dismissed.

There are principally three reasons why the exception cannot be sustained. First, and as will appear more fully below, the defendants have fundamentally misconstrued the particulars of claim. Second, there is no warrant for the proposition that s 252 does not apply where prejudice is suffered by all members. It is artificial to reason that there is no unfair prejudice to one shareholder since all shareholders are prejudiced equally. Notionally, all members of a company may be prejudiced but some may be prejudiced in a different manner. Conduct by controllers of a company which lacks probity, is inherently prejudicial to members and would entitle a member to approach the court for s 252 relief. Third, there is no warrant for the proposition that a member is disentitled to relief if prejudice is inflicted on the company but not directly on a member or some part of the members. There is abundant authority to the effect that prejudice suffered derivatively by shareholders is justiciable under s 252.

ABSA BANK LTD v NAUDE NO



JUDGMENT BY SCHOEMAN AJA (PONNAN JA, PILLAY JA, WILLIS JA and FOURIE AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2015

2016 (6) SA 540 (SCA)

A creditor bringing an application for a declaratory order that a meeting of creditors approving a business rescue plan for a company is unlawful and invalid must join in the application the other creditors who have been affected by the business rescue plan.

THE FACTS

On 19 June 2012 the board of directors of Louis Pasteur Investments Ltd resolved that the company begin business rescue proceedings in terms of section 129 of the Companies Act (no 71 of 2008). The company was indebted to the bank in an amount of approximately R8.5m. The debt was secured by two mortgage loans. The company and four other related companies had executed a cross-suretyship in favour of the bank. The cross-suretyship potentially increased the company's liability by an additional amount of approximately R150m.

In terms of the proposed business rescue plan circulated to creditors before the meeting in which the adoption of the business rescue plan was scheduled to take place, the bank was allocated a voting interest in respect of its full secured claim. The bank's claim in respect of the cross-suretyship was considered to be a 'contingent claim' and the voting interest allocated thereto was limited to a value of approximately R2m. The practitioner did not consider the claim in respect of the cross-suretyship to be a concurrent claim and it was not included as such.

The bank objected to the voting interest allocated to it before the meeting of creditors, as its voting interest had been determined without reference to the cross-suretyship, but its objection was rejected. Due to the reduction of the concurrent claim of the bank, its opposition to the acceptance of the business rescue plan was also rejected, and the business rescue plan was preliminarily approved in terms of section 152(2) of the Act, on the basis that it was supported by the holders of more than 75% of the creditors' voting interest at the meeting.

The bank brought an application against Naude, the business rescue practitioner, and the company, for a declaratory order that the decision taken at the meeting of creditors approving the business rescue plan for the company, was unlawful and invalid.

Naude opposed the application on the grounds that it should have been brought against the other creditors as well.

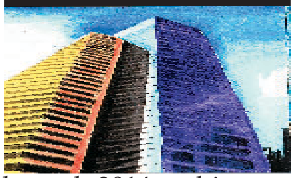
THE DECISION

If an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That was the position in the present case. If the creditors were not joined their position would be prejudicially affected. A business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive to extinguish debts owing to them, would not be paid; the money that they had received, for a period of 30 months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received might be reduced if the company was liquidated.

It was contended that if this conclusion was reached, the proceedings should be stayed and the bank should be afforded an opportunity to join the creditors. However, a simple declaratory order was sought with no consequential relief such as the repayment by the creditors of the amounts received in terms of the plan. In any event the relief sought would have to be amended to provide inter alia for the repayment by creditors. There therefore seemed to be little point in keeping the application alive and remitting the matter to the High Court.

The application failed.

REMGRO LIMITED v UNILEVER SOUTH AFRICA HOLDINGS (PTY) LIMITED



A JUDGMENT BY OLSEN J
KWAZULU NATAL DIVISION, PIETERMARITZBURG
23 NOVEMBER 2015

2015 SACLR 497 (KZP)

A provision protecting a minority shareholder in certain defined circumstances does not require the board of directors to implement such protection in all conceivable circumstances when it is clear there are circumstances in which such protection may be lifted.

THE FACTS

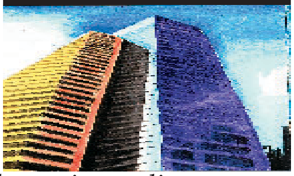
In April 2013, Robertsons Holdings (Pty) Ltd and the other two shareholders in Unilever South Africa Holdings (Pty) Ltd concluded a shareholders agreement. It provided that Robertsons, which held 25% of the shares, and the other shareholders had the right to nominate directors for appointment to the board of Unilever. It also provided that Unilever would not undertake any action in connection with certain 'fundamental issues' without the matter first having been discussed by the board, and without having obtained the prior approval of Robertsons. One of the fundamental issues was defined as 'Termination or amendment (including, for the avoidance of doubt, amendment pursuant to the provisions of clause 4.9 of the Corporate Services Agreement) of the Corporate Services Agreement ....'

The Corporate Services Agreement (CSA) was an agreement between Unilever and an overseas associated company, Unilever plc. This involved the payment of certain fees by Unilever to Unilever plc. Clause 7.8 of the shareholders agreement provided that if a proposal affecting a fundamental issue was made, was discussed by the Board, and did not secure the approval of Robertsons, and this occured twice within six months, then the other two Unilever shareholders would be entitled to serve notice (a 'Deadlock Resolution Notice') on the Robertsons shareholder implementing the proposal on that matter without any further vote.

In June 2013, there was a proposal for the increase of the fees, and this was discussed and repeated through 2014 and into 2015. Robertsons was of the view that the proposal held no advantage for Unilever and was in fact severely prejudicial to it. In March 2015a director nominated by the other two Unilever shareholders conveyed to Robertsons that there was a firm intention to amend the CSA in line with the proposals that had been made. Notice was then given of a meeting of the directors to be held on 9 June 2015. Robertsons took the view that this was intended to be an unlawful implementation of clause 7.8. It brought an application for an interdict to prevent Unilever from holding any directors or shareholders meeting for the discussion or consideration of the proposal to amend the CSA by increasing fees. An undertaking was given to Robertsons that no meeting involving the disputed proposal to increase fees would be held without an acceptable period of notice being given. Subsequently notice of a meeting to be held on 24 November 2015 was given to Robertsons.

THE DECISION

Robertsons was of the view that whenever the board considered a proposal supported by the other Unilever shareholders which was not in its interests, the directors had an unexpressed power to support Roberstons in a dispute between shareholders over a fundamental issue, and override the majority status of the Unilever shareholders. However, the provisions of the shareholders agreement and the Articles of the company did not support that contention. Subject only to the constraints of law, the default position within companies is that the majority prevails. The concession made by the other



Unilever shareholders regarding this principle was subject to its right to break deadlocks in certain circumstances. The clear purpose of a deadlock breaking mechanism was the restoration of the default position. Nowhere was it said that the default position could only be restored if the board agreed.

Considering the provisions as a whole, and given that the board was bound by the provisions of the memorandum of incorporation, it had to be implied that the board was duty bound to discuss any proposal concerning a fundamental issue. The board's views on the quality of the proposal determined nothing until it was called upon eventually to decide the issue. Robertsons had not established a case for the relief it seeks.

Whatever might have been said about the meeting of 9 June, the notice of the meeting due to take place was in precise compliance with the requirement of the shareholders agreement that the proposal to amend the scale of fees should be 'discussed by the board'. The notice to directors did not place a proposed resolution on the agenda and did not convey that a resolution would be 'considered' in the sense that that word is used in section 75 of the Companies Act. The directors were bound to discuss the matter as required by the memorandum of incorporation (and the shareholders agreement) by which they were bound. Any dispute as to the lawfulness of anything which followed would be a matter for adjudication only once such an event had taken place.

CONSTANTIA INSURANCE CO LTD v MASTER OF THE HIGH COURT, JOHANNESBURG

A JUDGMENT BY VAN DER LINDE J
GAUTENG HIGH COURT, JOHANNESBURG
13 MAY 2016

2016 (6) SA 386 (GJ)

Insolvency

Section 45(3) of the Insolvency Act (no 24 of 1936) envisages a procedure that is procedurally fair, all things being equal.

THE FACTS

Constantia Insurance Co Ltd was a creditor in the insolvent estate of Protech Khuthele Property Investments (Pty) Ltd. The second and third respondents were appointed as provisional liquidators.

At the second meeting of creditors Constantia proved three claims against the Protech estate. Thereafter, the liquidators reported to the Master in terms of section 45(3) of the Insolvency Act that they disputed this claim, and gave reasons for so disputing the claim. The Master afforded Constantia an opportunity to substantiate its claim. She provided Constantia with the report, and gave it an opportunity to respond. Constantia did so.

The Master then provided the liquidators with a copy of Constantia's substantiation of its claim, and afforded the liquidators an opportunity to respond to it. The liquidators did so by furnishing a voluminous response. Constantia alleged that in it, they raised new matter that had not been dealt with before by either Constantia or the liquidators. The Master then invited Constantia to deal with this second document emanating from the liquidators. Constantia declined, saying that the Master had no power to invite the response from the liquidators, and the liquidators had no power to accept the invitation. The liquidators contended that the Master is entitled to ask for clarification or comment, and the Master contended that she would consider 'all relevant information'.

Constantia then launched an application for declaratory orders to the effect that the Master of the High Court has no power to consider a response by a liquidator to a creditor's substantiation of its claim in terms of section 45(3) of the Insolvency Act (no 24 of 1936).

THE DECISION

Section 45(3) provides that if the liquidator disputes a claim after it has been proved against the estate at a meeting of creditors, he shall report the fact in writing to the Master and shall state in his report his reasons for disputing the claim. Thereupon the Master may confirm the claim, or he may, after having afforded the claimant an opportunity to substantiate his claim, reduce or disallow the claim, and if he has done so, he shall forthwith notify the claimant in writing.

Constantia argued that based on the scheme of the Insolvency Act and sections 44 and 45 in particular, the principle of audi alteram partem did not apply in the present case.

Under section 3(1) of the Promotion of Administrative Justice Act (no 3 of 2000) (PAJA) the process under section 45(3) must be procedurally fair. Under section 3(2)(a) of PAJA what is procedurally fair depends on the circumstances of each case.

Section 45(3) envisages a procedure that is procedurally fair, all things being equal. In this case no facts or circumstances were disclosed that rendered the procedure there laid down procedurally unfair. It followed that Constantia was entitled to the relief it sought.

EDWARDS v FIRSTRAND BANK LIMITED

A JUDGMENT BY SHONGWE JA (TSHIQI, SERITI JJA AND MAKGOKA AJA concurring)
SUPREME COURT OF APPEAL
30 SEPTEMBER 2016

2017 (1) SA 316 (SCA)

Credit Transactions

Section 127(2) of the National Credit Act (no 34 of 2005) does not apply if the credit agreement in question has already been cancelled. A consumer's failure to receive a notice required by the Act for the reason that the consumer provided an address at which there is no postal delivery service does not mean that there has been a failure to comply with the duty to furnish such a notice.

THE FACTS

Edwards and Firstrand Bank Ltd concluded an instalment sale agreement for the purchase of an Aston Martin Vantage Coupe for a contract price of R1 457 958.00. Edwards fell into arrears, and as a result the bank issued summons against him cancelling the agreement and claiming the return of the vehicle, and the shortfall.

Edwards unsuccessfully applied for leave to appeal against summary judgment which was granted against him. The vehicle was eventually repossessed and a notice in terms of section 127(2) of the National Credit Act (no 34 of 2005) was despatched by ordinary post to Edwards, using the address he had given in the credit agreement as his domicilium citandi ex executandi. No delivery service was given at this address. Section 127(2) provides that a credit provider must give the consumer written notice setting out the estimated value of the goods and any other prescribed information.

The bank attached to an amended summons the previous notices sent to Edwards in terms of sections 129(1) and 127(2) of the Act and continued the action in order to recover a shortfall after the vehicle was sold at an auction. The bank sent a notice to Edwards in terms of section 127(5) of the Act and the matter proceeded to trial. Section 127(5) provides that after selling the goods the credit provider must credit the consumer with the nett proceeds of the sale and notify the consumer of the entries applicable forming the final balance oustanding.

The essential point of dispute was whether or not the bank complied with section 127(2) and (5) of the Act before disposing of the vehicle. Edwards contended that he did not receive these notices, and also that the vehicle was not sold for the best price reasonably obtainable as required by section 127(4)(*b*) of the Act.

Held—

The first question was whether section 127 of the Act applies at all in the circumstances where the goods forming the subject of a credit agreement have been repossessed by order of the court. Generally, section 127(2) to (9) of the Act is applicable. However, it was not applicable in the present case because the agreement had already been cancelled.

Edwards failure to receive the first notice was to be attributed to him because he had given an address at which there was no delivery service. In consequence, it could be held that the notices in terms of s 127(2) and (5) of the Act were duly given and/or sent to him. Edwards had himself to blame by providing an address, in respect of which there was no delivery service.

FIRSTRAND BANK LTD v ZWANE AND TWO OTHER CASES

A JUDGMENT BY VAN DER LINDE J
GAUTENG DIVISION, JOHANNESBURG
29 JULY 2016

2016 (6) SA 400 (GJ)

The court has a discretion not to declare property executable. Such discretion may be applied in favour of the homeowner when the homeowner is in arrears for only a few months and the home loan agreement has not been cancelled.

THE FACTS

Firstrand Bank Ltd and Nedbank Ltd applied for default judgment and orders that bonded property be declared executable against Zwane and two others.

In Zwane's case, the bond instalments were R7694,95, and the arrears as of 23 June 2016, R23 410,29. The arrears amounted to just over three monthly instalments The home-loan agreement had not been cancelled.

In the second (Hyslop's) case, the bond instalments were R11 205,79, and the arrears as of 29 June 2016, R33 194,75. That reflected just under three months' instalment arrears. The accelerated full balance was R953 399,28. The home-loan agreement had not been cancelled.

In the third (Nkuna's) case, the bank had earlier, on 11 May 2016, obtained a money judgment for the accelerated balance of R840 255,46. The bond instalments were R7770,76, and the arrears as of 24 August 2015, R46 800,89. That reflected just over six months' instalment arrears, and at a point in time some nine months before.

THE DECISION

The banks submitted that although the court had a discretion to postpone the application for the declaratory relief sought, it had no discretion to do so in respect of the applications for default judgment for the capital amounts. Reliance was placed on the *judgment FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd* [2014] ZAGPJHC 117 (4 June 2014), and on the principle that contracts deliberately entered into must be honoured.

Reliance on acceleration clauses which in typical home-loan agreements found the right to cancel even when the arrears are few or small was based on that principle.

The banks' submission highlighted the question as to what happens when a court, acting under the power afforded in terms of Rule 46(1)(a)(ii), declines immediately to grant an order for execution against the debtor's home because the arrears are too few and small, but the full accelerated outstanding balance large; and instead postpones the application for executability, say, six months, and the debtor then pays all the arrears.

Apart from the provisions of the Practice Manual, in these types of applications the court has a discretion to postpone the applications for default judgment for the accelerated capital amounts, and so to tie those applications in with the applications for declarations of executability.

In Zwane's case, the amount owing reflected just over three months' instalment arrears. The accelerated full balance was R708 452,85. In this context, arrears of just over three monthly instalments were 'few', in the context of para 4 of ch 10.17 of the Practice Manual.

As the home-loan agreement had not been cancelled, and Zwane was thus still able to reinstate it under section 129(3)(a) of the National Credit Act. If a judgment for the accelerated balance was given, the bank could take out a writ against movables and the respondents would be prejudiced under section 29(4)(b) of the National Credit Act.

In Hyslop's case, arrears of just under three monthly instalments were 'few', in the context of para 4 of ch 10.17 of the Practice Manual. As the home-loan agreement had not been

cancelled, the respondent was thus still able to reinstate it under section 129(3)(a). If a judgment for the accelerated balance was given, the bank could take out a writ against movables and the respondent would be prejudiced under section 129(4)(b).

In Nkuna's case, arrears of just over six months' instalments had arisen, nine months before the application was made. These were not 'few', in the context of para 4 of ch 10.17 of the Practice Manual.

There are principally three reasons why the exception cannot be sustained. First, and as will appear more fully below, the defendants have fundamentally misconstrued the particulars of claim. Second, there is no warrant for the proposition that s 252 does not apply where prejudice is suffered by all members. It is artificial to reason that there is no unfair prejudice to one shareholder since all shareholders are prejudiced equally. Notionally, all members of a company may be prejudiced but some may be prejudiced in a different manner. Conduct by controllers of a company which lacks probity, is inherently prejudicial to members and would entitle a member to approach the court for s 252 relief. Third, there is no warrant for the proposition that a member is disentitled to relief if prejudice is inflicted on the company but not directly on a member or some part of the members. There is abundant authority to the effect that prejudice suffered derivatively by shareholders is justiciable under s 252.

GERSTLE v CAPE TOWN CITY

A JUDGMENT BY DAVIS J
(BAARTMAN J and BOQWANA J concurring)
WESTERN CAPE DIVISION
16 AUGUST 2016

2017 (1) SA 11 (WCC)

Property

A group housing development which is required to ensure that it maintains a 'harmonious entity' means that all the structures within the development, taken together, must form an orderly or pleasing style of building. This requirement provides no grounds for an extension of a property owner's rights to a view, to privacy and to light.

THE FACTS

The second and third respondents, and the trustees of the Welkom Property Development Trust, purchased front-row dwellings in Mill Row, a group housing development situated in Cape Town. Mill Row consisted of seventeen properties, nine of which were in the back row and eight of which were in the front row. The front row properties constituted single-storey residential dwellings.

In June 2011 the second and third respondents and the Trust submitted plans to the City of Cape Town in order to convert their front-row dwellings to double-storey dwellings. These plans were approved by the City in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 . This permitted both the second and third respondents to convert their front-row single-storey dwelling into a double storey.

In 1984, the City's town planning scheme had been amended to change the zoning of the properties from Special Business to General Residential subzone subject to height restriction of three storeys. There was a subsequent subdivision of the erven in terms of section 9 of the Townships Ordinances. The consequence of this was that neither of the approvals to amend the front-row houses required submission of a site development plan to control the architectural detail of the development, and there were no requirement to implement a design manual or design guidelines or architectural guidelines to control the architectural elements of the development. There was also no requirement to form a Home Owners Association to control the aesthetics of the development.

Gerstle and the other appellants were registered owners of dwellings in Mill Row. They applied to the court a quo for the setting-aside of the City's decision to approve the building plans.

THE DECISION

Section 7(1)(b) of the National Building Regulations and Building Standards Act (no 103 of 1977) provides that if the decision maker in the approval of building plans is not satisfied that the application complies with the necessary requirements, he shall refuse to grant approval. Gerstle contended that approval should not have been granted because a reasonable decision-maker would not have agreed to approve the construction of a two-storey building in the front row of Mill Row, as such a construction would destroy 'the harmonious entity' as defined within the concept of a group housing scheme.

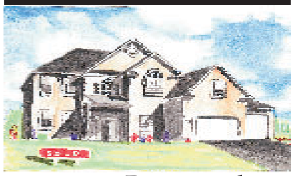
A 'harmonious entity' meant that all the structures within a group housing development, taken together, must form an orderly or pleasing style of building.

As a result of the amendment of the zoning of the properties, there was no further restriction other than the three storey height and architectural detail limitation on the development including the front row of the development. This meant that whatever the claims of the developer or the designer might have later been, no legal limitations had been imposed by the developer pursuant to the idea of a Group Housing Scheme. Taking this into account, it appeared that Gerstle was really attempting to utilise the concept of an 'harmonious architectural entity' so as to create rights to a view, to privacy and to light, notwithstanding that none of these claims were specifically provided for in any of the applicable legal mechanisms.

The application was dismissed.

ABSA LTD v MOORE

Property



A JUDGMENT BY CAMERON J (NKABINDE ADCJ, FRONEMAN J, JAFTA J, KHAMPEPE J, MADLANGA J, MBHA AJ, MHLANTLA J and MUSI AJ concurring)
CONSTITUTIONAL COURT
21 OCTOBER 2016

2017 (1) SA 255 (CC)

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 High Court granted the orders. The court imposed no condition on the restitution of the property that it become subject to the bonds previously registered with the bank. The bank contended that this condition should have been imposed. It argued that the cancellation of the bonds was part of a greater fraudulent scheme, and therefore had to be reversed. If, however,

the cancellation was valid, then the bank contended that the Moores had been enriched at its expense, and the appropriate remedy was to reinstate the security the bank previously held over their home.

THE DECISION

Assuming in favour of the bank that Kabini paid the Moores' bond debt, his payment was effective to discharge their debt, even if he did so in fraud of the bank with funds the bank provided. Whether Kabini paid the debt on the Moores' behalf, by a book deduction from his own freshly advanced bond loan, or by some other means, the bank accepted it and the payment was valid. The Moores no longer owed the bank anything.

The question then was whether the Brusson fraud could be a reason to cancel the the Moores' bonds. The answer to this had to be in the negative. The bonds were accessory to the main debt they owed to the bank. The main obligation was validly cancelled. It followed that the accessory obligation was discharged too.

The bank contended that it should be restored to its security under its agreement with the Moores because it provided the funds from which the Moores were benefiting, and because it never intended to expose itself to debt, whether to the Moores or Kabini, without the security of the Moores' property. At no stage in any of these transactions did it assume the risk of an insolvency that would leave it without cover.

This argument could not be sustained. It depended on separating the bank's function first as lender to the Moores, and then as lender to Kabini. But if the first lender were in fact a different bank, on what terms and conditions would the court be able to impose a new bond in its favour as second bank? Secondly, the argument assumed that the Moores were enriched at the bank's expense. This was by no means clear. It was not clear that they were enriched, and if so whether this was at the expense of the bank. The answers to both questions seem to be in the negative. The release of the Moores' property from the bonds over them was not gratuitous. It came at a cost: their new debt to Brusson.

The bank pointed out that the Moores owed Brusson and Kabini nothing. Kabini, Brusson and their respective trustees in insolvency had no claim against them and they had come away with no liabilities to anyone at all. However, the accuracy of this analysis depended on whether the Moores were vulnerable to a claim by the trustees of either Brusson's or Mr Kabini's insolvency.

The bank's argument had some force, because according to general principle, neither Brusson nor Kabini could sue the Moores to reclaim what they were paid under the fraudulent contracts. But even if the Moores were enriched, the bank faced the further hurdle, ie that it was not impoverished.

LANCELOT STELLENBOSCH MOUNTAIN RETREAT (PTY) LTD *v* GORE N.O.

JUDGMENT BY ZONDI JA (MAYA JA, BOSIELO JA, WILLIS JA AND GORVEN AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2015

2015 SACLR 469 (A)

Contract

It is necessary to set out the particular terms of an alleged loan agreement if it is asserted that such an agreement was concluded.

THE FACTS

In April 2008, Queensgate Wealth Manager (Pty) Ltd borrowed •2 350 000 from AIK Credit plc. Clause 9 of the loan agreement provided that at any time, subject to two days notice, the entire amount due, including interest, would be payable in full within 6 months, or if renewed at the end of the renewal period. Queensgate on-lent some of these funds to another company which signed a deed of suretyship in favour of AIK. In September 2008, by means of an agreement of assignment and delegation Lancelot Stellenbosch Mountain Retreat (Pty) Ltd assumed that company's obligation to pay Queensgate Wealth R6 480 000. Queensgate Wealth defaulted in repaying the loan to AIK. On 20 October 2008, AIK sent a letter of demand to Queensgate Wealth demanding payment of •2 350 000.

On 26 April 2010, the liquidators of Queensgate Wealth addressed a letter of demand in terms of section 345(1)(a) of the Companies Act (no 61 of 1973) to Lancelot for payment of the sum of R6 480 000. They brought an application for the liquidation of Lancelot on 14 May 2012.

Lancelot contended that the terms of its payment obligations were governed by the loan made by AIK. The date on which the AIK loan became due for payment by Queensgate Wealth was 17 October 2008, that this debt prescribed three years later on 16 October 2011, and accordingly also the debt owed by it to Queensgate Wealth. The application for liquidation having been brought after this date, it contended the liquidators had no claim against it.

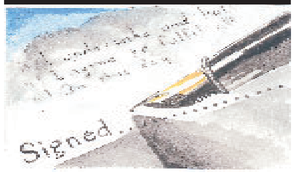
THE DECISION

There was insufficient evidence to establish the assertion that the loan to Queensgate Wealth was repayable on the same date the loan to AIK was repayable. The terms of the oral loan agreement between Queensgate Wealth and the company to which it lent money were set out by Lancelot in vague terms. All that it alleged was that the loan between Queensgate Wealth and that company was payable on 17 October 2008 because that was the repayment date of the AIK loan, but there was no factual basis laid for that assertion.

It could not be accepted that the payment date of the loan between Queensgate Wealth and its debtor should be determined with reference to the terms and conditions of the AIK loan. Therefore, the loan of R6 480 000 became due and payable when a demand for its payment was served on Lancelot on 5 May 2010. Accordingly, when the winding-up application was launched on 14 May 2012 the debt under that loan had not become prescribed.

MONYETLA PROPERTY HOLDINGS (PTY) LIMITED v IMM GRADUATE SCHOOL OF MARKETING (PTY) LIMITED

Contract



A JUDGMENT BY LEACH JA (PONNAN JA SHONGWE JA, DAMBUZA AJA AND MAYAT AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2015

2015 SACLR 479 (A)

In accordance with the rule that damages become claimable upon breach of an agreement, the debt arises upon that date even if payments by the debtor would have arisen at a later date in terms of the agreement.

THE FACTS

Monyetla Property Holdings (Pty) Limited leased certain premises to IMM Graduate School of Marketing (Pty) Limited. The lease was to subsist until 30 September 2010. Clause 26.2 of the lease provided that irrespective of any dispute between the parties, while IMM continued in occupation of the premises, it would be obliged to continue paying any amounts due in terms of the lease. IMM fell into arrears in paying the rental, and by 1 March 2009 had become indebted to Monyetla by more than R2m. Monyetla successfully sued for payment. The lease was formally cancelled on 6 March 2009.

Monyetla brought further proceedings against IMM in respect of its continued occupation of the premises up until the end of April 2010. The parties settled this action.

On 16 March 2012, Monyetla issued summons claiming damages from IMM in the sum of R1 192 493,81 allegedly suffered due to its breach of the lease and its resultant cancellation. It alleged that this represented the rental, operating costs, rates, open parking, basement parking, parking, water, refuse, sewerage and electricity which it would have received in respect of the period 16 April 2010 to 30 September 2010 but for IMM's breach of the lease agreement.

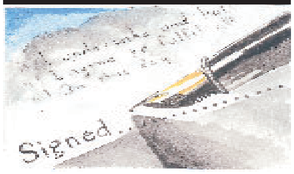
IMM pleaded that Monyetla's claim had arisen on the date of cancellation of the agreement on 6 March 2009, that the summons had been served more than three years later on 19 March 2012, and that the claim for damages flowing from that breach had therefore prescribed under section 11 of the Prescription Act (no 68 of 1969).

THE DECISION

Monyetla argued that the damages which it claimed were a debt which became due subsequent to the cancellation of the lease. In consequence, prescription began to run from that date, and not from the date of cancellation of the lease.

This argument however, could not be sustained because as at the date of cancellation of the lease, Monyetla became entitled to claim all amounts for which IMM would become liable including those arising up until 30 September 2010. This position was not changed because of clause 26.2. Continued occupation of the premises is irrelevant to a claim for damages arising from cancelling a lease due to the tenant's breach.

NEDBANK LTD *v* STEYN



A JUDGMENT BY BRAND JA (LEWIS JA, MBHA JA MEYER JA AND MAYAT AJA concurring)
SUPREME COURT OF APPEAL
25 MARCH 2015

2015 SACLR 488 (A)

A creditor is not bound to follow the claims procedures provided for in the Administration of the Estates Act (no 66 of 1965) but may enforce its rights by bringing an action against the debtor for that purpose.

THE FACTS

Steyn died on 4 June 2012. The second respondent was appointed executrix in his estate but failed to finalise the estate. The immovable property in the estate was bonded to Nedbank Ltd. Nedbank issued summons on 24 July 2013, for payment of amounts outstanding under the bond, a sum of R132 005.71. It did not follow the claims procedure for claims against a deceased estate as provided for in the Administration of the Estates Act (no 66 of 1965).

When Nedbank applied for default judgment, its application was dismissed on the grounds that there had been a failure to comply with the Act. Nedbank appealed.

THE DECISION

The question was whether or not the claims procedure provided for in the Act took away a creditor's common law right to sue for payment.

It was held in *Davids v Estate Hall* 1956 (1) SA 774 (C) that the Administration of Estates Act did not create the right which the creditor sought to enforce. That right arose from a contract and under the common law, and the claimant was entitled to enforce it by action. This was followed by later cases, most recently in Nedbank Ltd v Samsodien NO 2012 (5) SA 642 (GSJ). The ratio decidendi in these cases is that the procedure laid down in the Act does not preclude the claimant from instituting an action in common law against the estate. Tthese cases were correctly decided. Unless it can be said that the Act must be construed to deprive the plaintiff of the common law action against the estate, that action remains extant.

The appeal was upheld.

BALISO v FIRSTRAND BANK LTD

A JUDGMENT BY FRONEMAN J (MOSENEKE DCJ, CAMERON J, KHAMPEPE J, MADLANGA AJ, MHLANTLA J and NKABINDE J concurring, ZONDO J (MOGOENG CJ, BOSIELO AJ and JAFTA J dissenting)
CONSTITUTIONAL COURT
4 AUGUST 2016

2017 (1) SA 292 (CC)

Credit Transactions

A debtor alleging that insufficient notice was given in terms of the National Credit Act (no 34 of 2005) should not raise this as an exception when there is nothing on the pleadings to indicate that insufficient notice was given, but should raise this as a defence at trial.

THE FACTS

Firstrand Bank Ltd brought an action against Baliso for payment of an amount of R224 880,27 allegedly outstanding in terms of a credit agreement. In its particulars of claim the bank alleged that it despatched a notice in terms of section 127(2) of the National Credit Act (no 34 of 2005) to Baliso and attached a copy of the notice to the particulars of claim. After filing a plea that contained an allegation that the notice was sent by ordinary mail only, Baliso filed an exception to the claim, as lacking averments necessary to sustain an action.

Baliso excepted to the particulars of claim on the grounds that it should have contained allegations of notice by registered mail.

THE DECISION

The section 127(2) notice follows upon the termination of the relevant credit agreement by the consumer and the surrender of the goods to the credit provider. Within 10 business days of receiving the notice or the tendered goods, the credit provider must give the consumer the requisite notice under s 127(2)(b) 'setting out the estimated value of the goods and any other prescribed information'.

The section 127(2) notice setting out the estimated value of the goods provides the consumer with vital information about whether he is likely to benefit from the sale of the goods, or will still be liable for payment of some money to the credit provider after the sale. Without proper notice the consumer is deprived of the opportunity of making the choice of whether to withdraw the termination of the agreement. But it works to the detriment of the credit provider too. If no proper notice is given, the provisions allowing for the sale of the goods become inoperative and the credit provider's claim for repayment of outstanding moneys in the case of a shortfall on the settlement value of the goods will fail. If a sale follows upon an invalid notice, a credit provider risks losing its claim for repayment of outstanding moneys.

Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) sought to prevent possible injustice to consumers who did not oppose claims. It did this by providing guidance on how courts should ensure that sufficient allegations are contained in unopposed claims under the Act where default judgment is sought, to prevent possible injustice to consumers who did not oppose the claims. The guidance provided in *Sebola* is restricted to unopposed matters where default judgment is sought and is not exhaustive of the manner in which notice can probably be brought to the attention of a reasonable consumer.

There were few or no prospects of success that the exception could succeed. The factual basis upon which Baliso relied for his exception was that the notice was sent by ordinary mail. The bank's particulars of claim made no allegation that the notice was sent by ordinary mail. Where an exception is taken a court looks only to the pleading excepted to as it stands, not to facts outside those stated in it. The only allegation about notice by ordinary mail was in Baliso's own plea and as an averment in his notice of exception and an affidavit filed simultaneously with it. Those allegations could not be used as the basis for deciding the exception.

The question of probable receipt of the section 127(2) notice, or of it probably coming to the attention of the reasonable consumer was one of the issues that had to be determined by way of evidence at the trial. The exception procedure was therefore inappropriate in the circumstances.

The applicant excepted to the particulars of claim on the basis that it should have contained allegations of notice by registered mail in a manner similar to those referred to in Sebola, after he had already filed a plea alleging that the notice was sent by ordinary mail. This procedure was misconceived. Sebola sought to prevent possible injustice to consumers who did not oppose claims. It did this by providing guidance on how courts should ensure that sufficient allegations are contained in unopposed claims under the Act where default judgment is sought, to prevent possible injustice to consumers who did not oppose the claims. As explained in Kubyana, the guidance provided in Sebola is restricted to unopposed matters where default judgment is sought and is not exhaustive of the manner in which notice can probably be brought to the attention of a reasonable consumer. A summons may well be excipiable if it does not meet the Sebola/Kubyana standard, but it is not necessary to make a definitive holding in this regard. The issue here is the appealability of a dismissal of an exception. In addition, there are few or no prospects of success that the exception in its present form can possibly succeed. The factual basis upon which the applicant relies for his exception is that the notice was sent by ordinary mail. The respondent's particulars of claim make no allegation that the notice was sent by ordinary mail. Where an exception is taken a court looks only to the pleading excepted to as it stands, not to facts outside those stated in it. The only allegation about notice by ordinary mail is in the applicant's own plea and as an averment in his notice of exception and an affidavit filed simultaneously with it. Those allegations may not be used as the basis for deciding the exception.

Here, the question of probable receipt of the s 127(2) notice, or of it probably coming to the attention of the reasonable consumer, in this case the applicant, is one of the issues that must be determined by way of evidence at the trial. The exception procedure was inappropriate in the circumstances. Leave to appeal must be refused.

FIRSTRAND BANK LTD v KRUGER

A JUDGMENT BY SPILG J
GAUTENG LOCAL DIVISION, JOHANNESBURG
23 MAY 2016

2017 (1) SA 533 (GJ)

In an application for judgment based on the allegation that the respondent is liable for repayment of a loan, the creditor's deponent must identify from whom he obtained any of the information relied upon, so that it is possible to ascertain which parts of the evidence presented were within his own knowledge and which was conveyed to him by unnamed sources.

THE FACTS

Firstrand Bank Ltd brought a claim against Kruger on notice of motion for payment of an amount of just over R2.6m, together with interest, and the hypothecation of the immovable property which was provided as security for the loan.

The bank's affidavit was deposed to by a person who described himself as a commercial recoveries manager at the bank. The grounds on which the facts contained in the affidavit were said to be admissible were stated: 'The facts contained in this affidavit fall within my personal knowledge, save where otherwise stated or where the contrary appears from a context, are true and correct. Where I rely on information obtained by and from individuals, including representatives of the applicants I believe such info to be true and correct.'

To prove the agreement between the bank and Kruger, the deponent attached a copy of the credit facility agreement and stated that the bank was represented by two named individuals. There was no confirmatory affidavit filed by these officials in relation to the conclusion of the agreement. The deponent did not identify from whom he obtained any of the information relied upon.

THE DECISION

Because the deponent did not identify from whom he obtained any of the information relied upon, it was not possible to ascertain which parts of the evidence presented were within his own knowledge and which was conveyed to him by his unnamed sources.

The requirement for summary judgment allows a degree of flexibility in regard to the rules of evidence, since the deponent to the application for summary judgment, in terms of rule 32(2) of the Uniform Rules of Court, is only required to verify the cause of action by swearing positively to the facts. Nonetheless, where a person is in control of the relevant files and is directly involved in the matter at hand, whether having engaged the defendant directly or by correspondence without come-back, then that person qualifies to depose to an affidavit verifying the facts.

Under the exceptions to the hearsay rule the inherent difficulties of producing every individual who dealt with the credit receiver and made each entry reflected in the account in question would, together with the other factors already mentioned regarding probity and reliability, entitle an applicant credit grantor seeking judgment in an unopposed matter to rely on (a) the evidence of a person who exercises custody and control of the documents in issue to introduce them into evidence through the founding affidavit provided such allegation is made, or appears from the contents of the affidavit as a whole, and provided the agreements are attached and are alleged to be true copies. This would usually be a bank manager or an official holding the position of a recoveries manager; (b) the evidence of a person who has personal knowledge of the current status of the credit receiver's account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance; and (c) the evidence of a person who

positively attests that notice was properly sent to the respondent under either section 129(1) or section 86(10) of the National Credit Act (no 34 of 2005).

In the present case the deponent, while having the trappings of authority in the department, did not claim to have been personally involved in the process of recovering the debt, let alone having personally accessed the bank's records, accounts or other relevant documents. The deponent left it unclear as to what he personally did and what information was provided to him by others or from where they in turn might have sourced it.

The bank was ordered to remedy these defects.

Under the exceptions to the hearsay rule the inherent difficulties of producing every individual who dealt with the credit receiver and made each entry reflected in the account in question would in my view, together with the other factors already mentioned regarding probity and reliability, entitle an applicant credit grantor seeking judgment in an unopposed matter to rely on —

(a) the evidence of a person who exercises custody and control of the documents in issue to introduce them into evidence through the founding affidavit provided such allegation is made, or appears from the contents of the affidavit as a whole, and provided the agreements are attached and are alleged to be true copies. This would usually be a bank manager or an official holding the position of a recoveries manager;

(b) the evidence of a person who has personal knowledge of the current status of the credit receiver's account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance.

THOMANI *v* SEBOKA N.O.

A JUDGMENT BY JANSEN J
GAUTENG DIVISION, PRETORIA
12 JULY 2016

2017 (1) SA 51 (GP)

An application for default judgment against a surety should not be made a time when the principal debtor is unregistered.

THE FACTS

Thomani and his wife bound themselves as sureties and co-principal debtors in respect of a the company Abrina 1591 (Pty) Ltd in favour of Absa Bank Ltd.

The mortgage bond which was granted by the bank to Thomani to secure their personal home loan agreement contained a clause 4 which provided that the bond would remain in force as continuing covering security for the capital amount, the interest thereon and the additional amount, notwithstanding any intermediate settlement, the bond would remain of full force and effect as a continuing covering security and covering bond for each and every sum in which the mortgagor might become indebted to the bank from any cause whatsoever.

Clause 5 of the suretyship agreement provided that they acknowledged that the suretyship was additional to any security which the bank currently held in respect of the obligations of Abrina 1591 (Pty) Ltd and that the suretyship would not detract in any way from other security already furnished in favour of the bank. Clause 11 of the suretyship agreement provided that the suretyship would be a continuing covering security notwithstanding any intermediate settlement of the amount owing.

At a time when Abrina 1591 (Pty) Ltd was de-registered, it and the bank entered into a loan agreement, which was partly written and partly oral.

In enforcing its right in terms of the loan and suretyship agreements, the bank obtained judgment against Thomani. Thomani sought rescission of judgment. He contended that the bank obtained judgment based on a bond which he and his wife entered into in their personal capacities in order to obtain a loan in respect of the unit section No 3, known as Crystal Springs situate at Erf 29338, Highveld, Extension 50 Township City of Tshwane Metropolitan Municipality.

Their main defence to the bank's claim was that they stood surety for the company Abrina 1591 (Pty) Ltd, whereas the bond on which the bank relied was a normal housing bond over their sectional unit and not a surety bond.

THE DECISION

The question to be answered was whether the sureties could be sued, whilst the principal debtor Abrina 1591 (Pty) Ltd was no longer in existence. It had to be determined whether the phrase 'for each and every sum in which the mortgager may now or hereafter become indebted to the Bank from any cause whatsoever' could be construed to cover the sureties' liability to the bank in terms of the suretyship agreement.

It was clear that Thomani and his wife stood surety only for the amount loaned to Abrina 1591 (Pty) Ltd. It was stated that '(t)his suretyship shall be a continuing covering security'. Hence, the security which the bank obtained for the payment of Abrina 1591 (Pty) Ltd's debt was the deed of suretyship and not a mortgage bond.

It was also clear that the bringing of the application for default judgment at a time when the company had been de-registered was premature. This constituted a fatal flaw in the bank's application. Furthermore, the mortgage bond which was registered as security for the home loan, could not be used as security for a loan to Abrina 1591 (Pty) Ltd.

Rescission of judgment was granted.

STANDARD BANK OF SOUTH AFRICA LTD v GAS 2 LIQUIDS (PTY) LTD

A JUDGMENT BY SATCHWELL J
GAUTENG LOCAL DIVISION, JOHANNESBURG
9 MARCH 2016

2017 (2) SA 56 (GJ)

Companies

There must be service and notification as required in terms of section 131 of the Companies Act (no 71 of 2008) before it can be said that a business rescue application has been 'made' and that liquidation proceedings have been suspended.

THE FACTS

Gas 2 Liquids (Pty) Ltd was placed under provisional liquidation. On the return day, Gas 2 presented an application, which had been brought by a third party, for Gas 2 to be placed under supervision and for business rescue proceedings to commence in terms of the Companies Act (no 71 of 2008).

The application for business rescue was served on the CIPC after the hearing of the application for final liquidation and after the application for business rescue was presented to court as grounds for suspending the liquidation proceedings. There was no service of this business rescue application on the company in liquidation or on the provisional liquidator who was appointed pursuant to the order for provisional liquidation.

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

The question arose whether or not the mere issue out of court of the business rescue application was sufficient to suspend the liquidation proceedings.

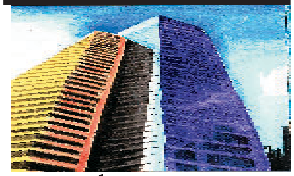
THE DECISION

The provisional and final liquidators may in certain instances step into the shoes of the company in that he or she is entrusted with the functions to control and administer the property and affairs of the company and to liquidate it. In essence the acts of the provisional liquidator are 'the acts of the company itself'.

Where there is no service upon the provisional liquidator of the application for business rescue, the provisional liquidator may have no knowledge of the business-rescue application. In fact, knowledge alone would be insufficient. The provisional liquidator is entitled to service in terms of section 131 of the Act. Without such service, the provisional liquidator does not officially know that he or she is 'suspended' in his or her duties and powers. It may be that service upon the company/ liquidator, upon the Commission and notification to affected parties may take quite some time. In this period, the provisional liquidator would be carrying out his or her duties and exercising his or her power in ignorance. This should not be permitted or implemented by a provisional liquidator who is suspended because the liquidation proceedings are suspended.

The 'provisional liquidator' is in effect, in suspension. He or she should not do anything which may impact upon the business rescue application. But the provisional liquidator would continue to carry out his or her duties and exercise his or her powers where there has been no service of the business rescue application upon the provisional liquidator. Lodgement of papers at court and issue of a case number do not mean that anyone other than the applicant, the messenger and the individual clerk in the office of the registrar has knowledge that the provisional liquidator should do nothing further because the liquidation proceedings are suspended.

The mere lodgement of papers and issue of a case number are sufficient to trigger a suspension.



If that were the case, a provisional liquidator might be acting without authority, and perhaps unlawfully. That cannot have been the intention of the legislature. The question would then also arise as to when, where, why and by whom these unauthorised actions of a provisional liquidator are to be undone and with what consequences to third parties or to the company whose liquidation is suspended but which is not yet (and may never be) in business rescue.

There must be service and notification as required in terms of section 131 of the Act before it can be said that the business rescue application has been 'made' and that the liquidation proceedings have been suspended.

Where there is no service upon the provisional liquidator of the application for business rescue, the provisional liquidator may have absolutely no knowledge of that business-rescue application. In fact, knowledge alone would be insufficient. The provisional liquidator is entitled to service in terms of s 131 of the Act. Absent such service, the provisional liquidator does not officially know that he or she is 'suspended' in his or her duties and powers, if such suspension of the liquidation proceedings were to eventuate solely by reason of lodgement of papers at court and issue of a case number.

COMPANY SECRETARY OF ARCELORMITTAL SOUTH AFRICA v VAAL ENVIRONMENTAL JUSTICE ALLIANCE

A JUDGMENT BY NAVSA ADP (MAJIEDT JA, SALDULKER JA, MATHOPO AJA AND MOCUMIE AJA concurring)
SUPREME COURT OF APPEAL
26 NOVEMBER 2014

2016 SACLR 23 (A)

A private company may be compelled to provide information concerning its activities which may affect environmental concerns in terms of the Promotion of Access to Information Act (no 2 of 2000)

THE FACTS

The Vaal Environmental Justice Alliance requested Arcelormittal South Africa for information relating to Arcelor's past and present activities, including its documented historical operational and strategic approach to the protection of the environment in the Vanderbijlpark and Vereeniging areas. In these areas, the company operated a steel plant.

The Alliance stated it required this information to ensure that Arcelor was carrying out its obligations under the relevant governing legislation, including the National Environmental Management Act (no 107 of 1998), the National Environmental Management: Waste Act (no 59 of 2008), and the National Water Act (no 36 of 1998).

One of the documents requested by the Alliance was a Master Plan which detailed the results of numerous specialist environmental tests for pollution levels at Arcelor's plants, and set out the plans to alleviate pollution and rehabilitate its work sites over a 20-year period. Arcelor contended that this document had become obsolescent.

Arcelor refused to supply the information requested. The Alliance brought an application to compel it to do so.

THE DECISION

The Master Plan was an important baseline document. Its asserted flaws could be examined and challenged, and the allegation of obsolescence determined.

It was clear, in accordance with international trends, and constitutional values and norms, that the legislature had recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. The Alliance, as advocate for environmental justice, was entitled to place reliance on the statutes it referred to in requesting the information from Arcelor. Furthermore, in doing so the Alliance met the threshold requirement for obtaining the requested information.

The application was granted.

JORDAAN *v* TSHWANE CITY

A JUDGMENT BY FOURIE J
GAUTENG DIVISION, PRETORIA
7 NOVEMBER 2016

2017 (2) SA 295 (GP)

Property

Section 118(3) of the Municipal Systems Act (no 32 of 2000) may not be applied by a municipality to demand payment of historical debts before entering into a service agreement with a new owner of property in respect of which such debts subsist.

THE FACTS

Jordaan bought an immovable property at a sale in execution. She took transfer of the property after a certificate in terms of section 118(1) of the Municipal Systems Act (no 32 of 2000) had been issued by the Tshwane City municipality. In terms thereof the municipality certified that all amounts that became due in connection with that property for municipal service fees as well as property rates and taxes during the two years preceding the date of application for the certificate, had been fully paid.

There were historical debts outstanding with regard to the property. These were debts which had been incurred by previous owners and/or occupiers prior to the two-year period envisaged by section 118(1) of the Act. The municipality demanded that all historical debts in respect of a property be paid before entering into a service agreement with Jordaan.

It adopted this approach because it considered that it was entitled to do so because the historical debts, as 'a charge upon the property' as contemplated in section 118(3), survived transfer of ownership and were therefore enforceable against Jordaan and her successors in title.

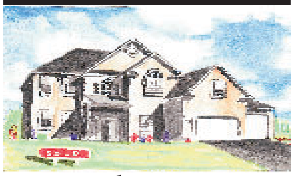
The court considered the question whether or not section 118(3) was constitutional.

THE DECISION

Section 118(3) 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.

This means that s 118(3) could result in a loss of ownership for new or subsequent owners and consequently a loss of the ability to use, enjoy or exploit the property. Even in the absence of actual loss, the mere existence of such a drastic remedy as a security provision constitutes a severe limitation of a new owner's property rights in terms of section 25(1) of the Constitution. This infringement or limitation of rights constitutes a deprivation for the purposes of that section. This infringement was substantial: nothing would prevent a municipality from demanding payment, issuing summons and if the current owner then fails to pay, to perfect its security in terms of an order of court to ensure payment of all outstanding debts. In fact, in terms of section 96 of the Municipal Systems Act a municipality is obliged to collect all money 'that is due and payable to it', subject to any applicable law.

The purpose of the deprivation has been indiscriminately extended far beyond what is necessary. In the absence of any relevant relationship between the purpose for the deprivation and the person whose property is affected (ie the new or subsequent owner), no sufficient reason exists for section 118(3) to deprive new or subsequent owners (other than the current owner before transfer takes place) of their title in the property concerned. The deprivation with regard to new or subsequent owners is arbitrary for purposes of section 25(1) of the Constitution. Furthermore, the infringement serves no purpose that could be considered legitimate by reasonable citizens in a constitutional democracy that values human dignity, equality



and freedom above all other considerations.

As far as the bylaws and property rates policy applicable to the property owner were concerned, they also did not contain a provision, either expressly or by necessary implication, that a successor in title who is not a debtor of the municipality with regard to the property concerned, shall be liable for the payment of historical debts. They referred, by implication, to the person who is the consumer, customer, occupier or owner of the property when the debt was incurred. A new or subsequent owner, who is not a debtor in this regard, could therefore not be held liable for the payment of these debts, neither should the municipality be entitled to refuse the rendering of services to such a person. Doing so would mean that the municipality is not only disregarding its constitutional duty to ensure the provision of services to a member of the community who is entitled thereto, but is also exercising a public power without any legal authority.

It would also not serve the general purpose of these bylaws to hold a person liable for the payment of historical debts who is not a debtor of the municipality. In the absence of an agreement to that effect, a new or subsequent owner does not become a co-debtor with regard to the principal debt and is not liable for the payment of historical debts incurred by previous owners or occupiers. To hold otherwise would strain the language in order to read something else into it which the legislature could not have contemplated. The municipality therefore had no right to refuse the rendering of municipal services to a new or subsequent owner because of historical debts still outstanding with regard to the property concerned, or to demand payment thereof before entering into a service agreement for the rendering of services.

UNIQON WONINGS (PTY) LTD v CITY OF TSHWANE METROPOLITAN MUNICIPALITY

A JUDGMENT BY THERON JA (LEWIS JA, CACHALIA JA, WALLIS JA AND SALDULKER JA concurring)
SUPREME COURT OF APPEAL
30 NOVEMBER 2015

2016 SACLR 8 (A)

In determining property rates, a municipality is not obliged to apply both national Local Government Transition Act (no 209 of 1993) and provincial legislation (the Ordinance).

THE FACTS

Uniqon Wonings (Pty) Ltd was the owner of land situated within the jurisdiction of the Kungwini Local Municipality. Kungwini levied property rates for the first time in the pursuant to Local Authority Notice 4/2003 dated 19 February 2003. In terms of the notice, assessment rate tariffs of 0,02 cents per rand value as per the valuation roll were levied from 1 April 2003. The notice was given in terms of section 10G(7) of the Local Government Transition Act (no 209 of 1993) read with section 26(2) of the Local Authorities Rating Ordinance (no 11 of 1977). Kungwini published various other notices. On 28 July 2004, it published a notice in terms of which the assessment tariff was increased to 0,054 cents in the rand.

Uniqon contended that the increase in property rates for Kungwini's 2004/2005 financial year to 0,054 cents in the rand was invalid. It contended that section 10G of the Transition Act co-existed with the Ordinance until 2 July 2005, when the Local Government: Municipal Property Rates Act (no 6 of 2004) (the Rates Act) came into effect. In consequence, for the 2004/2005 financial year, both the Transition Act and the Ordinance applied to the levying of property rates and a municipality, in order to validly impose property rates, had to comply with the provisions of both statutes.

Kungwini was disestablished and incorporated into the City of Tshwane Metropolitan Municipality, a Metropolitan Municipality created in terms of the Local Government: Municipal Structures Act (no 117 of 1998).

Uniqon sought an order that the increase in rates was invalid and that it was entitled to a refund of the rates it had paid.

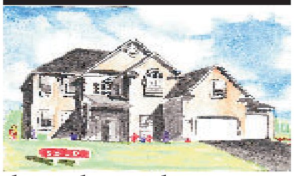
THE DECISION

The Rates Act came into operation on 2 July 2005. In terms of the transitional provisions contained in that Act, municipalities were entitled to continue conducting valuations and property rating in terms of legislation repealed by that Act until the date on which the new valuation rolls prepared in terms of that Act took effect.

During the transition, the source of a municipality's rating power was section 10G of the Transition Act. A municipality's power to levy rates was 'derived from and exercised' in terms of section 10G(7), which was national legislation, as envisaged by section 229(2)(b) of the Constitution. A municipality's delegated rating power was a freestanding rate-levying competence which meant that a municipality could levy property rates in terms of the provisions of s 10G(7) without reliance on or reference to the Ordinance.

Unlike s 10G(6), which required that municipalities perform valuations 'subject to any other law', the exercise of rating power under s 10G(7) was not 'subject to any other law'. Old order or pre-constitutional legislation continued in force subject to amendment or repeal and consistency with the Constitution.

A municipality is not obliged to apply both national (the Transition Act) and provincial legislation (the Ordinance). Unless specifically provided by legislation, or if there is a lacuna in the Transition Act, a municipality is not required to have regard to the Ordinance. In the circumstances, Kungwini, when exercising its rating power under section 10G(7), was not obliged to comply with the provisions of the Ordinance.



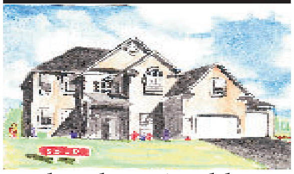
There was no indication in section 10G of the Transition Act that the fixing of property rates had to form part of the municipality's budgetary process, that it had to be determined yearly, or that property rates would come into operation at the commencement of the new financial year.

The application failed.

This 'self-standing' or 'freestanding' rate-levying competence can only mean that a municipality could levy property rates in terms of the provisions of s 10G(7) without reliance on or reference to the Ordinance. Unlike s 10G(6), Provided that if, in the case of any property or category of properties, it is not feasible to value or measure such property, the basis on which the property rates thereof shall be determined, shall be as prescribed: Provided further that the provisions of this subsection shall be applicable to district councils in so far as such councils are responsible for the valuation or measurement of property within a remaining area or within the areas of jurisdiction of representative councils.' which required that municipalities perform valuations 'subject to any other law', the exercise of rating power under s 10G(7) was not 'subject to any other law'. Old order or pre-constitutional legislation continued in force subject to amendment or repeal and consistency with the Constitution. Resort was had to the old order Provincial Ordinances when necessary and in respect of matters not covered by the Transition Act.

LYONS *v* SKYWAYS BODY CORPORATE

Property



A JUDGMENT BY MAHOMED AJ
WESTERN CAPE DIVISION, CAPE TOWN
26 MAY 2016

2016 (6) SA 405 (WCC)

An owner of property subject to a sectional title scheme may interdict a body corporate to comply with its obligations under the Sectional Titles Act (no 95 of 1986) when it is clear there is no alternative remedy available to such owner.

THE FACTS

Lyons was the owner of unit in one of ten buildings under the Skyways Sectional Title Scheme No SS110/1984, situated at Constitution Street, Zonnebloem, Cape Town. The Skyways Body Corporate was the body corporate of the Skyways scheme in terms of the Sectional Titles Act (no 95 of 1986).

The building in question had its own elevator. It had not been operational for approximately two years. Lyons' attorneys sent a letter to the body corporate's representative complaining of the delay, and demanding that it remedy the situation. This was followed by an email message to the trustees requesting a response as to when and how the repairs of the elevators would be effected. The trustees resolved to demand a resolution to the issue, failing which the matter would be handed over to attorneys.

Despite the resolutions by the trustees, a change in service providers, and various further steps, the status quo remained unchanged. There were five elevators that were still inoperable, including the elevator in the building where Lyons owned a unit.

Lyons relied on section 37(1)(j), (o) and (r) of the Sectional Titles Act (no 95 of 1986) in order to establish a so-called 'clear right' that the owners enjoy and the corresponding obligation of the body corporate to maintain the elevators and keep them in a state of good and serviceable repair

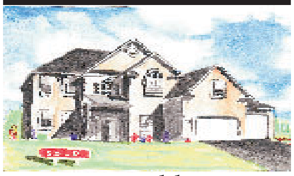
Section 37 provides that a body corporate shall perform the functions entrusted to it under the Act or the rules, and such functions shall include ... (j) properly to maintain the common property (including elevators) and to keep it in a good and serviceable repair; ... (o) to keep in a state of good and serviceable repair and properly maintain the plant, machinery, fixtures and fittings used in connection with the common property and sections;
. . . and (r) in general, to control, manage and administer the common property for the benefit of all owners.

Lyons brough an application for an interdict to compel compliance with this section.

THE DECISION

Since the body corporate accepted its obligation to comply, the question was whether there was an alternative legal remedy available to Lyons that was adequate. The body corporate argued that the two internal remedies regulated by the body corporate itself were available to Lyons: the first, to hold a special general meeting of the members in order to obtain a directional mandate for the trustees to take specific steps with clear time frames; and the second, to change the composition of the board of trustees, ie disposing of the trustees and replacing them with new trustees who could do what is necessary in the circumstances.

The internal remedies suggested would not provide adequate redress in the sense that neither of these was a legal remedy that engenders prompt enforceable action. Both were dependent upon a range of factors before achieving the desired outcome. That outcome might not necessarily result in any tangible relief for Lyons and other vulnerable people using the buildings. It was also reasonably conceivable that further delays would ensue from these internal remedies, compounding the pattern of delayed interventions that had already been established and causing the continued



violation of the clear right and ongoing injury to Lyons.

The Skyways Body Corporate's purported internal remedial processes, involving special general meetings and a change in the composition of trustees, did not constitute alternative remedies available to Lyons that were remotely adequate in the circumstances. They did not provide adequate redress or offer an ordinary or reasonable remedy for the persistent infringementof his rights. The body corporate's internal regulatory mechanisms had failed Lyons, and the law had therefore to be the instrument that protected his rights.

Lyons had established on abalance of probabilities that he had exhausted other remedies at his disposal and made out a case for a final interdict.

The inescapable conclusion is that there was gross incompetence in the management and implementation of the resolutions adopted by the respondent's trustees. In the result, the steps taken by the respondent through its managing agent were wholly inadequate, resulting in unreasonable delays in repairing or replacing the elevators in the buildings.

VAN DEN HEEVER v MINISTER OF MINERALS AND ENERGY

A JUDGMENT BY CACHALIA JA (BRAND JA, LEWIS JA, ZONDI JA AND DAMBUZA AJA concurring)
SUPREME COURT OF APPEAL
19 MARCH 2015

2016 SACLR 1 (A)

A qualified abandonment of a mining right does not amount to a complete abandonment thereof.

THE FACTS

Trans Hex Operations (Pty) Ltd held a mining lease over the farm Richtersveld 11, property which was owned by the State, and held in trust for the Richtersveld Community. Mining in the area could only be undertaken with the consent of the Minister of Land Affairs.

In 1991 Trans Hex Mynbou Ltd became the holder of Notarial Mining Lease 2/91, which gave it the right to mine for diamonds on the farm. This lease encumbered the land in favour of Mynbou, as did the deemed mineral right and mining licence in its favour. During 1998, a claim was lodged by the Richtersveld Community in terms of the Restitution of Land Rights Act (no 22 of 1994). Because of this, Mynbou entered into negotiations with the Community which resulted in an agreement that portions of the land over which it held mining rights would be excluded from the lease and would be for the use of irrigation areas to be transferred to the Community for agricultural purposes. This was to be without prejudice to its rights under the mining lease.

On 26 January 2001, Mynbou wrote to the Department of Minerals and Energy indicating that it was foregoing its right to mine on the property in the excluded areas. Later that year, it ceded its rights under the lease to Trans Hex Operations (Pty) Ltd.

In 2008, Van den Heever attempted to secure mining permits over the farm from the Department of Mineral Resources. The applications for the right to mine were refused on the ground that a permit to mine on the same property was already in existence and held by Trans Hex. Van den Heever contended that when Mynbou wrote to the Department of Minerals and Energy it abandoned its right. This meant that Mynbou's purported cession of the right to Trans Hex was invalid as it had no right to cede, and the department's refusal to grant the application on the ground that that company held the mining right was therefore unlawful.

Van den Heever sought a review order declaring that Mynbou had abandoned its right to mine for diamonds on the property and setting aside the decision to convert the abandoned old order mining right previously held by Mynbou.

THE DECISION

The letter sent by Mynbou reflected the intention that Mynbou would retain its rights under the mining lease, even though the irrigation areas would be physically excised from the mining lease area. The excision would occur, if the Minister approved, only for the purpose of allowing surface use of these portions for irrigation purposes, and not with respect to the right to mine. It did not relinquish the right to mine.

That this was what Mynbou intended, and also what the representatives of the Richtersveld community agreed to was confirmed in a later agreement entered into in August 2001 between Mynbou and the Community, long before Van den Heever applied for mining permits over the excised portions of the mining area. In this agreement, the parties agreed that the Community would not allow mining on the properties.

The application failed.

MASSTORES (PTY) LTD *v* PICK N PAY RETAILERS (PTY) LTD

A JUDGMENT BY FRONEMAN J (NKABINDE ADCJ, KHAMPEPE J, MADLANGA J, MBHA AJ, MHLANTLA J, MUSI AJ and ZONDO J concurring)
CONSTITUTIONAL COURT
25 NOVEMBER 2016

2017 (1) SA 613 (CC)

Contract

In establishing that the wrong of interference in contractual relations has been committed, the wrongfulness enquiry must be concerned with the duty not to cause harm or the infringement of rights. Our law does not usually recognise exclusive rights secured by contract as worthy of general protection.

THE FACTS

Pick 'n Pay Retailers (Pty) Ltd concluded a lease agreement with Hyprop Investments Ltd in respect of premises situated at a shopping centre known as Capegate. Clause 10.1 provided that save for Pick 'n Pay and Checkers, Hyprop would not permit the conduct of a supermarket in the shopping centre.

Masstores (Pty) Ltd also concluded a lease agreement with Hyprop entitling it to operate as a general merchandise retailer at Capegate.. Clause 12 prohibited Masstores from trading as a general food supermarket. Its products excluded food, but just before 2010 it began selling on a limited scale non-perishable food and grocery items. On 19 September 2013 Foodco was introduced in Masstores' store at Capegate. Foodco entailed the introduction of fresh fruit and vegetables and fresh pre-packed meat products, which complemented its existing non-perishable food and grocery lines. From 15 April 2014, Masstores operated a Foodco at Capegate.

Pick 'n Pay brought an application seeking a final interdict against Masstores, restraining it from interfering in the contractual relationship between it and Hyprop by carrying on a business exclusively granted to Pick 'n Pay in terms of its lease agreement.

THE DECISION

Pick n Pay had to prove that the contractual right it obtained from Hyprop protected an interest that was enforceable against third parties.

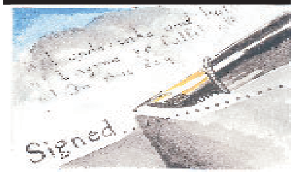
In *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC), the court did not hold that the deprivation of contractual rights in delictual claims for interference with contractual relations is prima facie unlawful. Nor did it lay down that in inducement cases the wrongfulness enquiry need not be concerned with the duty not to cause harm or the infringement of rights. The limits of the court's judgment effectively disposed of Pick n Pay's contention that prima facie wrongfulness on the part of Masstores had been established.

A right can be deprived without usurping it. Masstores' trading as a general supermarket did not deprive Pick n Pay of its entitlement to continue trading as a supermarket in the shopping centre. There may have been a deprivation of part of Pick n Pay's trading interest, namely its exclusivity, but Masstores had not 'usurped' that exclusivity. Masstores did not usurp any exclusive right of Pick n Pay and appropriate it as its own.

It also had to be determined whether our law recognises an extended form of the delict of unlawful competition under the common law.

The protection of the general right to goodwill was recognised by our law, but it was not this general right that Pick n Pay sought to protect. It was its exclusive right to trade in terms of its lease with Hyprop that it sought tp protect. Our law does not usually recognise this kind of exclusive right as worthy of general protection. The reason lies in the fact that the underlying purpose of the law of unlawful competition is to protect free competition, not to undermine it by making it less free. There was no legal duty on third parties not to infringe contractually derived exclusive rights to trade.

The question remained whether there was nevertheless room for a delictual claim to be found



elsewhere? This was possible. But the justification for the claim would then not lie in the direct infringement of Pick n Pay's contractual exclusive trade rights, or a breach of the duty to respect them, but in the possibly unreasonable manner that Masstores used or exercised its own rights. Pick n Pay's pleaded case did not refer to such a situation and so its case could not be adjudicated on this basis. This was an issue that might be determined in another case.

The application failed.

> *The limits of this court's judgment in Country Cloud, as explained, effectively dispose of Pick n Pay's contention that prima facie wrongfulness on the part of Masstores has been established. A right can be deprived without usurping it. Holding-over cases involves both, but the present case does not. Masstores' trading as a general supermarket does not deprive Pick n Pay of its entitlement to continue trading as a supermarket in the shopping centre. There may have been a deprivation of part of Pick n Pay's trading interest, namely its exclusivity, but Masstores has not 'usurped' that exclusivity. Masstores did not usurp any exclusive right of Pick n Pay and appropriate it as its own. It claims no entitlement to exclusivity. Nor did the Supreme Court of Appeal enquire whether Masstores' degree or intensity of fault played any role in the wrongfulness enquiry*

TRANSNET SOC LTD v TOTAL SOUTH AFRICA (PTY) LTD

A JUDGMENT BY LEWIS JA (THERON JA, ZONDI JA, SCHOEMAN AJA AND MAKGOKA AJA I concurring)
SUPREME COURT OF APPEAL
14 SEPTEMBER 2016

2017 (1) SA 526 (SCA)

Existing agreements with the administration established to ensure the supply of refined oil continue to apply after the enactment of the National Energy Regulator Act (no 40 of 2004) (the 'NERSA') and the Petroleum Pipelines Act (no 60 of 2003).

THE FACTS

Total South Africa (Pty) Ltd participated in oil refining operations established at an inland refinery. It did so upon an understanding with an Administration established by the government that the cost of conveyance of crude oil to the refinery would be no more than it would have been if delivered at a coastal refinery. This was known as 'the neutrality principle'.

When Transnet Soc Ltd succeeded the Administration, it refused to recognise the neutrality principle when the regulatory regime governing the supply of petroleum products was changed. The National Energy Regulator Act (no 40 of 2004) (the 'NERSA') came into force in September 2005 and the Petroleum Pipelines Act (no 60 of 2003) (the 'PPA') came into force in November 2005. The former Act established a single regulator to regulate the electricity, piped-gas and petroleum pipeline industries.

In its decision in respect of Transnet's application for a licence for the 2010/2011 years, the Regulator expressly stated that 'the maximum tariff' set out in a table would be applied from 1 April 2010. In its reasons for the decision the NERSA stated: 'The tariffs set in this decision are maximum tariffs thus permitting the licensee to discount.'

Total brought an action against Transnet directed at compelling it to comply with the neutrality principle.

Transnet defended the action on the grounds that the understanding, and the neutrality principle upon which it was based, was abolished by the PPA. Transnet contended that the neutrality principle was inconsistent with the provisions of the PPA and that the basis of determining the tariff before its enactment could not exist together with that determined by the NERSA in terms of section 28 of the PPA.

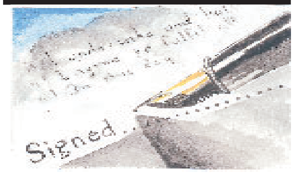
Section 28 of the PPA provides that the Authority must set as a condition of a license the tariffs to be charged by a licensee in the operation of a petroleum pipeline and approve the tariffs for storage facilities and loading facilities. Subsection 6 provides that a licensee may not charge a tariff for the licensed activity in question other than that set or approved by the Authority.

THE DECISION

The nub of Transnet's argument was that the neutrality principle cannot co-exist with section 28(6). Only the NERSA may set a tariff and the provisions of s 28 do not permit of any deviation. Total argued that the neutrality principle is consistent with section 28(6): the NERSA must set a tariff and the neutrality principle then requires that a lesser amount be charged in respect of crude-petroleum conveyance.

The PPA as a whole is intended inter alia to achieve competition in the construction and operation of petroleum pipelines and associated facilities; to achieve environmentally responsible transport, loading and transport of petroleum products; to facilitate investment in the industry and to promote companies owned or controlled by historically disadvantaged South Africans. There is no reason why it would be intended to discriminate against long-established suppliers.

This was reinforced by section 20 of the PPA which sets out the conditions on which a licence may be granted by the NERSA. If the neutrality principle were not



applied, there would be no differentiation despite different circumstances. Total and the other participant in the refinery, Sasol, would be treated unfairly if they were not able to recover the cost of piping crude oil: that would mean that they were discriminated against vis-à-vis coastal refineries. If therefinery were situated at the coast, its shareholders would not have incurred the costs of transporting crude oil. That was what the neutrality principle was designed to avoid and the position was no different when the tariff was set not by Transnet but by the NERSA.

This construction appeared to be shared by the NERSA. This was evident in its decision in respect of Transnet's application for a licence for the 2010/2011 years. This meant that Transnet was entitled to discount, and the neutrality principle embodied in the original understanding obliged it to allow a discount for the conveyance of crude oil to the refinery.

It was clear that Transnet was bound by the original understanding. That is in keeping with the general principle that new legislation is presumed not to interfere with vested rights. Transnet's defences to the action had to fail.

In its decision in respect of Transnet's application for a licence for the 2010/2011 years, it expressly stated that 'the maximum tariff' (my emphasis) set out in a table would be applied from 1 April 2010. And in its reasons for the decision the NERSA stated: 'The tariffs set in this decision are maximum tariffs thus permitting the licensee to discount.' Subsequent decisions of the NERSA have again referred to maximum tariffs.

Nothing could be clearer. Transnet is entitled to discount, and the neutrality principle embodied in the variation agreement obliges it to allow a discount for the conveyance of crude oil to the Natref refinery. The evidence for Transnet, given by Mr L Moodley, was that at present coastal customers are treated in the same way as the Natref refinery. That is unfair discrimination which puts the Natref shareholder at a disadvantage. That is clearly what the NERSA decision aims to avoid, and why it allows for a maximum tariff and a discounting of it.

In the circumstances it is clear that Transnet is bound by the variation agreement of 1991.

SPAR GROUP LTD v FIRSTRAND BANK LTD

A JUDGMENT BY FOURIE J
GAUTENG DIVISION, PRETORIA
9 SEPTEMBER 2016

2017 (1) SA 449 (GP)

Banking

A bank is not under a duty of care not to appropriate payments made into its customer's account to indebtedness existing in an associated account.

THE FACTS

Spar supplied goods and services on credit to a business known as Umtshingo. As security for Umtshingo's indebtedness to Spar, a notarial bond over Umtshingo's movable assets was registered in favour of Spar. It was a term of the notarial bond that should Umtshingo fail to pay any amount due to Spar on the due date thereof, or commit a breach of any of the provisions of the notarial bond, Spar could enter upon, seize and take full possession of the business and all the assets of Umtshingo and hold this as security for the repayment of all amounts due to Spar.

At a time when Umtshingo's indebtedness had reached R2 539 408,14, Spar brought an application against Umtshingo for the perfection of its notarial bond. The order was executed and three businesses conducted under the umbrella of Umtshingo were attached and possession given to Spar.

The parties entered into negotiations for the conclusion of a short-term lease-of-business agreement. Various versions of a draft lease were exchanged, but a final version was never signed. However, from 9 March 2010 Spar traded the three businesses for its own profit or loss. One of the businesses held an account with First National Bank Ltd in the name Central Route. The bank permitted Central Route to draw cheques and process debit and stop orders on the account on condition that Central Route first made deposits or transfers into the account in sufficient amounts to cover such debts. However, as from 24 June 2010, this account was frozen in terms of a court order.

On 9 March 2010 Central Route was indebted to the bank in the sum of R1 343 422,92, and Umtshingo was indebted to the bank in the sum of R292 140,84. On 12 July 2010, the indebtedness of Central Route to the bank was extinguished, and thereafter the account remained in credit at all times. On 8 May 2010, the indebtedness of Umtshingo to the Bank on one of the other accounts was extinguished. This was effected by applying speed-point sales credits of R1 300 051,21 which had been obtained by all three businesses.

The bank did not obtain Spar's permission to set off the speed-point credits against the indebtedness of Central Route and the other business.

Spar brought an action against the bank and the owner of Umtshingo seeking payment from them jointly and severally in a total sum in excess of R5m. It contended that the bank was liable towards it because of (i) unlawful appropriation and (ii) an alleged duty of care to avoid economic loss in circumstances where the bank had knowledge pertaining to the alleged true owner of moneys deposited into the bank accounts.

THE DECISION

The question was whether the bank permitted Umtshingo to withdraw moneys in excess of the amounts deposited or transferred into the two business accounts after 9 March 2010, whether the bank owed Spar a duty of care to avoid economic loss in the circumstances, and in that event, whether the bank breached the duty of care, and acted intentionally or negligently in permitting the excess funds to be withdrawn by the accountholder.

The general rule is that moneys deposited into a bank account fall into the ownership of the bank. The resulting credit belongs to the customer, the bank having a

contractual obligation to pay the customer on demand and to honour cheques validly drawn on the account to the extent that it stands in credit. However, the bank's apparent ownership of the funds in an account does not in all circumstances confer an absolute or unqualified right on it to treat the funds as its own or the credit as the property of its customer.

What had to be determined was the position when a bank has knowledge of an arrangement between an accountholder and a third party with regard to the latter's right to claim ownership of moneys deposited into the accountholder's account. Mere knowledge of the bank about a particular arrangement is not sufficient. A person claiming to have a quasi-vindicatory claim with regard to funds deposited into an account held in the name of a client of the bank will have to prove that the bank was a party to an agreement with its client to warehouse such moneys on behalf of such other person claiming to be entitled thereto.

In the present case, both claims were founded on the contention that the bank should not have allowed Umtshingo, or its controllers to withdraw funds from the accounts. Spar's contention that a duty of care existed was based primarily on the allegation that it was a customer of the bank, and that the bank was aware of its entitlement to the funds as the true owner thereof. It was not in dispute that during the relevant period Spar was a customer of the bank. However, the bank denied the existence of a duty of care toward Spar.

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015 (1) SA 1 (CC) it was stated that our law is generally reluctant to recognise pure-economic-loss claims, especially where it would constitute an extension of the law of delict. Wrongfulness must therefore be positively established to provide the necessary check on liability in these circumstances. The question therefore was whether or not it could be said that the bank had a legal duty to avoid economic loss to Spar by acting positively. When considering this question, one has to take into account that Spar was not a customer operating a bank account at the bank's branch where the accounts were held, although it was a customer of the bank at another branch. The bank therefore had a duty of confidentiality towards Umtshingo and was therefore obliged not to disclose any particulars concerning the accountholder's bank accounts and the transactions concluded by such accountholder.

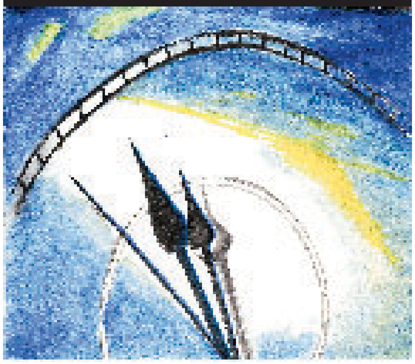
Having regard to all these considerations and by applying the general criterion of reasonableness, it would be unreasonable to conclude that the bank had a legal duty to avoid economic loss to Spar. The claims could therefore not succeed.

ARGENT INDUSTRIAL INVESTMENT (PTY) LTD *v* EKURHULENI METROPOLITAN MUNICIPALITY

A JUDGMENT BY YACOOB AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
13 FEBRUARY 2017

2017 (3) SA 146 (GJ)

Prescription



Prescription will run against a debt which the creditor could have known had arisen in its favour, even if the creditor fails to take steps to quantify the actual debt which has arisen.

THE FACTS

Between September 2009 and March 2015, Argent Industrial Investment (Pty) Ltd was charged, and paid for estimated water consumption. In this period, the meter installed at its premises was not read. After the meter was read on 13 March 2015, Argent was billed R1 152 666,98 for the difference between its actual usage and the estimated consumption for which it had already paid.

Argent contended that its obligation to pay for any consumption more than three years before 13 March 2015 had prescribed by the time the Ekurhuleni Metropolitan Municipality presented it with its invoice. The municipality contended that the obligation to pay had not prescribed, because prescription on that obligation did not start running until Argent was billed for that consumption, on 24 March 2015. It submitted that the fact that Argent regularly paid monthly amounts for its estimated consumption amounted to an acknowledgment of liability which interrupted prescription.

The municipality relied on section 12(3) of the Prescription Act (no 68 of 1969) for the contention that the debt only became due when the meter was read and the invoice issued, contending that it was only when the meter was read and the invoice issued that the municipality as creditor, became aware of the facts giving rise to the debt.

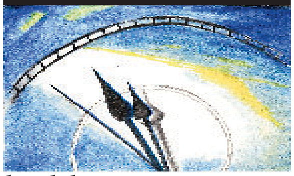
THE DECISION

Prescription was not prevented from running until the municipality had taken the steps of reading the meter and issuing the invoice. This would be inconsistent with the very reason why the law recognises the concept of prescription. It would also entitle the municipality to ignore its constitutional duties, which included debt collection, indefinitely. The municipality's duty to take reasonable steps to collect what is due to it, is for the benefit of both it and its consumers.

In any event, the municipality had knowledge of the relevant facts. At all times, it was aware that it was supplying water to Argent. It was aware of the applicant's identity. It was clear from the fact that Argent was paying an estimate each month, if from nothing else, that the municipality had not read the meter on Argent's property. These were the facts giving rise to the debt. The only 'fact' of which the municipality did not have knowledge was the exact consumption, and this was knowledge within the municipality's reach, had it simply fulfilled its functions.

Even if the municipality did not have the necessary knowledge of the facts giving rise to the debt, it was clear that the municipality could have acquired it by exercising reasonable care, that is, by reading the meter on the property and issuing an invoice for consumption within a period less than that which did in fact elapse.

As far as the contention that Argent's regular payments for estimated consumption amounted to an acknowledgment of debt was concerned, there was no merit in that contention. The municipality could not rely on Argent's fulfilment of its obligations to make up for its own failures. Had the municipality read the meter and informed Argent of the indebtedness, Argent's regular payments from that date without



raising a dispute would have constituted acknowledgments of debt. However, a debtor cannot be considered to have acknowledged a debt of which it knows nothing, when either the details of the debt are particularly within the knowledge of the creditor, or only the creditor has the ability to quantify the debt, and does not do so.

Even if, as the respondent contends, it did not have the necessary knowledge of the facts giving rise to the debt, it is in my view clear in this particular case that the respondent could have acquired it by exercising reasonable care, that is, by reading the meter or meters on the property and issuing an invoice for consumption within a period less than that which did in fact elapse.
It is not the applicant's duty to read meters, determine what its consumption is, and be ready to pay for that consumption whenever the respondent gets around to asking for payment, whenever in the future that may be. The respondent has a duty to read the meters and invoice for consumption, at its convenience but at reasonable intervals.
The applicant submitted that a reasonable interval at which a meter should be read is every six months. There is no reason, in the circumstances of the relief sought in this case, for me to make a determination in that regard.

Had the respondent read the meter and informed the applicant of the indebtedness, the applicant's regular payments from that date without raising a dispute would have constituted acknowledgments of debt. However, a debtor cannot be considered to have acknowledged a debt of which it knows nothing, when either the details of the debt are particularly within the knowledge of the creditor, or only the creditor has the ability to quantify the debt, and does not do so.

FLUXMANS INC *v* LEVENSON

A JUDGMENT BY ZONDI JA (THERON JA and VAN DER MERWE JA concurring, MPATI AP and MAKGOKA AJA dissenting)
SUPREME COURT OF APPEAL
19 NOVEMBER 2016

2017 (2) SA 520 (SCA)

Confirmation of some legal defect in a claim which is unknown at the time the claim arises does not mean that the debtor is unaware of the facts from which the claim arises. Prescription therefore begins to run in respect of such a claim when the claim arises and not when such legal defect is confirmed.

THE FACTS

On 1 February 2006 Levenson gave instructions to Fluxmans Inc to institute action on his behalf for damages against the Road Accident Fund in respect of injuries sustained in a motor vehicle collision. Fluxmans accepted the instructions on a contingency fee basis. In terms of the agreement, Fluxmans would be paid a contingency fee of 22,5% of the amount that would be recovered as damages on behalf of Levenson.

The claim was subsequently settled. The terms of the settlement were made an order of court on 23 May 2008. In terms of the order, the Fund was to pay to Levenson 'the capital sum of R4 862 561,40 . . . in delictual damages', with costs on the scale as between party and party, including the qualifying fees of four named medical practitioners. In addition, the Fund undertook to cover the respondent's future medical and hospital expenses.

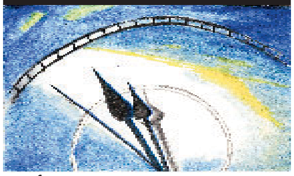
By 1 September 2008, Levenson had received a statement of account from Fluxmans which reflected that he had been paid a total amount of R3 290 138,90, made up of R3 103 449,39 in respect of capital and R186 689,51, being the costs recovered from the Fund. More than five years thereafter, on 9 April 2014, Levenson wrote a letter to Fluxmans in which he alleged that it had recently been brought to his attention that the contingency fees agreement entered into between him and Fluxmans did not comply with the provisions of the Contingency Fees Act (no 66 of 1997). He referred to the judgment of the Gauteng Division in *De La Guerre v Ronald Bobroff & Partners Inc* [2013] ZAGPPHC 33 which was upheld by the Constitutional Court in February 2014. Levenson contended that that decision found that 'any agreement outside the Act is invalid, null and void'. He sought to be reimbursed for moneys that had been incorrectly debited against his account with Fluxmans.

The question to be determined was whether Levenson's claim had not become prescribed. This depended on a consideration of the provisions of section 12(1) of the Prescription Act (no 68 of 1969) which provides that prescription shall commence to run as soon as the debt is due. This in turn required a consideration of whether Levenson had actual or deemed knowledge of 'the facts from which the debt arises' on 1 September 2008 when Levenson received the statement of account.

THE DECISION

The agreement the parties did not comply with the peremptory requirements of section 3 of the Act which, among others, require a contingency fees agreement to be in writing and signed by the client and an attorney representing such client. The agreement the parties concluded was therefore invalid.

The question, therefore, was whether before February 2014 Levenson had knowledge of the facts from which his claim arose. He did have knowledge of such facts. Immediately after he paid the fees to Fluxmans, he knew all the facts even though he did not know the legal conclusion flowing from those facts. Levenson knew that fees which he paid to Fluxmans on 20 August 2008 were calculated on the basis of the oral contingency fees agreement which he concluded with Fluxmans. On his own evidence, Levenson then also knew all the other facts that he relied upon in his founding



affidavit for the conclusion that the contingency fees agreement was invalid.

Knowledge that the relevant agreement did not comply with the provisions of the Act was not a fact which Levenson needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription.

If Levenson's claim had become prescribed in the interim because of the lapse of the prescriptive period of three years, knowledge of invalidity of the common-law contingency fees agreement allegedly acquired thereafter following the Constitutional Court judgment in *Bobroff* could not revive such a prescribed claim. Levenson's cause of action arose on 20 August 2008 when he paid fees to Fluxmans. The action should have been instituted by August 2011, three years from the date on which the cause of action arose. When Levenson therefore instituted action in July 2014 his claim had become prescribed.

The appeal succeeded.

Knowledge that the relevant agreement did not comply with the provisions of the Act is not a fact which the respondent needed to acquire to complete a cause of action and was therefore not relevant to the running of prescription. This court stated in Gore NO para 17 24 that the period of prescription begins to run against the creditor when it has minimum facts that are necessary to institute action. The running of prescription is not postponed until it becomes aware of the full extent of its rights nor until it has evidence that would prove a case 'comfortably'. The 'fact' on which the respondent relies for the contention that the period of prescription began to run in February 2014, is knowledge about the legal status of the agreement, which is irrelevant to the commencement of prescription. It may be that before February 2014 the respondent did not appreciate the legal consequences which flowed from the facts, but his failure to do so did not delay the date on which the prescription began to run. Knowledge of invalidity of the contingency fees agreement or knowledge of its non-compliance with the provision of the Act is one and the same thing otherwise stated or expressed differently.

DE FREITAS v JONOPRO (PTY) LTD

A JUDGMENT BY SPILG J
GAUTENG LOCAL DIVISION, JOHANNESBURG
9 MARCH 2016

2017 (2) SA 450 (GJ)

Competition

An interdict may be given against a party infringing a competitor's use of imagery distinctive of the competitor's business.

THE FACTS

De Freitas obtained an order interdicting Jonopro (Pty) Ltd from opening its business under the name and style of Cheeky Tiger at 29 Pretoria Road, Kempton Park, Gauteng, and from passing off the name Cheeky Tiger and interdicting it from using the name Cheeky Tiger without its consent.

De Freitas then applied for an order that Jonopro was in contempt of the interdict in that it was operating a business known as 'SA's Hottest Action Bar' located at 29 Pretoria Rd, Kempton Park, and was using the name Cheeky Tiger. It contended that the only agreement entered into between the parties was an agreement between Jonopro, represented by Mr Bettencourt and De Freitas, when De Freitas agreed to change the name Cheeky Tiger at his business in Kempton Park, to another name. As the owners of the name Cheeky Tiger, Jonopro was entitled to use the name.

De Freitas alleged that the agreement related to the business operating at another location. He contended that he was obliged to seek a further interdict as an alternative to the contempt proceedings in case the existing order did not cover Jonopro's passing-off of its get-up.

THE DECISION

Bringing an application for a second interdict did not offend against the res judicata principle. The previous court did not consider the possibility that Jonopro would use the get-up without the name. However, that situation had materialised and if De Freitas could make out a case of passing-off of the get-up then it should be able to obtain a remedy, provided the earlier court's pronouncement was not intended to refuse that relief.

The question whether the requirements of issue estoppe - which was a species of res judicata - had been satisfied. Issue estoppel operated to counter the allegation that the applicant cannot show a prima facie right because there was a subsequent agreement not to trade.
Independent of issue estoppel the papers established a prima facie right in favour of De Freitas because Bettencourt allowed De Freitas to implement the Cheeky Tiger concept in Kempton Park without paying anyone a royalty or other amount for the mark or the layout.
While De Freitas owned the Cheeky Tiger establishment in Kempton Park, Bettencourt personally operated the other establishments.At no stage did Bettencourt require De Freitas to desist, despite the identical mark and similar if not identical branding. They finalised an oral agreement in terms of which De Freitas would inter alia change the name.

The evidence of was clear: under the extant agreement there would be no physical-proximity competition as each Cheeky Tiger establishment would be a significant distance from the other. Aside from the name and style of Cheeky Tiger which was the subject of the current interim interdict, there was the predominant colour combination of red and green as well as a depiction of a woman's face or body whether in part or whole having superimposed on it or superimposing on, whether selectively or otherwise, the colouring or features of a tiger. The distinctive feature of the establishment, the superimposition of an animal or other species' colouring or features onto a woman's form or face, would lead the ordinary clientele to believe that it is part of the branding of the same business or one associated with it.

The interdict was granted.

MOVE ON UP 104 CC v SAGEWISE 1018 CC

Competition

A JUDGMENT BY LOPES J
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
5 JANUARY 2016

2016 SACLR 73 (KZP)

Parties who will be prejudiced by a competitor's contravention of licence conditions are entitled to interdict the competitor from contravening such conditions provided that all the conditions for an interdict are met.

THE FACTS

Sagewise 1018 CC applied for special consent to carry on the business of a service station and other activities at 60 Murchison Street, Newcastle. The application succeeded on the condition, imposed by the Town Planning Appeal Board, that Sagewise abandoned all rights to operate a service station at 22 Terminus Street, Newcastle, an operation then controlled by the controller of Sagewise, Mr Kader.

Kader then applied for a site and retail licence for 60 Murchison Street in terms of the Petroleum Products Act, 1977. The application for a retail licence for 60 Murchison Street was then approved.

Move on Up 104 CC and the other applicants were petrol retailers operating in the area of Newcastle. Their attorneys notified the attorneys acting for Sagewise and Mr Kader that the service station at 22 Terminus Street was continuing to operate. They were called upon to cease that operation immediately.

Sagewise contended that Move on Up was unlawfully interfering with its right to trade. Both the service station at 22 Terminus Street and the one at 60 Murchison Street continued to operate by, inter alia, selling fuel in contravention of the condition imposed by the Town Planning Appeal Board. Engen took the view that it should no longer supply fuel to the 22 Terminus Street site, and stated that it intended to cancel its supply contracts

Move on Up sought an interdict preventing Sagewise from conducting the service stations at 22 Terminus Street and 60 Murchison Street at the same time.

THE DECISION

Move on Up and the other applicants had a prima facie right to ensure that the restrictions on the operation of the property situated at 60 Murchison Street which were imposed by the Town Planning Appeal Board were complied with. They would suffer irreparable harm if this was not done because with both 60 Murchison Street and 22 Terminus Street operating at the same time, the overall market share would be reduced.

The balance of convenience favoured Move on Up and the other applicants. The undertakings given to the Town Planning Appeal Board had to operate until set aside. In addition, it was a factor in assessing the prejudice to Kader and the respondents that Engen intended to persist in the non-supply of fuel to the 22 Terminus Street site, and intended to cancel the supply contracts.

There was no other satisfactory alternative remedy available to the applicants, the computation of their damages being inexact and difficult to compute with any accuracy.

An interdict was therefore appropriate.

PREMIER FOODS (PTY) LTD v MANOIM N.O.

JUDGMENT BY GORVEN AJA (MAYA ADP, SHONGWE JA, PETSE JA AND BAARTMAN AJA concurring)
SUPREME COURT OF APPEAL
4 NOVEMBER 2015

2016 SACLR 85 (SCA)

The Competition Tribunal may not make an order declaring that a party has contravened section 4(1)*(b)*(i) and (ii) of the Competition Act (no 89 of 1998) if particulars of the complaint relating to its conduct did not fall within the ambit of the referrals made to the Tribunal.

THE FACTS

In December 2006, the Competition Commission received information of an alleged bread cartel operating in the Western Cape. It initiated a complaint against Premier, Tiger Food Brands (Pty) Ltd (Tiger) and Pioneer Foods (Pty) Ltd (Pioneer). Premier applied for leniency under the corporate leniency policy, disclosing that it and the other two parties had been operating a cartel in the Western Cape by fixing selling prices and other trading conditions. Premier also disclosed that it, Pioneer and Foodcorp (Pty) Ltd had operated a bread cartel in other parts of the country. As a result, Premier was granted conditional immunity from prosecution. The Commission initiated a second complaint, and referred the two complaints to the Competition Tribunal. Only Tiger and Pioneer were cited as respondents in the first complaint and only Pioneer and Foodcorp were cited as respondents in the second complaint.

After hearing the referred complaints, the Tribunal granted a declaration that Premier and the cited respondents had contravened section 4(1)*(b)*(i) and (ii) of the Competition Act (no 89 of 1998) in respect of the complaints. Premier was granted final immunity from prosecution as a result of the evidence it gave.

The fourth to eight respondents alleged that they had been injured by the cartel activity investigated by the Tribunal, and wished to sue the four responsible companies for damages. They applied in terms of section 65(6)*(b)* of the Act for a certification that the conduct constituting the basis for their action had been found to be a prohibited practice in terms of the Act.

Premier then applied for an order declaring that the Competition Tribunal could not lawfully issue a notice in terms of section 65(6)*(b)* of the Act certifying that its conduct had been found to be a prohibited practice under the Act.

THE DECISION

The first question was whether or not the Tribunal had the power to declare the conduct of Premier to be a prohibited practice. This resolved into the question whether the particulars of the complaint relating to Premier's conduct fell within the ambit of the referrals. Although it was a respondent as defined in the Act, this did not mean that it was included in the referrals. That had to be determined by construing the ambit of the referrals themselves.

Premier's conduct was not covered by the referrals. The Tribunal therefore had no power to make the declaration. The decision not to cite Premier as a respondent in the referrals provided an additional basis why the Tribunal was not empowered to make the declaration. The Tribunal lacked the power to make the declaration.

As a result of this, the declaration was accordingly a nullity. Premier was not obliged to have the order containing the declaration set aside. Being a nullity, it was competent for a court to find that there was simply no declaration to certify. This in turn meant that no notice in terms of s 65(6)*(b)* should have been issued.

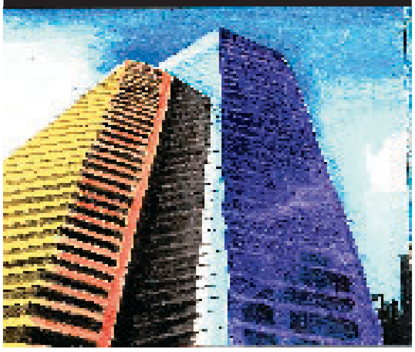
The order sought by Premier was granted.

DU PLOOY N.O. v DE HOLLANDSCHE MOLEN SHARE BLOCK LTD

A JUDGMENT BY DAVIS J
WESTERN CAPE DIVISION, CAPE TOWN
11 NOVEMBER 2015

2017 (3) SA 274 (WCC)

Companies



Section 161 of the Companies Act (no 71 of 2008) should be applied to provide a shareholder with the means to protect his or her rights, and where appropriate to bring clarity and certainty to the legal position between shareholders and company.

THE FACTS

The NJ du Plooy Trust was the majority shareholder of De Hollandsche Molen Share Block Ltd. The company was incorporated and registered as a company on 18 November 1991 with an authorised share capital of 35 600 shares comprising six classes of shares of one cent each. These were 6980 class A shares and 28620 shares in the classes B–F. The trust was the registered owner of all the class B–F shares.

On 27 February 2015 the company's board gave notice to the shareholders of a special general meeting as well as an annual general meeting of shareholders to be convened for the purpose of adopting a special resolution that the ordinary class A shareholders be increased from 6980 to 256 980.

The trust alleged that the purpose of the board in adopting this resolution was to substantially increase the number of class A shares and the combined voting rights in terms thereof, before making any further attempts to address and resolve an issue which had arisen pertaining to the status of the trust as a shareholder.

The trust applied for an order that its name be entered in the company's security register as the owner of all the shares referred to as class B – F shares. In the alternative, it sought an order that the trust was entitled to exercise voting rights in respect of the shares at any meeting of the shareholders of the company.

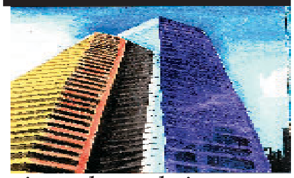
THE DECISION

Section 161 of the Companies Act (no 71 of 2008) provides that a holder of issued securities of a company may apply to a court for (a) an order determining any rights of that securities holder in terms of the Act, the company's Memorandum of Incorporation, any rules of the company, or any applicable debt instrument, or (b) any appropriate order necessary to (i) protect any right referred to in paragraph (a) or (ii) rectify any harm done to the securities holder by (aa) the company as a consequence of an act or omission that contravened the Act or (bb) any of its directors to the extent that they are or may be held liable in terms of section 77.

The aim of this provision is to provide a shareholder with the means to protect his or her rights. In the context of the present case, it was appropriate to bring clarity and certainty to the legal position, namely that the trust was the owner of all class B – F shares in the company. To order otherwise would be to create chaos, whereas at present there was only ambiguity which arguably could be cured.

The company contended that it was possible to have issued 14 of the 18 class B shares to the initial shareholders, being two share blocks each. The remaining share blocks could only be issued in fractions. As a result, these shares would revert back to the company to be reflected as authorised but unissued shared capital. Further, given that there was no use agreements for the class B shares, these shares could not have been transferred to the applicants by the original shareholders. The question would then arise as to whether the they were still the shareholders of these shares or would company be possessed of the authorised but unissued shared capital. Even on its argument, six class A share blocks would immediately revert back to the company as authorised unissued share capital.

The company conceded that, if this argument was correct this



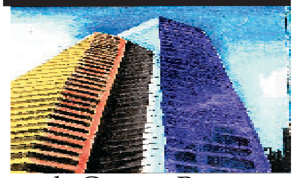
would be fatal to the existence of any rights of the original shareholders.

In the circumstances, it was appropriate to utilise the scope of this section in order to bring some harmony to the company. It was declared that the trust was the registered owner of the B – F shares.

It appears to me to be equally appropriate in this case to bring clarity and certainty to the legal position, namely that the trust is the owner of all class B – F shares in first respondent. To order otherwise, as respondents would have it, would be to create chaos, where at present there is only ambiguity which arguably can be cured. Take for example the submission of Mr La Grange that it was possible to have issued 14 of the 18 class B shares to the initial shareholders, being two share blocks each. The remaining share blocks could only be issued in fractions. As a result, these shares would revert back to the first respondent to be reflected as authorised but unissued shared capital. Further, given that there were no use agreements for the class B shares, these shares could not have been transferred to the applicants by the Schoeman employees. The question would then arise as to whether the Schoeman employees were still the shareholders of these shares or would the first respondent be possessed of the authorised but unissued shared capital. Even on respondents' argument, six class A share blocks would immediately revert back to first respondent as authorised unissued share capital.

Mr La Grange was forced to concede further that, if his argument was correct, namely that there was no evidence that the initial shareholders ever paid for the shares and that there was a disconnect between the individual share blocks and the registered layout plan (the fractional argument) this would be fatal to the existence of any rights of these shareholders. He thus contended that s 163 of the 2008 Companies Act should be employed in favour of the class A shareholders, notwithstanding that no counter-application had been brought in the present case by the individual shareholders as opposed to the first respondent which, as H I shall show, does not have locus standi itself to gain relief in terms of s 163(1) of the Act.

GIHWALA *v* GRANCY PROPERTY LTD



A JUDGMENT BY WALLIS JA (LEWIS JA, LEACH JA, SERITI JA and TSOKA AJA concurring)
SUPREME COURT OF APPEAL
24 MARCH 2016

2017 (2) SA 337 (SCA)

A joint venture agreement which is breached by one or more the parties thereto may result in the application of remedies provided for in the Companies Act (no 71 of 2008) including an order that the party in breach be declared a delinquent director.

THE FACTS

Spearhead Property Holdings Ltd was a property loan stock company listed on the Johannesburg Stock Exchange. Its business was to hold and invest in immovable commercial, industrial and retail properties, primarily in the Western Cape, and to derive its income from rentals. In 2005, Spearhead wished to engage in a Black Economic Empowerment transaction to expand its shareholder base in the black community. To that end it was prepared to make available 3,5 million linked units to a special purpose vehicle, the shares in which would predominantly be held by black shareholders or organisations or companies that predominantly represented the interests of black people. The SPV would subscribe for the shares at R15,50 per unit, a price significantly below the then current price of Spearhead shares on the stock exchange, of around R20 per unit.

Ngatana Property Investments (Pty) Ltd was incorporated as the SPV through which the BEE transaction would be implemented. Gihwala and Manala were offered a 40% stake in Ngatana, which they proposed to take up through SMI, an existing company in which a Trust and Manala held equal shares.

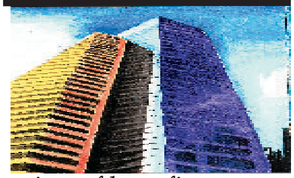
At a meeting in Johannesburg in February 2005, Gihwala and Manala agreed that a Mawji would take up an 18% stake in Ngatana. In return for a shareholding in SMI Mawji would provide a portion of the funds, a sum of approximately R3,5 million, needed for SMI to obtain the 58% stake in Ngatana. In addition, as Mr Manala was unable to make his contribution to SMI as a one-third shareholder, Mawji, through Grancy Property Ltd, and Gihwala would each fund one-half of Manala's share. These loans would attract interest at a commercial rate and, if and when Manala realised his interests at a profit, Gihwala and Mawji would share in a proportion of that profit.

In the early stages of 2006 the business relationship between Mawji and Gihwala soured. Mawji sought to withdraw from the investment, and Gihwala was informed that a decision had been made to exit the Spearhead investment.

In November 2007 Grancy brought an application claiming against Gihwala and Manala, SMI and the Trust delivery of a 31% shareholding in SMI. It also sought an accounting in respect of its original investment in SMI. Grancy alleged that Gihwala and Manala, as well as the Trust and SMI, breached the February 2005 agreement, and that these breaches gave rise to a number of claims to recover compensation for financial loss that it had suffered in consequence of such breaches. It also sought orders for the disclosure of financial records and books of account and an accounting against both Gihwala and Manala and the Trust and SMI. It sought an order that Gihwala and Manala be declared delinquent directors in terms of section 162(5)(c) of the Companies Act (no 71 of 2008).

THE DECISION

When the meeting of February 2005 commenced, the Trust and Manala held equal shareholdings in SMI, that is, each held a 50% stake in SMI. The agreement involved each of them sacrificing one-third of their interest in order for Grancy to acquire a one-third stake in SMI. Gihwala contended that the agreement merely



involved Grancy taking up a shareholding in SMI, and enjoying the ordinary rights and incurring the ordinary obligations that attach to being a shareholder. In other words, that Grancy's rights would be no different from those of a person who purchased shares in a company on the Johannesburg Stock Exchange. This characterisation could not be accepted. The investment in Spearhead was presented as an opportunity for Gihwala and Mawji to do business together.

Until the agreement was prepared and signed, the parties were bound by the express terms of the agreement and any tacit terms that formed part of it. Such an agreement does not alter or vary the company's founding documents. It is an agreement between the parties thereto in terms of which they agree as to the manner in which, and the purpose for which, the powers of the company and its directors will be exercised. There is no reason why such an agreement should not ordinarily be given effect and no reason why it should not be given effect in this case. Section 15(7) of the Companies Act expressly provides that this is to be the situation. The qualification that the shareholders' agreement may not be inconsistent with the Act and the Memorandum of Incorporation deals with situations where there is a direct conflict between them, not with a qualification in the shareholders' agreement on the manner in which general powers are to be exercised, which may constrain the exercise of those powers.

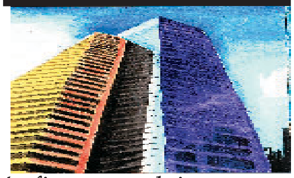
Parties entering into this type of investment anticipate that they will receive a flow of income in accordance with the nature of the investment. When funds become available they are be distributed. The material terms of the agreement concluded between the parties in February 2005 that Gihwala, Manala and Grancy would participate in the Spearhead BEE transaction and thereby invest indirectly in Spearhead linked units. The investment would be undertaken using SMI as a corporate vehicle with each participant holding one-third of the shares in SMI. The parties would make their investment contributions by way of subscription for shares in and the making of loans to SMI, which would use the funds so acquired to subscribe for 58% of the shares in Ngatana, which was the corporate vehicle that would hold the 3,5 million Spearhead linked units acquired in terms of the BEE transaction, and lend money to Ngatana to enable it to take up these Spearhead units. The investment would be directly managed by Gihwala and Manala. In the management of the investment Gihwala and Manala, the Trust and SMI owed Grancy a duty to exercise good faith and to account fully for their stewardship of Grancy's investment. Their relationship with Grancy was a fiduciary one. Grancy would be entitled on request to be given access to all books and records of SMI relating to its affairs and Grancy's investment in it. The two directors would ensure that the net income accruing to Ngatana from the investment would be distributed to shareholders, first by repaying shareholder loans and then as dividends. The net income accruing to SMI after paying its administrative expenses would be distributed to shareholders, first by repaying shareholder loans and then by way of dividends. The investors would be treated equally so that in the allocation of benefits arising from the investment no investor would be treated less favourably than another and no investor would secure for himself or itself a benefit that was not afforded to the other investors.

The agreement amounted to a joint venture. But rom the very start there were wholesale breaches of the investment agreement by Gihwala and Manala, as well as by the Trust and SMI acting through Gihwala, who was throughout the driving force in dealing with Grancy and the alter ego of the Trust. The first and primary breach, which coloured all the others, was the refusal to accept that Grancy had a right to a one-third shareholding in SMI.

The duty of good faith that formed an integral part of the terms of this contract could in this case only be breached by the joint conduct of Gihwala and Manala and, through Mr Gihwala, the Trust. The obligations they undertook to Grancy were indivisible. They carried with them fiduciary duties of good faith that are characteristic of partnership, where liability is joint and several.

In the circumstances, Grancy's claim had to be upheld.

LEWIS GROUP LTD v WOOLLAM



A JUDGMENT BY BINNS-WARD J
WESTERN CAPE DIVISION, CAPE TOWN
11 OCTOBER 2016

2017 (2) SA 547 (WCC)

Section 162 of the Companies Act (no 71 of 2008) is directed at ensuring that persons guilty of specified serious misconduct or serial non-compliers with applicable regulatory legislation are disqualified from holding office as directors of any companies, or, if the court considers it appropriate to limit the extent of the declaration, specified categories of company.

THE FACTS

Woollam, a shareholder in Lewis Group Ltd, issued a demand against the company calling upon it 'to protect its legal interests, more specifically . . . [by commencing] proceedings to declare as delinquent' four of the company's directors, namely Messrs Johan Enslin, Leslie Davies, David Nurek and Hilton Saven (the second to fifth respondents, respectively)'.

The demand was based on six separate grounds as to why proceedings should be instituted by the company for a declaration that the second to fifth respondents should be declared delinquent directors. These were:

1. That loss-of-employment insurance was being sold to customers of Lewis Stores who were pensioners and self-employed persons and thus had no insurable interest in terms of the relevant insurance policies.
2. That Lewis Stores' customers were required, whether they wished to or not, to purchase extended warranties on goods purchased.
3. That compulsory delivery fees were charged to Lewis Stores customers, irrespective of whether they required delivery of the goods to be effected.
4. That the group's accounts had for many years appeared to overstate revenue from the sale of insurance policies.
5. That the group had inappropriate revenue-recognition policies with regard to the sale of extended warranties that resulted in the ongoing overstatement of reported revenue.
6. The incorrect processing of various accounting policy errors and the changing of estimates, as prior year adjustments in the interim results for the period ended 30 September 2015.

Woollam's first complaint was based on the fact that loss-of-employment insurance was sold to some customers of Lewis Stores (Pty) Ltd who were pensioners or self-employed persons and thus had no insurable interest. The resulting revenue, which should not have been generated, had been reflected in the applicant's group consolidated financial statements.

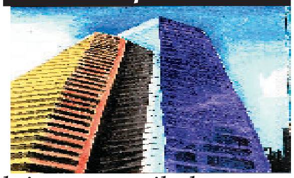
The second complaint was based on the fact that in the majority of transactions concluded by Lewis Stores the customer purchases an extended product warranty. Woollam contended that the practice of selling the extended product warranty was unconscionable in many cases because the manufacturer in any event often provided a product warranty that extended for longer than the standard one-year warranty that Lewis Stores stipulates must be provided by all its suppliers.

The third ground of complaint was based on the fact that Lewis Stores charged first-time purchasers on credit a delivery or 'handling' fee, even in respect of goods in respect of which delivery would not ordinarily be required because the goods were of a type that could easily be carried out of the store by the customer. Lewis Stores stated that this was done because it was considered necessary to confirm the physical address given by the first-time credit customer.

THE DECISION

The statutory disqualification of directors provided for in section 162 of the Companies Act (no 71 of 2008) gives standing to companies to bring proceedings for the disqualification of their directors or former directors.

Assuming the company does not accede to his demand, Woollam



sought to use the derivative action remedy in terms of section 165 to achieve a declaration in terms of section 162. Subsection (2) of that section provides that a company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if — (a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and (b) any of the circumstances contemplated in — (i) subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency.

Section 162 is directed at ensuring that persons guilty of specified serious misconduct or serial non-compliers with applicable regulatory legislation are disqualified from holding office as directors of any companies, or, if the court considers it appropriate to limit the extent of the declaration, specified categories of company.

For a company or any of its shareholders to succeed in obtaining a declaration of delinquency in respect of any of the company's directors or former directors they must demonstrate very serious misconduct by the person concerned. The relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing so-called 'ordinary' negligence, poor business decision-making, or misguided reliance by a director on incorrect professional advice will not be enough.

As to the first complaint, Woollam was unable to controvert the evidence that the insurance sold had happened because of erroneous data-capturing by personnel in the shops where the transactions concerned were processed. If the data had been correctly captured, the computer program used for the processing of the proposals for insurance would automatically have excluded their acceptance. Woollam had not qualified his complaint as falling within the categories of conduct described in section 162(5)(c) of the 2008 Companies Act. The complaint was without merit.

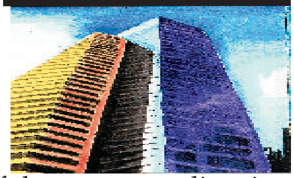
As to the second complaint, none of the matters raised in Woollam's implicated conduct by any of the directors falling within the scope of s 162(5)(c) of the Companies Act. His allegations did not merit an investigation by the company into the question whether it should apply for declarations of delinquency against the second to fifth respondents. C

As to the third complaint, the matter was referred to the National Credit Regulator, which had not seen fit to refer the practice to the National Credit Tribunal. It sufficed to hold that even if it did, that would not make out a case of fraud against the subsidiary company. Even less would it follow that the four directors of the holding company were thereby guilty of the sort of conduct referred to in section 162(5)(c) of the Act.

Having regard to the notice-to-consumer requirements imposed on credit providers in terms of the National Credit Act before it was able to prosecute enforcement proceedings in the event of default, the concern of Lewis Stores (Pty) Ltd to verify the addresses of its credit customers was understandable. Whether its means of doing so entailed making a prohibited charge within the meaning of section 100 of the National Credit Act, as alleged by Woollam in his demand, this did not fall for determination in the present proceedings.

In the result Woollam's demands failed to demonstrate that the company had the makings of a cognisable case for the relief that he insisted the company should pursue against the second to fifth respondents.

KAIMOWITZ v DELAHUNT



A JUDGMENT BY DAVIS J
WESTERN CAPE DIVISION, CAPE TOWN
23 NOVEMBER 2016

2017 (3) SA 201 (WCC)

A director of a company may require that he not be impeded and/ or obstructed his capacity to act as a director and to fulfil his fiduciary responsibilities to the company, but this right does not include the right to be present at day to day management meetings of the company's business.

THE FACTS

Kaimowitz was a director of a company, the fifth respondent. He was previously employed by the company. On 4 May 2016 he was informed by Weber, the fourth respondent, that he was no longer employed by the company and that henceforth he would be a non-executive director of the company. Weber said that, while he would remain a director of the company, he 'will no longer be involved in the day to day management of the business', but would be a non-executive director. Weber informed him that he would be entitled to exercise all his rights as a director as provided for in the Companies Act and the Memorandum of Incorporation. After termination of his employment, he would no longer be involved in the day-to-day management of the business. He would be entitled to attend all directors' meetings but would no longer be entitled to participate in any management meetings by virtue of the end of his employment.

Kaimowitz contended that he had been unlawfully prevented from carrying out his lawful obligations as a director. This conduct was unlawful, prejudicial to him and contrary to the scope of section 163 of the Companies Act. It was oppressive conduct and was contrary to section 66 of the Companies Act. By creating a post of non-executive director for him, thus preventing him from fulfilling his obligations as a director, which included the management of the company.

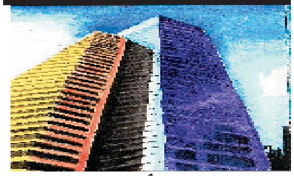
Kaimowitz applied for an order that the respondents be restrained from barring, interfering with, or preventing him from taking part in the management of the company's business for so long as he was a director of the company, directing that the respondents were to give him reasonable prior written notice of all management meetings pertaining to the business and/or the company's affairs, and generally interdicting and restraining the respondents from doing anything which interfered with his ability to take part in the management of the business.

THE DECISION

Kaimowitz' main demand was that he play a greater role in the affairs of the company than mere attendance at board meetings. This meant that there were two separate considerations requiring the attention of the court: was Kaimowitz, as a director, as of right entitled to be involved in the day-to-day running of the business of the company? and, if not, had he been prevented from being involved in the business in a manner which impeded his role as a director in terms of the applicable law?

The day-to-day management of a company may be delegated to a managing director and/or to committees of the board as chosen by the board, as opposed to each director, as of right, having the power to involve himself/herself in the 'day-to-day' operations of the company. The question remained as to whether a director on a board, save where it is provided for in the Memorandum of Incorporation and who pursuant thereto may be given the task by way of membership of a subcommittee created by the board for being responsible for the management of the company, is entitled to be involved in the overall day-to-day running of the affairs of the company.

The involvement of a director in the affairs of the company must be assessed in terms of enabling



of a director to perform those duties which are imposed upon him/her as a result of his/her appointment as a director. This means that each director does not have to be involved in the day-to-day running of a company nor that every director must sit on every subcommittee which is constituted by a board. The management of a company in terms of the overall supervision thereof resides in the board as opposed to individual directors. So much is clear from the wording of section 66(1) of the Companies Act. This results in a conclusion that the only relief to which Kaimowitz was entitled would be in terms of any acts performed by the respondents which undermine, prevent or reduce his ability to perform his functions as a director of the company.

While Kaimowitz was entitled to perform his functions as member of the board and no action could be taken which would prevent him from fulfilling these duties as a board member, this could not support the relief sought. It had not been shown that Kaimowitz had been prevented from acting as a director and fulfilling his obligations pursuant thereto. Hence, the relief which he sought could not be justified on the evidential matrix which he had presented. Certainly on the basis of a distinction between the day-to-day management of a company and the overall supervisory role of a board, the relief sought with regard to attendance at unspecified management meetings (as opposed to board meetings) could not be justified on the law. Had Kaimowitz laid out a case that respondents' actions had prevented him from fulfilling his role as a director on the board of the company, this would have been different.

Kaimowitz' only argument could be that as a director, the actions of the respondents had impeded and/or obstructed his capacity to act as a director and to fulfil his fiduciary responsibilities to the company. This case had not been made out.

NEDBANK LTD v JONES

A JUDGMENT BY GAMBLE J and HACK AJ
WESTERN CAPE DIVISION, CAPETOWN
12 OCTOBER 2016

2017 (2) SA 473 (WCC)

Credit Transactions

A magistrates' court hearing a matter in terms of section 87(1) of the National Credit Act (no 34 of 2005), does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision is null and void. A rearrangement proposal in terms of section 86(7)(c) of the Act that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance does not meet the purposes of the Act. A rearrangement order incorporating such a proposal is ultra vires the Act and the magistrates' court has no jurisdiction to grant such an order.

THE FACTS

Jones' debt counsellor brought an application for debt review in terms of section 86 of the National Credit Act (no 34 of 2005) citing Nedbank Ltd, as well as other creditors. The magistrate granted leave to the debt counsellor to bring the application in terms of section 86 of the Act, and found that the Joneses were overindebted in terms of section 79 of the Act. On 8 June 2010, the magistrate made an order for debt rearrangement.

In granting the debt-rearrangement proposal the magistrate ordered that the home loan, the balance then being in excess of R2,2 m, was to be restructured so that the monthly instalment would be R4007,06 and the interest rate would be fixed at 10,4 % per annum. The repayment period was left open-ended on the basis that the instalment would be payable 'till debt settled'. At the time the rearrangement order was made the contractual instalment was R17 343,75 per month and the interest rate 8,9 % per annum.

Dissatisfied with the nature and extent of the order, the bank sought to apply for rescission thereof on the basis that the order was void ab origine. The bank applied for review of the decision and for declaratory relief. In the bank's founding affidavit, it was pointed out that the effect of the magistrate's order for rearrangement of the debt was that the consumer's obligation under the Act would never be satisfied and that the rescheduled monthly instalment would not even cover the monthly interest payable on the debt, let alone reduce the capital due. It asserted that this was contrary to the purpose of the Act.

THE DECISION

In this matter the magistrate permanently fixed the interest rate at a level which would render the debt incapable of ever being settled. Adopting the reasoning in *Nedbank Ltd v Norris* 2016 (3) SA 568 (ECP), the order of the magistrate of 8 June 2010 was ultra vires and accordingly of no force and effect. That judgment held that section 86(7)(c)(ii) confirms no power upon the magistrates' court to reduce the interest payable from 17,5 % to 0 %. It held that 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. This much is plain from the wording of section 86(7).

The order reducing Jones' contractual obligation to pay interest on the outstanding balance of the loan was therefore ultra vires

A review of the order would create a commercial nightmare for both parties and undoubtedly be prejudicial to the debtors. The calculation of what would have been due to the bank had the order not been made, or had the debt otherwise have been rescheduled lawfully and the contract enforced in its original terms, would not be a simple exercise, given that, as a matter of fact, Jones had been making part payment of what was contractually due. An order for

review would not be in the interests of justice.

A declaratory order was therefore appropriate: A magistrates' court hearing a matter in terms of section 87(1) of the Act, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and any order containing such a provision is null and void. A rearrangement proposal in terms of section 86(7)(c) of the Act that contemplates a monthly instalment which is less than the monthly interest which accrues on the outstanding balance does not meet the purposes of the Act. A rearrangement order incorporating such a proposal is ultra vires the Act and the magistrates' court has no jurisdiction to grant such an order.

The immediate problem that confronts the bank in seeking to have the order reviewed and set aside is, as the Joneses themselves say in their affidavit filed of record, the very lengthy delay of more than five years in bringing the application. In terms of the approach in Wolgroeiers, 8 this court exercises its inherent jurisdiction in a matter such as this and, in so doing, has the power (in the regulation of its own proceedings) to refuse to come to the assistance of an aggrieved party if the latter has been guilty of unreasonable delay in initiating review proceedings. As Navsa JA points out in Sanral, the question of prejudice is important and in deciding whether or not to assist the litigant the court asks itself two questions —

- *Was there an unreasonable delay?*
- *If so, should the delay, in all the circumstances of the case, be condoned?*

TYRE CORPORATION CAPE TOWN (PTY) LTD v GT LOGISTICS (PTY) LTD

A JUDGMENT BY ROGERS J
WESTERN CAPE HIGH COURT, CAPE TOWN
21 SEPTEMBER 2016

2017 (3) SA 74 (WCC)

Insolvency

The current insolvency of a company is not an absolute bar to granting business rescue. In establishing that a company should be placed in business rescue, rather than liquidation, it must be shown that there are reasonable grounds for a belief that the company could be rescued.

THE FACTS

Tyre Corporation Cape Town (Pty) Ltd and the other applicants were trade creditors of GT Logistics (Pty) Ltd. They sought the liquidation of GTL. An intervening party, GTL's managing director and sole shareholder, Esterhuizen, applied to have GTL placed in business rescue.

Tyre's claims totalled R3 381 582. Esterhuizen questioned this amount but admitted that GTL owed Tyre a substantial amount. It was clear that GTL was commercially insolvent, and unless the business rescue application succeeded, GTL should be placed in provisional liquidation.

GTL began operations in 2010. It provided logistical and transport services throughout South Africa. It had offices in Cape Town, Johannesburg, Durban and Port Elizabeth. It had 353 employees. Its customers included substantial companies. It had a substantial fleet of vehicles. The vehicles were financed in terms of instalment-sale agreements, financial leases and rental agreements. Most of the current fleet had been acquired within the previous two to three years.

GTL's audited financial statements for the year ended 28 February 2015 reflected that the company's fleet, at cost less accumulated depreciation, increased from R12 225 358 to R54 909 679, turnover increased from R93 637 284 to R122 112 735 and gross profit from R30 360 981 to R70 821 737, operating expenditure increased from R25 467 384 to R63 595 037. The main sources of this increase were increased consulting expenses, contract expenses, depreciation, equipment hire, insurance, vehicle expenses and salaries. Most of these increases would have been occasioned by the substantial increase in the fleet. Post-tax profit increased from R3 549 658 to R5 250 414. Retained income increased from R4 149 954 to R9 400 368.

Esterhuizen acknowledged that the company was experiencing financial distress. GTL's audited financial statements for the year ended 29 February 2016 had not been finalised. However, he submitted a balance sheet of the company as at 31 July 2016. The only indications in the balance sheet of the company's recent operational performance were the entries for retained income. The opening figure was R10 817 417, being the retained income for the year ended 29 February 2016. Since retained income for the year ended 28 February 2015 was R9 400 368, this implied that the profit after tax for the year ended 29 February 2016 was R1 417 049. There was then recorded a loss for the year to date (March – July 2016) of R1 125 843, reducing the retained income as at 31 July 2016 to R9 691 574. This indicated a trend of declining profits in the year ended 29 February 2016 turning to losses in the current year.

THE DECISION

Tyre contended that the current insolvency of a company is an absolute bar to granting business rescue. It submitted further that GTL was not only commercially but factually insolvent.

However, this would not be a bar to business rescue, since in terms of section 131(4)(a)(iii) of the Companies Act (no 71 of 2008) the court can grant a business rescue order if it is just and equitable to do so for financial reasons, ie whether or not the company is 'financially distressed'.

There were three key aspects in

assessing Esterhuizen's proposal for rescuing the company. The first was his contention that the non-critical creditors would receive no dividend in a liquidation. The second was that the claims of non-critical creditors would be compromised at 40 cents in the rand. The third was his projection of increased revenue and profits in the year ahead.

The proposed business rescue had as its object that the company should continue trading and be restored to solvency. Accordingly, in considering the costs of business rescue as against liquidation, one should not be simply concerned with the differing costs of effectively winding up the business but with the costs associated with attempting to save it on the one hand and wind it up on the other. It may be, in the light of the liquidation scenario, that a plan which provides for a more equitable distribution of the loss currently to be borne by the non-critical creditors could be devised. The indications were that the money which Esterhuizen proposed to save for the company by compromising the non-critical creditors at 40 cents in the rand could be saved by an alternative scheme in which all creditors, including the financiers, write off 6 – 8% of their claims. But that is not the plan which Esterhuizen proposed and there was no evidence that he had discussed it with the financiers. There was no evidential basis for saying that such a plan was likely to receive the requisite approval. Accordingly, and even if the proposed plan would restore the company to solvency, the better option appeared not to place the company in business rescue.

All things considered, Esterhuizen had not established reasonable grounds for a belief that the company will achieve the projected turnover and profits on which the rescue plan depended. Something more than a prima facie case or arguable possibility was needed. Naturally projections involve an element of speculation, but in this case they were so divorced from a factual foundation that they did not provide a basis on which the court could assess the company's return to solvency.

Although affected parties are entitled to be heard in relation to a business rescue application, and although their attitude is relevant to the exercise of the court's discretion, the existence of a reasonable prospect of rescuing the company is a factual question, albeit involving a value judgment. If the court concludes that reasonable grounds for believing that the business can be rescued have not been established, the court cannot grant the application, even though many affected parties may support business rescue.

In the present case reasonable grounds for a belief that GTL could be rescued had not been established. Esterhuizen's projections, on which the plan depended, were on the face of it unreliable, contradictory and not based on reasonable grounds. In any event, the manner in which only non-critical creditors' claims were to be compromised was fundamentally unfair and objectionable.

The application for business rescue had to fail and the company had to be placed in provisional liquidation.

CITY OF TSHWANE METROPOLITAN MUNICIPALITY v MITCHELL

JUDGMENT BY BAARTMAN AJA (MPATI P, BOSIELO JA AND SALDULKER JA CONCURRING, ZONDI JA dissenting)
SUPREME COURT OF APPEAL
29 JANUARY 2016

2016 SACLR 110 (SCA)

Property

A municipality may refuse to issue a clearance certificate in terms of section 118 of the Local Government: Municipal Systems Act (no 32 of 2000) if debt older than two years is owed to it. Such refusal is possible even if the property was sold in execution.

THE FACTS

On 22 February 2013 Mitchell purchased certain fixed property situated within the area of jurisdiction of the Tshwane Municipality at a sale in execution. Clause 6.4 of the terms of sale provided that Mitchell would be responsible for payment of all costs and charges necessary to effect transfer including conveyancing costs, rates, taxes and other like charges necessary to procure a rate clearance certificate, transfer duty or VAT attracted by the sale and any Deeds registration office levies.

The municipality issued a clearance certificate reflecting the outstanding amount due to it as R126 608.50. This represented only the debt due for the two years preceding the date of Mitchell's application for issue of the certificate. Mitchell paid that amount, leaving a historical debt of R106 219.75 still outstanding. Mitchell sold the property to a third party but that party could not obtain transfer because the municipality refused to issue a clearance certificate until the historical debt was paid.

Mitchell then brought an application for an order declaring that he was not liable for the historical debt owed to the municipality by previous owners. The municipality appealed against a judgment granting him that order.

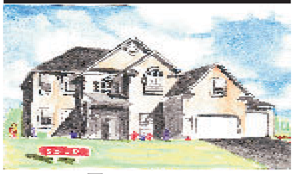
THE DECISION

In terms of section 118(1) of the Local Government: Municipal Systems Act (no 32 of 2000), a registrar of deeds may not register the transfer of property, except on production of a clearance certificate – confirming that all amounts due to the municipality in respect of that property for service fees, levies, rates and taxes for the two years preceding the date of application for the certificate, have been paid in full.

In *City of Tshwane Metropolitan Municipality v Mathabathe* 2013 (4) SA 319 (SCA) it was held that a transfer of property from one owner to another does not extinguish the security created by section 118(3). Mitchell contended that at least in respect of sales in execution, the statutory hypothec created in terms of that section is to be enforced against the proceeds of the sale of the property at a sale in execution. However, this contention could not be sustained. The provisions of section 118, including s 118(3), are made subject to section 89 of the Insolvency Act (no 24 of 1936) in the case of the transfer of property by a trustee of an insolvent estate (s 118(2) of the Act). Section 118(5) provides that subsection (3) 'does not apply to any amount referred to in that subsection that became due before a transfer of a residential property or a conversion of land tenure rights into ownership contemplated in subsection (4) took place'. Therefore, 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 had not done so. It followed that a statutory hypothec would not have been extinguished by the sale in execution and subsequent transfer of the property into the name of Mitchell.

The appeal was upheld.

TRANSNET SOC LTD v GROUP FIVE CONSTRUCTION (PTY) LTD



JUDGMENT GIVEN IN THE KWAZULU NATAL HIGH COURT, DURBAN, ON 9 FEBRUARY 2016 BY JEFFREY AJ

2016 SACLR 136 (KZD)

A complex construction project may require the appointment of more than one adjudicator for the different disputes that might arise between contractor and employer. A provision in the construction contract that an adjudicator be appointed 'if and when a dispute arises' may be construed to intend that multiple appointments of an adjudicator may be made.

THE FACTS

Group Five Construction (Pty) Ltd undertook certain construction work in terms of a New Engineering Contract concluded with Transnet Soc Ltd as employer. The contract provided for the appointment of an adjudicator in the event of a dispute arising. It provided that the adjudicator was to be appointed under the NEC3 Adjudicator's Contract (June 2005) 'if and when a dispute arises'.

Transnet contended that that, on a proper interpretation of the contract, the fourth respondent had been appointed as the adjudicator for all disputes arising under or in connection with the contract. Group Five contended that the parties contemplated the appointment of multiple adjudicators or ad hoc adjudicators for each dispute that may arise during the course of the project.

Transnet applied for an order that its contention was correct.

THE DECISION

The words 'if and when a dispute arises' could mean that an adjudicator is appointed initially 'if and when a dispute arises' and then retains such appointment, as Transnet contended, throughout the period of the project. They could also mean that an ad hoc adjudicator was to be appointed 'if and when a dispute arises' for that dispute only and another ad hoc adjudicator may be appointed 'if and when' each subsequent dispute arises.

Construed in the context of the contract as a whole that provides in great detail for large and extensive works, the parties, as rational businessmen, were likely to have intended that multiple disputes could arise during the course of the project and that the determination of these disputes would require the expertise of ad hoc adjudicators from different disciplines or experience, or even more than one ad hoc adjudicator. This intention would be sensible, practical, expeditious and businesslike. It was likely that the expeditious progress of a large project like the one undertaken by Group Five would be jeopardised if ad hoc adjudicators were not appointed.

The interpretation placed by Transnet on the provisions of the contract regarding the appointment of adjudicators could not be sustained.

NELSON MANDELA BAY MUNICIPALITY v AMBER MOUNTAIN INVESTMENTS 3 (PTY) LTD

A JUDGMENT BY THERON JA (CACHALIA JA, DAMBUZA JA, MOCUMIE JA and MOLEMELA AJA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2017

2017 (4) SA 272 (SCA)

Property

When issuing a certificate in terms of section 118 of the Local Government: Municipal Systems Act (no 32 of 2000) a municipality may not insist on payment of the full amount which remains unpaid for the remaining financial year.

THE FACTS

Amber Mountain Investments 3 (Pty) Ltd, was the owner property situated in Port Elizabeth, an area of jurisdiction of Nelson Mandela Bay Municipality. It sold the property to Joburg Skyscraper (Pty) Ltd.

Before transfer of the property Amber required a rates clearance certificate in terms of section 118 of the Local Government: Municipal Systems Act (no 32 of 2000) (the Systems Act) from the municipality. The municipality required payment of rates until the end of its financial year, 30 June 2010, as a condition for furnishing the certificate. The municipality presented Amber with an account for the sum of R2 281 014,68. The respondent paid this under protest, in order to obtain the certificate.

At the time of payment, Amber's actual indebtedness to the municipality was for the sum of R1 214 482,68. It contended that what it paid to the municipality constituted an overpayment, and it was entitled to be reimbursed.

The municipality contended that in light of the relevant provisions in chs 2 and 3 of the Local Government: Municipal Property Rates Act (no 6 of 2004) (the Rates Act) Amber was obliged, when it sought a rates clearance certificate, to pay the full property rate on the property for the financial year commencing 1 July 2009. Clause 31 of the municipality's rates policy provided that in the case of an application for a certificate in terms of section 118 of the Systems Act, the full amount which remains unpaid, inclusive of all instalments, for the remaining financial year would be payable.

THE DECISION

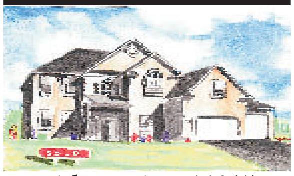
Section 12 of the Rates Act provides that when levying rates, a municipality must levy the rate for a financial year. A rate lapses at the end of the financial year for which it was levied.

Section 13(1) provides that a rate becomes payable (a) as from the start of a financial year, or (b) if the municipality's annual budget is not approved by the start of the financial year, as from such later date when the municipality's annual budget, including a resolution levying rates, is approved by the provincial executive in terms of section 26 of the Municipal Finance Management Act.

The municipality contended that once its financial year had commenced, Amber became liable to pay the rates fixed for that financial year and it was entitled to withhold the rates clearance certificate until it had received payment of rates for that financial year.

Adopting the relevant tools of interpretation, and having regard to the definition of 'financial year' and the provisions of ss 12(1), C 26, 27 and 28, the words 'payable as from' in section 13(1)(a), were to be interpreted to mean that the rate is payable within the period of the financial year and not on 1 July as contended by the municipality. The legislature could have inserted the words 'due and' before 'payable' in section 13(1)(a), without offending the scheme of the Act if it were the intention that the rates should be due and payable on 1 July of each year.

The final question was whether a municipality could, prior to issuing a rates clearance certificate, insist on payment of all rates, fees and charges in respect of the property for the



current financial year, even if this period extended beyond the date of the certificate. Section 118 of the Systems Act provides that a registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate (a) issued by the municipality in which that property is situated; and (b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid.'

The section makes it clear that the certificate is issued in respect of municipal debts which have become due in the two years preceding the date of application for the certificate and does not apply to future municipal debts. The clear intention of the legislature is to limit the period to two years preceding the date of application for the certificate. The municipality's policy contradicted the express terms of the statute and would frustrate its terms. To the extent that the municipality's policy was inconsistent with section 118(1), and was void.

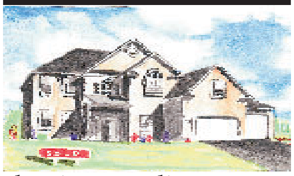
The municipality was not entitled to withhold the property rates clearance certificate until it had received payment of the property rates for the entire financial year. Such property rates became payable (but not due) from the start of the financial year. Furthermore, section 118(1) clearly applies to municipal debts which have become due in the two years preceding the date of application for the certificate and does not apply to future municipal debts.

The municipality was obliged to refund the overpaid rates.

The clear intention of the legislature was to limit the period in s 118(1) to two years preceding the date of application for the certificate. The municipality's policy contradicts the express terms of the statute and 'would frustrate its terms'. To the extent that the municipality's policy is inconsistent with s 118(1), it is ultra vires and void.

To sum up: the relevant provisions of the Rates Act, the Finance Act and the Systems Act, read together, buttress the contention of the respondent that the municipality was not entitled to withhold the property rates clearance certificate until it had received payment of the property rates for the entire financial year. Such property rates became payable (but not due) from the start of the financial year. Further, s 118(1) clearly applies to municipal debts which have become due in the two years preceding the date of application for the certificate and does not apply to future municipal debts.

AQUILA STEEL (SA) LTD v MINISTER OF MINERAL RESOURCES



A JUDGMENT BY TUCHTEN J
GAUTENG DIVISION, PRETORIA
22 NOVEMBER 2016

2017 (3) SA 301 (GP)

The return of an application by a Regional Manager under section 16 of the Mineral and Petroleum Resources Development Act (no 24 of 2008) is equivalent to the rejection of such an application. It is open to such an unsuccessful applicant to amend or amplify its application and resubmit it. In such a case, the application would be treated as a new application and given a place in the queue of applications as such, rather than as a pending application enjoying first place in the queue.

THE FACTS

In 2006, Aquila Steel (SA) Ltd was granted a prospecting right over a piece of land in the Northern Cape and a further twelve properties. In the exercise of that right it spent R156m on prospecting activities and found a significant manganese reserve. Aquila wished to mine that reserve.

A company known as ZiZa had held land grants made by the government of the Cape Colony in the late 19th century. ZiZa was incorporated in the United Kingdom on 24 May 1893 under the name The Bechuanaland Railway Co Ltd, and ultimately became owned by the governments of Zimbabwe and Zambia. Part of ZiZa's patrimony involved mineral rights over land which had long before been alienated. ZiZa was the holder of an unused old order right.

ZiZa's common-law mineral rights were never exploited. They were therefore unused old order rights as defined in the Mineral and Petroleum Resources Development Act (no 24 of 2008). In order to gain any right to exploit its unused old order rights, had to apply for prospecting or mining rights. If ZiZa did nothing in this regard, its common-law rights would cease to exist. This gave rise to certain steps on its part in the period February to April 2005. By agreement between three governments, a new company, the Pan African Mineral Development Company (the PAMDC), was established. All mineral rights held by ZiZa were to be transferred to it, but this never in fact took place. In 2005, ZiZa resolved to submit appropriate applications to secure prospecting licences and conversion of its old order mineral rights to new order mineral rights in compliance with a deadline set by the Act. During April 2005 ZiZa filed a number of applications in respect of different agglomerations of land making up its total of 1,7 million hectares of unused old order rights. An application for a prospecting right relating to 500 000 hectares of land was filed on 19 April 2005 in Kimberley.

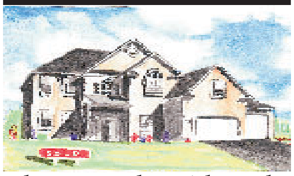
ZiZa's application for a prospecting right was affected by certain irregularities. One of these defects was that in relation to the land or area over which the right was sought, there were no 'coordinated maps'. In addition, the ZiZa application did not show the required financial resources or technical ability on the part of ZiZa. Despite the irrgularities, the Regional Manager purported to accept ZiZa's application for a prospecting right on 17 August 2005.

On 9 November 2010 ZiZa was dissolved and deregistered.

In 2013, Aquila received notice of a grant letter of February 2008 in favour of ZiZa and an executed prospecting right in favour of PAMDC. On the strength of these documents, it brought an internal appeal against the decisions evidenced in the documents it had received.

Its appeal was brought by a notice of appeal and was directed against the grant of the prospecting right to ZiZa. The remainder of the notice set out further grounds of appeal, factual allegations and argument. Aquila alleged that the ZiZa prospecting-right acceptance decision was irregular.

The Minister of Mineral Resources rejected the Aquila appeal, granted a cross-appeal brought by PAMDC, and refused Aquila's mining right application. The Minister gave reasons for the three decisions embodied within



his ruling. These were that the prospecting right application of ZiZa Ltd was lodged and accepted during a period which afforded it exclusivity in terms of the transitional provisions of the Act. The granting of a prospecting right in its favour was therefore lawful. As a consequence, the prospecting right application of Aquila Steel was unlawfully accepted, processed and granted. Accordingly, the Minister was also not in a position to grant the mining right application in favour of Aquila Steel, because of the existence of a prospecting right in favour of ZiZa.

Aquila applied for an order reviewing and setting aside this decision.

THE DECISION

Section 16(2) of the MPRDA as it read at the time provided that the Regional Manager must accept an application for a prospecting right if (a) the requirements contemplated in subsection (1) are met, and (b) no other person holds a prospecting right, mining right, mining permit or retention permit for the same mineral and land.

The return of an application by a Regional Manager under section 16 is equivalent to the rejection of such an application. It is open to such an unsuccessful applicant to amend or amplify its application and resubmit it. But then the application would be treated as a new application and given a place in the queue of applications as such, rather than as a pending application enjoying first place in the queue.

Because ZiZa was the holder of an unused old order right, it enjoyed certain preferent rights. The issue in question related to both the content and the duration of this preferent right.

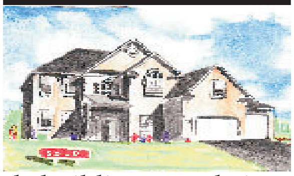
Item 8 of schedule II of the Act provides for preferential treatment for holders of old order rights, of which an unused old order right is one, provided they exercise certain rights conferred upon them by the measure within a specified period. This period expired on 30 April 2005. The objects of the Act would be far better achieved if item 8 were interpreted to mean that the exclusivity ran only until 30 April 2005. Thereafter other aspirant right-holders might join the queue. The continued validity of the unused old order right relates to its place in the queuing system which originates from the provisions of the Act. The common-law mineral right enjoyed by ZiZa entitled it to search for, mine and dispose of minerals on its land for its own account. The common-law right did not regulate how the right was to be exercised outside the statutory regime in place regulating that topic. The regime under which that common-law right might be exercised passed from that under the Minerals Act, 1991, to that provided for under the MPRDA. The exclusivity was conferred for no more than to enable the old order right-holder to apply for a prospecting or mining right in terms of the new Act.

An old order right-holder which exercised the exclusive right to apply in terms of the Act was then obliged to comply with and be subject to the Act in relation to prospecting or mining rights. If this were not so, absurd results would follow: an unused old order right-holder could submit a manifestly inadequate application; upon its return to the right-holder under section 16(3), the old order right-holder might take no action at all, ever; then, the old order right would remain valid forever because the application had been lodged but neither granted nor refused.

The contrary interpretation would preserve the exclusivity until 30 April 2006 and then permit the objects of the Act o be achieved. The interpretation restricting the exclusivity afforded to ZiZa as the holder of an unused old order right to queue for rights under the Act expired on 30 April 2005. From that date, ZiZa had to be treated like any other applicant and other applicants might lawfully join the queue for rights under the Act.

The effect of this conclusion was that if the ZiZa prospecting-right acceptance decision and the ZiZa mining right acceptance decision were set aside, then the position would be as if the ZiZa application for a prospecting-right had never been made. No substantive grounds were advanced in defence of these decisions. It followed that the relief sought in relation to these decisions had to be granted. It similarly followed that the decision to register a prospecting right in favour of PAMDC had to be set aside.

DA CRUZ v CAPE TOWN CITY



A JUDGMENT BY BINNS-WARD J
WESTERN CAPE DIVISION, CAPE TOWN
13 JANUARY 2017

2017 (4) SA 107 (WCC)

In approving building plans, a local authority must consider whether the effect of any conventional structure erected within the applicable land-use restrictions would have been taken into account by anyone purchasing a unit in adjoining property.

THE FACTS

The second respondent acquired a property in Cape Town on which was built the Oracle building. It was then in a derelict condition at that time and stood only four storeys high. The Four Seasons building was erected adjacent to it between 2005 and 2007. The first seven storeys of the Four Seasons building, comprising a parking garage, were built right up to the common boundary line between the two properties so as to directly abut the Oracle building. The residential accommodation in the Four Seasons building comprised apartments on the eighth and higher storeys. The levels on which the apartments were situated were set back about three metres from the common boundary with the Oracle building property. The roof space above the top floor of a parking garage between the common boundary and the set-back façade of the eighth to seventeenth storeys was designed to provide small balconies for the apartments on the eighth floor. Da Cruz owned one such apartment.

The City of Cape Town approved building plans provide for the renovation and extension of the Oracle building to comprise a structure consisting of eight floors above the ground floor, with a roof terrace over part of the new top floor. The newly created sixth floor of the Oracle building would be at a level approximately equal to that of the eighth floor of the Four Seasons building.

Affected owners of units in the Four Seasons building, who had not been given notice of the building plan application, noticed the ensuing building activity only when it became apparent, during 2012, that the levels being added to the Oracle building were being built flush with the common boundary, right up against the balconies of the apartments on the Table Bay-facing side of the building on the eighth storey, and approximately three metres from the windows of the apartments on the ninth and tenth storeys on that side of the Four Seasons building.

Both properties were zoned General Commercial subzones C4 and C5. This permitted 100% building coverage of the property. Accordingly, 0-metre building setbacks were permissible on all of their boundaries. The area in issue was categorised as an urban conservation area in terms of the existing zoning scheme. The council's consent in terms of was consequently required for the proposed extension of the Oracle building. The application for the required consent related to heritage or aesthetic aspects and had no bearing on development rights.

The approval of the building plans followed a recommendation given by the building control officer. These were:

1. It was fully acceptable to develop the property to its full potential as long as the set development parameters were adhered to. By 'set development parameters', the building control officer meant the applicable land-use development restrictions in terms of the zoning scheme.
2. Most new buildings did have an impact on their surroundings. However, an application would be disqualified under the Building Standards Act (no 103 of 1977) only if the building to which it related would disfigure the area. The right to build on the common boundary existed all along. While some might regard the proposed building work as intrusive, unattractive and unreasonable,

development progress made such changes inevitable when such changes were within the permitted parameters.

3. It was not correct that it was expected that the Oracle building would be stepped back once it reached the residential part of the Four Seasons Building. This expectation was not established in law and upholding such an expectation would undermine the development rights of the property. The design of the building was compliant with architectural trends. The building was designed by a competent professional person in a contemporary way and the proposal was sensible. The construction methods and materials proposed for the building were conventional and in keeping with the acceptable norms in the industry. The proposed building would be an improvement on the subject property in the circumstances. The proposed building would not probably or in fact be unsightly or objectionable.

4. An informed buyer and an informed seller of a surrounding property would have been aware of the long-standing right of the subject property to develop a higher building on the common boundary. The proposal was close to common practice in the city centre. This kind of development was consistent with a trend towards densification, which was generally promoted by the City. A developer could reasonably be expected to erect a building of the maximum size permitted by the Scheme Regulations on the property.

Da Cruz applied for judicial review and setting-aside of the decision by the City of Cape Town to approve the building plans.

THE DECISION

At the heart of the case was Da Cruz's contention that the further development of the Oracle building site to provide higher levels built flush up against the balconies on the eighth floor of the Four Seasons building was something so exceptionally intrusive and objectionable that it would not reasonably have been foreseen by any notional purchaser of an affected unit in the Four Seasons building. This contention was grounded on the assertion that the reasonable expectations of purchasers of units in the Four Seasons building prior to the redevelopment of the Oracle building, was that a reasonable notional purchaser and seller of a unit in the Four Seasons building would never expect that the City, having approved the balconies, would then approve a neighbouring building which had the effect of rendering those balconies entirely useless.

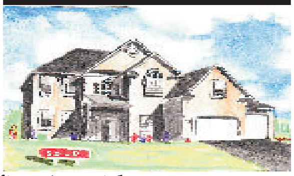
Section 7(1) of the Building Act provides that if a local authority, having considered a recommendation, is satisfied that a building application complies with the requirements of the Act and any other applicable law, it shall grant its approval in respect thereof.

Da Cruz claimed that the City failed to take relevant considerations when approving the application put for the Four Seasons construction. It was therefore necessary to understand the basis of a conceptual understanding of what a local authority must consider when approving building plans. Both the recognised objects of town-planning and zoning schemes must applied integrally in the consideration of building plan applications. The object of harmonious and co-ordinated building development is common to the planning and the building legislation. This means that when a local authority considers a building plan application, it must have regard not only to the compliance of the proposed building with the technical restrictions and regulatory prescriptions in respect of building development on the building plan applicant's property, but also to the contextual effect of the contemplated finished product. The obligation to consider the contextual effect of the proposed building implies that the local authority must take account of how the proposed structure would fit in with the existing development of neighbouring properties, and what might reasonably be anticipated to be the possible future use of such properties.

The effect is that in discharging the function of building plan approval a local authority must act like a moderator in respect of the potentially conflicting rights and obligations of neighbouring property owners. It is inevitable that in fulfilling that function the local authority will on an incremental basis play a material role in determining the character of a neighbourhood.

The notion that a property owner may develop its property to the maximum extent permitted by a zoning scheme regardless of the nature of the adverse effect on the utility of its neighbour's property is not only inconsistent with the provisions of s 7(1), it also runs counter to the precepts of the common law.

The moderating principle in the regulation of neighbour relations in the common law is reasonableness. If it were foreseeable, regard being had to



the object of achieving harmonious and co-ordinated development, that the design of the Four Seasons building would unreasonably compromise the ability of the owner of the neighbouring properties to develop their properties to full potential — thereby no doubt derogating from the value of such properties — the City should have refused to approve the plans for its construction, irrespective of their being zoning scheme and building regulation compliant. Furthermore, the remedy for the consequences of having possibly wrongly approved the plans for building A, does not lie in the local authority ignoring the characteristics of building A after it has been erected, especially those that contribute to its utility and market value, when subsequently considering plans for the erection of building B on the plot next door. On the contrary, it must accept that the parties to the so-called hypothetical sale of units in building A would reasonably take into account for the purpose of determining the market value of such units the character and utility of what the local authority has permitted to be built when they apply their minds to what it might reasonably allow to be put up on the adjoining property.

The recommendations given by the building control officer:

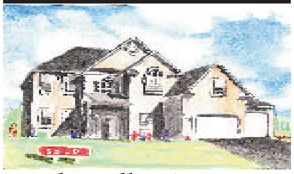
1. This showed a lack of appreciation that an enquiry into the existence of any disqualifying factors arises as a second-stage enquiry, and only in the event of the proposed building being found in the first-stage enquiry to actually be compliant with the 'set development parameters'. Being satisfied that the proposed building falls within the 'set development parameters' did not give an answer to the second part of the enquiry, particularly in the unusual context presented by the case in point. The remark called into question whether the building control officer properly appreciated the content of the statutory enquiry enjoined by the provisions of section 7(1)(b)(ii) of the Building Act.

2. This underscored the impression that the building control officer's approach proceeded from an understanding that any building erected 'within the permitted parameters' was one that neighbours were obliged to tolerate. His understanding was at odds with the provisions of section 7(1)(b)(ii) as construed by the Constitutional Court.

3. This indicated that the building control officer considered that the development limitations in terms of the zoning scheme afforded rights in favour of the second respondent, the full availment whereof could not be prejudiced by considerations bearing on the effect thereof on already established adjacent development. The indication is that no consideration was given to aspects of unsightliness or objectionableness from the perspective of the extant neighbouring building (as distinct from the impression of street-level users in the general area). It is evident that this was because of the building control officer's apparent opinion that the zoning provisions regulating development of the second respondent's property that permitted development up to the boundary line conferred a virtually absolute right. Zoning actually manifests a scheme of land-use restrictions, not land-use rights.

4. There was a conflation of the first and second stages of the statutory enquiry in the building control officer's evident conception of how he had to go about applying section 7(1) of the Building Act. His reference to the City's policy of densification was furthermore indicative of his introduction of a quite irrelevant consideration into the second-stage enquiry. Density of permitted development is something regulated by the zoning scheme regulations. His reference to it being common practice for buildings in the city centre to be built up hard against each other fails to acknowledge that the buildings concerned were designed to allow for that, with blank walls provided on existing buildings to anticipate such development on the boundary. The building control officer failed to engage at all with the consequences of the City's earlier decision to approve what was described as the 'unusual' nature of development of the Four Seasons building.

5. Nowhere in the recommendation did the building control officer deal with the particular impact of the proposed building additions on the Four Seasons building. He did not acknowledge that the City approved the development of the Four Seasons site in a manner that would render the balconies provided for in the approved building plans essentially useless if the adjoining erf were subsequently further developed to the maximum extent permitted in terms of the zoning scheme. He also did not deal with the impression that the City's approval of balconies along the common boundary would have given to objective notional sellers and buyers of the affected units in the Four Seasons building as to the nature of what the City would reasonably be likely to permit on the adjacent property.



He concentrated on what he conceived to be the rights attached to the subject property and failed to deal at all with the objectionable features of the building from the perspective of owners of the Four Seasons building.

It had not been established that the additions to the existing building would derogate from the value of surrounding or adjoining properties.

Neither the building control officer nor the City's Head of Building Development Management considered what sort of development on the adjacent property might qualify as unduly intrusive or unacceptably overbearing, and therefore objectionable, notwithstanding its compliance with the zoning scheme. They should have given an explanation of why the construction of a multi-storey, solid wall closing off existing balconies would not have those effects. Their failure to deal with these questions suggested that they either did not take those facts into account or did not properly direct themselves on them in forming their judgment.

The decision in issue was made because of the functionaries' misdirected opinion that any conventional structure erected within the applicable land-use restrictions had to be factored in by anyone purchasing a unit in the adjoining Four Seasons property irrespective of its effect on an extant building on the adjoining erf. That was a mistaken view based on a misapprehension of the law. They failed to consider and address the question whether a reasonable and informed purchaser of a unit on the eighth floor of the Four Seasons building would foresee that the regulating authority, having approved balconies along the common boundary, would permit the development of the adjoining erf in such a manner as to effectively destroy the utility of the balconies as such, and with the degree of overbearing intrusiveness that allowing a three-storey solid wall to be built up hard against them would unavoidably occasion.

Da Cruz had established that the approval of the building plan application occurred in circumstances in which the decision-maker was materially influenced by an error of law (ie a misapprehension of the import and requirements of section 7(1) of the Building Act) and in which there was a resultant failure by the decision-maker to take into account a relevant consideration (ie whether, in the peculiar factual circumstances, the construction of the building hard up against the balconies on the eighth floor of the Four Seasons building and close to the windows on the ninth and tenth floors in the manner required by the provision gave rise to any of the disqualifying factors).

The approval of the plans was therefore reviewed and set aside, and the application remitted for appropriate reconsideration by the City.

BARRY *v* CLEARWATER ESTATES NPC

A JUDGMENT BY SWAIN JA
(LEACH JA, WILLIS JA, MBHA JA and SCHIPPERS AJA concurring)
SUPREME COURT OF APPEAL
16 MARCH 2017

2017 (3) SA 364 (SCA)

Corporations

A provision of a company's Memorandum of Incorporation providing that if a proxy is not deposited timeously, it should be treated as invalid is contrary to section 58(1) of the Companies Act (no 71 of 2008) and is accordingly itself invalid.

THE FACTS

Clearwater Estates NPC convened a special general meeting for the purpose of considering and adopting various resolutions including one that approved an increase in the levy payments by residents of the property in respect of which the company was the homeowners' association.

In order to attain a quorum, the board proposed a vote condoning the late filing of proxies. This was accepted by a majority decision at the meeting. The resolutions were then put to the vote and passed.

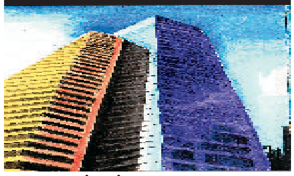
Barry, a resident and director of the company, contended that the meeting was not properly constituted as no special resolutions could be passed in the absence of a quorum. The board's proposal to condone the late filing of the proxies and the adoption of this proposal at the meeting, amounted to an amendment of the company's Memorandum of Incorporation (MOI) which could be effected only by way of a special resolution as contemplated in section 65(11) of the Companies Act (no 71 of 2008).

The company responded by contending that articles 13.7.10 and 13.7.11 of the MOI were contrary to the provisions of section 58(1) of the Act. Article 13.7.10 provided that a proxy was to be deposited not less than 48 hours before the time appointed for holding a meeting at which the person named in such instrument proposed to vote. Article 13.7.11 provided that if the proxy was not deposited timeously, it should not be treated as valid. Because section 58(1) of the Act provides that a shareholder may appoint a proxy 'at any time', the company contended that these articles were null and void, and the requirement in the articles that any proxy be delivered not less than 48 hours before the meeting, was null and void.

THE DECISION

The provisions of section 58(1) cannot be altered. The right of a shareholder to appoint a proxy 'at any time' is a provision that does not expressly contemplate its alteration in any way by a company's MOI. Consequently, if the articles in question contravene or are inconsistent with the provisions of section 58(1), they are void in terms of section 15(1) of the Act.

Barry sought to draw a distinction between the appointment of a proxy and the exercise of a proxy. However, this was an artificial distinction. On his interpretation, the appointment of a proxy by a shareholder to act for and on behalf of the shareholder at a particular meeting, less than 48 hours before the meeting is to take place, does not affect the validity of the appointment but simply means that the proxy cannot be exercised at that meeting. However, the appointment contemplated by section 58(1) is not made in vacuo. Although it may take place at 'any time', it has a defined purpose in terms of the Act. That purpose in terms of section 58(1)(a), is to 'participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder'. The appointment of a proxy in respect of a particular meeting seeks to achieve this statutorily defined purpose. If that purpose is thwarted by a time bar imposed in terms of section 58(3)(c) for the delivery of the instrument appointing the proxy, then the validity of the appointment of the proxy itself is impugned. The appointment of a proxy who is unable to perform any of these



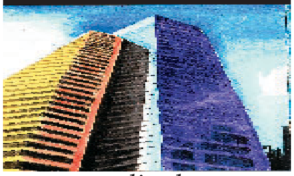
statutorily defined functions at a particular meeting has no purpose and is no appointment at all.

In contrast to section 58(1), the provisions of section 58(3)(c) are alterable, because the section expressly contemplates that its effects may be altered. It provides that except to the extent that the MOI of a company provides otherwise, a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting.

The provisions of articles 13.7.10 and 13.7.11 of the MOI were contrary to the provisions of section 58(1) and were therefore void.

In my view, the distinction which the appellant seeks to draw between the appointment of a proxy and the exercise of a proxy in terms of ss 58(1) and 58(3)(c) of the Act, is artificial. On the appellant's interpretation the appointment of a proxy by a shareholder to act for and on behalf of the shareholder at a particular meeting, less than 48 hours before the meeting is to take place, does not affect the validity of the appointment but simply means that the proxy cannot be exercised at that meeting. However, the appointment contemplated by s 58(1) is not made in vacuo. Although it may take place at 'any time', it has a defined purpose in terms of the Act. That purpose in terms of s 58(1)(a), is to 'participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder'. The appointment of a proxy in respect of a particular meeting seeks to achieve this statutorily defined purpose. If that purpose is thwarted by a time bar imposed in terms of s 58(3)(c) for the delivery of the instrument appointing the proxy, then the validity of the appointment of the proxy itself is impugned. The appointment of a proxy who is unable to perform any of these statutorily defined functions at a particular meeting has no purpose and is no appointment at all.

BOOYSEN *v* JONKHEER BOEREWYNMAKERY (PTY) LTD



A JUDGMENT BY SHER AJ
WESTERN CAPE DIVISION, CAPE TOWN
15 DECEMBER 2016

2017 (4) SA 51 (WCC)

It is not necessary to bring an initial separate application to commence or proceed with legal proceedings during business rescue proceedings. Such an application may be brought together with the bringing of such legal proceedings. A claim for remuneration is a claim referred toin section 144(2) of the Companies Act (no 71 of 2008) and as such is a preferent claim. A business rescue practitioner may not amend a business rescue plan after it has been approved at a meeting of creditors.

THE FACTS

During 2013 Jonkheer Boerewynmakery (Pty) Ltd, being in financial difficulties, its directors resolved to place it under business rescue, and to appoint the second respondent as the business rescue practitioner. The resolution was filed with the Companies and Intellectual Property Commission and on 29 August 2013, the second respondent was duly authorised by the Commission to serve as business rescue practitioner.

Booysen, the manager of the De Aar branch of the company's business at the time, lodged a claim in the amount of R698 830,12 for outstanding remuneration allegedly owing to him in respect of 'commission' on gross profit for preceding financial years.

On 8 November 2013 the second respondent published a draft business rescue plan he had prepared, for consideration by the creditors and employees. According to his rescue plan the bulk of the claims of the secured creditors was to be settled by way of a first distribution, at which time the claims of all the preferent creditors (including the applicant's claim) were also to be settled, in full.

The plan was duly put forward and adopted at a second meeting of creditors which was held on 22 November 2013. Some three years later Booysen had still not been paid the major portion of his claim. On 7 April 2016 the business rescue practitioner contested the claim. He stated that Jonkheer Boerewynmakery (Pty) Ltd's directors had informed him that the formula which had been used to calculate the value of the claim had been applied incorrectly as it did not take into consideration bank interest. The auditors were accordingly engaged in a process of re-calculating the value of the claim. It was also alleged that independent legal advice had been obtained to the effect that the applicant's claim was in fact not preferent, but concurrent, and would be treated accordingly.

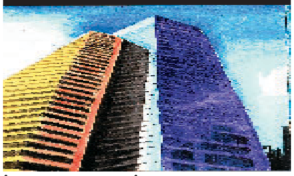
On 1 May 2016 an amount of R33 859,61 was paid to Booysen. Booysen demanded payment of the balance of R664 970,51. He then brought an application claiming payment.

THE DECISION

1.An initial separate application?

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

Booysen's claim was an 'enforcement action' within the meaning of this provision. As such, on the face of it, his application required either the written consent of the practitioner or the leave of the court before it could be 'commenced' or 'proceeded' with. The company contended that, inasmuch as Booysen's claim was one which arose prior to the commencement of business rescue proceedings, in the absence of any written consent from the practitioner he was required to make an initial, separate application for leave to institute the proceedings before commencing therewith, and he was not at liberty to seek the court's leave afterwards, in one and the same application. Booysen contended that, inasmuch as his claim arose out



of its acceptance and adoption by the meeting of creditors as part of the rescue plan, it was not a claim which arose prior to the commencement of rescue proceedings. On a proper interpretation of section 133, it should be held that only pre-existing claims, ie pre-business rescue proceedings claims, were to be subject to the requirement of consent or the leave of the court. The section did not apply to claims arising out of a rescue plan which has been adopted after rescue proceedings had commenced, and in respect of which the applicant simply seeks an order directing the respondents to give effect thereto.

It would be wrong to hold that, in each and every matter in which leave of the court is required, such leave had to be sought and obtained by way of a formal application. Such leave need not always be sought by way of a separate, prior application. It will in each case be a matter for the court's discretion, which, to be exercised judicially on the basis of considerations of convenience and fairness, and of justice.

Section 133 does not provide for a stay on the commencement or continuation of any legal proceedings against a company under business rescue, but a stay on the commencement or proceeding with such litigation. Had the section referred to the 'commencement or continuation' of proceedings, it would have been very clear that it was not open to an applicant to seek leave to sue after such proceedings had already been commenced, ie after such proceedings had already been launched. The requisite leave in respect of matters arising after the advent of business rescue proceedings could thus only be obtained by way of an application for leave which was brought separately and prior to the commencement of the substantive proceedings themselves. The use of the words 'proceeded with' in section 133(1) allows for leave to be obtained from a court in respect of proceedings which have a cause of action arising both before as well as after business rescue proceedings have commenced. It also allows for the necessary leave of the court to be obtained, in appropriate instances, subsequent to the principal application or action already having been launched, or even as part thereof, in the form of an in limine order, ie by way of interim relief.

Applying a purposive and contextual interpretation to the language used in the provisions in question, there is nothing in s 133(1) which excludes the leave of the court being sought and obtained, in appropriate circumstances, either together with or subsequent to the launch of the principal proceedings or action in question. Where legal proceedings concern the implementation of such plan, the leave of the court should be obtained by way of a substantive application, but, in order to avoid unnecessary expense and formalism, such application can properly be made as a part of the principal matter.

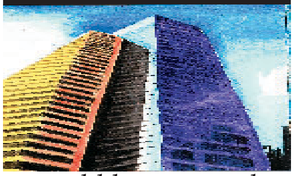
2. Preferent or concurrent claim?

The money claimed by Booysen was money pertaining to his remuneration or 'relating to his employment', in terms of section 144(2). As such Booysen became a preferent creditor. His claim was not a concurrent one.

3. Amendment of a business rescue plan?

There is no room for a business rescue practitioner to reserve to himself the right to amend a business rescue plan. By doing so, he would effectively circumvent the procedure set out in the Act in terms of which the claims, which are to be discharged as per the rescue plan, derive their binding force. Insofar as the second respondent sought to reserve to himself the right to amend the plan, such a right could only have been a right to amend the proposed — ie draft — plan prior to its adoption by the creditors in meeting, and not thereafter.

DE KLERK v FERREIRA



A JUDGMENT BY MURPHY J
GAUTENG DIVISION, PRETORIA
2 FEBRUARY 2017

2017 (3) SA 502 (GP)

A close corporation may be considered to be a related person as defined in section 163 of the Companies Act (no 61 of 1973).

THE FACTS

De Klerk and Ferreira held equal membership in the second defendant, Plantsaam Bestuurdienste CC (Plantsaam), and equal shares in the third defendant, Benjo Eiendomme (Pty) Ltd. They were the only members of Plantsaam and the only shareholders and directors of Benjo.

Benjo was the owner of a farm situated in the Northern Cape Province. Pecan nut orchards had been established on the farm. The farm was also used for maize and wheat production.

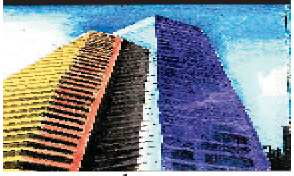
Over a number of years, Ferreira conducted the farming operations while De Klerk was involved in a practise as a medical doctor. The basis of their co-operation was in two agreements. The first agreement was an acknowledgment of debt signed by Ferreira in which he acknowledged liability in favour of De Klerk for a capital amount of R633 000, being the debt owing for the acquisition of half of the interests in Plantsaam and Benjo. The capital amount accrued interest at the prime rate charged by Absa Bank, minus 3 %, with effect from 1 March 2001. The debt had to be repaid by annual payments of 20 %, with the first instalment to be made on 28 February 2004 and thereafter annually on or before the last day of February. Ferreira did not make any payments in terms of this agreement. He disputed his liability to do so. De Klerk thus had not received consideration for the sale of the 50% interest in Plantsaam and Benjo to Ferreira.

The second agreement was a co-operation agreement entered into in order to regulate the affairs and dealings of Plantsaam. Clause 9.1 provided that for as long as Plantsaam had only two members, the affairs of the corporation would be managed on the basis of consensus. In the event that membership increased beyond two members, then a meeting of members would be required to appoint a managing member. The membership of Plantsaam at all times remained De Klerk and Ferreira and hence no managing member has ever been appointed.

The profitability of the farm declined, as a result of which disagreements between the two parties developed. In due course, the relationship between De Klerk and Ferreira broke down and became irreconcilable.

De Klerk sought orders, in terms of section 163 of the Companies Act and sections 49 or section 36 of the Close Corporations Act 2 compelling Ferreira to transfer his membership interest in Plantsaam and his shares in Benjo to him against payment of the amount representing the value of such interests. He claimed to be entitled to subtract from any amount so payable to Ferreira amounts which should have been debited against Ferreira's loan account in Plantsaam. De Klerk pleaded that it would be just and equitable for Ferreira's membership interest and shares in Plantsaam and Benjo to be transferred to him upon the payment of the sum of R429 727. This figure was based on a valuation of Ferreira's membership interest and shares at R4 617 272. From this was deducted R2 987 545 being the amount by which De Klerk alleged Ferreira's loan account was understated, and R1 200 000 being the unpaid amount owed to De Klerk by Ferreira for his acquisition in 2001 of the shares and membership interest in the two companies, including interest.

Ferreira denied De Klerk was entitled to the relief he sought.



However, he conceded that their relationship had broken down and accordingly sought orders for the winding-up of Plantsaam and Benjo as contemplated in section 344(f) of the Companies Act (no 61 of 1973). He also filed a counterclaim conditional upon a finding that the winding-up of Plantsaam and Benjo was not appropriate, requesting an order directing De Klerk to transfer his members' interest in Plantsaam and his shares in Benjo to him, against payment of the fair and reasonable value of the members' interest and shares.

THE DECISION

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

The term 'related person' in section 163, and its application to the relationship between Plantsaam and Benjo, was of importance in the determination of relief in this case. The word 'related' is defined in section 1 to mean 'persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c)'. Section 2(b) provides that an individual is related to a juristic person if the individual directly or indirectly controls the juristic person as determined in accordance with subsection (2).

The question of whether Plantsaam is a person related to Benjo for the purposes of s 163 of the Companies Act. Thus, if it appears to the court that particular acts or omissions by F Ferreira in relation to Plantsaam are unfairly prejudicial, unjust or inequitable or that Plantsaam's affairs have been conducted prejudicially, unjustly or inequitably, the court may make such order as it thinks fit, including an order compelling the sale of his membership interest, provided the court considers it just and equitable to do so.

The actions of Ferreira in relation to Plantsaam were unfairly prejudicial and he conducted the affairs of Plantsaam in a manner unfairly prejudicial to De Klerk. Given the fundamental breach of trust and confidence by Ferreira, it was no longer reasonably practicable for De Klerk to carry on the business of Plantsaam with Ferreira in the sense envisaged in section 36(1)(c) of the Close Corporations Act. It is was therefore appropriate to make an order that Ferreira cease to be a member of Plantsaam in terms of that section, and a further order for the acquisition of his interest.

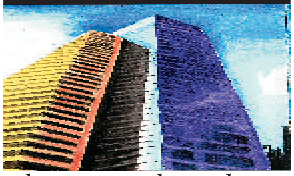
The second question was whether Plantsaam was a 'related person'. That ultimately depended on whether Ferreira had the ability to materially influence the policy of both Plantsaam and Benjo in a manner comparable to a person who could exercise control through a majority vote at a board or general meeting, as envisaged in section 2(2)(d). The provision takes 'control' beyond the ordinary corporate law principles of voting control. The purpose of the provision is to provide, inter alia, for a circumstance where the controlling person does not have majority voting power but has an element of control comparable to a person who would. Whether a person has control will depend on the circumstances. The question is unavoidably a factual one. It can include the situation where the controlling person, a minority or equal shareholder, has de facto control to materially influence the policy of the company, akin to a person who has de jure majority control. Thus, it is possible for a person to control a juristic person despite not having de jure control or the majority of controlling votes in the company. In short, if Ferreira had the ability to materially influence the policy of Benjo and Plantsaam in a manner similar to a controlling shareholder, despite not being a controlling shareholder, it could be concluded that Plantsaam was a person related to Benjo, with the result that the conduct of Plantsaam's business in a manner unfairly prejudicial or unfairly disregarding of De Klerk's interests would permit De Klerk to seek relief against Benjo in terms of section 163(1)(a) or (b) of the Companies Act.

Plantsaam was indeed a 'related I person' as contemplated in section 163(1) of the Companies Act. The consequence was that De Klerk was entitled to relief in terms of section 163(2)(e) in relation to Benjo.

Ferreira's membership in Plantsaam and Benjo was to terminate with immediate effect. He was removed as a director of Benjo, and ordered to transfer his member's interest in Plantsaam and his shares in Benjo to De Klerk.

ENERGYDRIVE SYSTEMS (PTY) LTD v TIN CAN MAN (PTY) LTD

Corporations



A JUDGMENT BY COETZEE AJ
GAUTENG LOCAL DIVISION, JOHANNESBURG
23 JUNE 2016

2017 (3) SA 539 (GJ)

Unless payment is made promptly in terms of section 134(3) of the Companies Act (no 71 of 2008) a party whose assets were subject to its title interest is entitled to delivery of those assets.

THE FACTS

Energydrive Systems (Pty) Ltd leased a power-saving variable-speed drive system to the second respondent. The lease contained a reservation-of-ownership clause in favour of Energydrive. The equipment was valued at approximately R800 000.

The second respondent went into business rescue. The business-rescue practitioner of the second respondent concluded the written sale agreement with Tin Can Man (Pty) Ltd. The selling price was more than R35m. The sale agreement described the goods sold as 'the items set out in annexures A to O hereto, being the subject matter of the sale and all movable items situated in the premises' of the second respondent. The 'movable items situated in the premises' included the equipment leased to the second respondent.

Tin Can Man took possession of all the movable goods on the premises.

Energydrive applied for an order that it be given possession of its equipment. Tin Can Man opposed the application on the grounds that section 134(3) of the Companies Act (no 71 of 2008) applied. That subsection provides that if, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest, and promptly pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person.

At the time of the application, payment of the sale proceeds had not been made to Energydrive.

THE DECISION

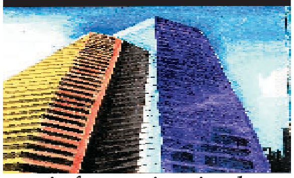
It had to be determined whether the equipment constituted 'security or title interest' in terms of section 134(3).

It could not be considered to be security as this refers to property of the company under business rescue which secures an indebtedness of the company, for an example property subject to a notarial bond. Like security, 'title interest' is something which safeguards the payment of the indebtedness due to the creditor of the company under business rescue; 'title interest' would include a reservation of ownership clause such as the one in the lease between the parties.

However, the obligation to promptly pay or secure the debt and the consideration was a requirement for the valid transfer of ownership by the practitioner by way of a sale and delivery in terms of section 134 without consent of the creditor. The rights of the creditor would only be terminated on payment or the provision of other security. The business-rescue practitioner did not pay or secure the debt due to Energydrive. It followed that the practitioner did not validly destroy Energydrive's right of ownership. It remained owner of the equipment.

The application succeeded.

LOEST v GENDAC (PTY) LTD



JUDGMENT BY MANAMELA AJ
GAUTENG DIVISION, PRETORIA
3 MARCH 2017

2017 (4) SA 187 (GP)

A shareholder cannot compel a company to produce information required for the purpose of exercising his rights in terms of section 164 of the Companies Act (no 71 of 2008) merely upon requesting such information but must show that the information is required for the exercise of the appraisal rights the court may make in terms of s 164.

THE FACTS

Loest was a director of Gendac (Pty) Ltd until his removal by special resolution of shareholders on 26 August 2014. He was also a shareholder in the company.

In his capacity as shareholder, Loest received notices informing him of general meetings of shareholders to be held on 27 August 2015. The notices stated that the company's ordinary share capital would be converted from shares with par value of R1 per share to shares of no par value; that the ordinary share capital would be increased; that the company would be authorised to issue such number of further ordinary shares from their authorised ordinary share capital which would exceed 30 % of the voting power of the then issued ordinary share capital; and that the memoranda of incorporation would be amended to achieve these intentions.

Loest delivered notices objecting to the proposed resolutions. The resolutions were nevertheless adopted by a majority of 71,4 % of the voting rights exercised, with Loest being the only dissenting shareholder.

Loest asserted his rights in terms of section 164 of the Companies Act (no 71 of 2008). He also approached BDO Corporate Finance in September 2015 to assist him in the determination of the value of his shareholding. BDO placed the values at a total of R6m. He had previously been offered an amount of R250 000 on the basis of a valuation by the company's auditor prepared a year earlier. Loest sent requests in terms of Promotion of Access to Information Act (no 2 of 2000) (PAIA) for access to specified financial information, but Genac failed to supply this.

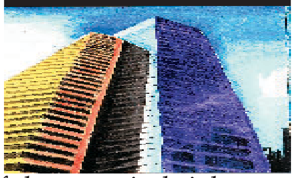
Loest sought an order compelling the company to allow him access to information in the form of copies of bank statements, management-account statements and contracts entered into with third parties.

THE DECISION

Section 164(14) of the Companies Act provides that a shareholder who has made a demand for payment of the fair value of his shares may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has (a) failed to make an offer under subsection (11), or (b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.

The court hearing an application to determine the fair value of the shares may appoint one or more appraisers to assist the court in this regard. In that case, there will be no room for the company or controlling shareholders to refuse disclosure or access by the court or the appointed appraiser to information necessary for determination of the fair value of the shares of the dissenting shareholder.

The question was whether an applicant exercising rights in terms of section 164 could access information in terms of PAIA, and if so, whether Loest had made out a case for access in terms of that Act. The provision has inbuilt mechanisms for dissenting shareholders to protect their rights to receive fair value for their shareholding, when exiting companies whose proposed resolutions they find objectionable. These mechanisms include bringing an application to court for determination of the fair value of shares. There is no impediment within that section



for exercising rights of access to information contemplated by PAIA.

In the present case, Loest did not require access to the requisite information simply because of the existence of the right and the information,. The question was whether the information was reasonably required for the exercise of the right. Loest had not established that the information was reasonably required for the exercise of his rights of appraisal. To determine whether the information is required for the exercise of the appraisal rights the court had to be put in a position to determine whether or not access was required for the exercise of the right in terms of s 164. Access was not to be granted simply for the asking.

A superficial reading of the provisions of s 164 does not justify a conclusion that the dissenting shareholder is precluded from exercising or accessing other legal remedies outside of this statutory provision.
However, I have indicated above that this provision appears to have inbuilt mechanisms for dissenting shareholders to protect their rights to receive fair value for their shareholding, when exiting companies whose proposed resolutions they find objectionable. 37 These mechanisms include launching an application to court for determination of the fair value of shares. I have already indicated above as to how the adjudicating court would be able to access the requested information for purposes of determination of fair value. I do not intend revisiting the issues here. But to avoid doubt, in my mind there is no impediment within s 164 for exercising rights of access to information contemplated by PAIA.

BODY CORPORATE OF EMPIRE GARDENS *v* SITHOLE

A JUDGMENT BY TSHIQI JA
(WALLIS JA, PETSE JA, MBHA JA and NICHOLLS AJA concurring)
SUPREME COURT OF APPEAL
27 MARCH 2017

2017 (4) SA 161 (SCA)

Insolvency

In applying for the sequestration of a sectional unit owner on the grounds that the owner has defaulted in the payment of levies, a body corporate is obliged to show that sequestration would be to the advantage of creditors in the sense that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole.

THE FACTS

Sithole was a joint owner of unit 12 of the sectional title scheme of the Empire Gardens Body Corporate. She and the other owner defaulted in the payment of their levies, and two default judgments in the amounts of R13 385,70 and R99 298,80 were granted against them. In order to satisfy the judgments, their movable assets were attached and sold at an auction but Body Corporate received nothing from the proceeds.

In a further attempt to satisfy the judgments, the Body Corporate obtained a warrant of execution against their immovable property and the unit was attached and sold at an auction, but the sale had to be abandoned because the second respondent, Nedbank Ltd, which had a mortgage bond registered in its favour in respect of the unit, did not accept the selling price of R170 000.

The Body Corporate then brought an application for Sithole's sequestration. It alleged that Sithole appeared to be factually insolvent in view of the fact that she had not paid for her levies, and because her movable assets had only realised R3237. It also referred to a judgment in the amount of R31 008 in favour of an entity known as Amazing Properties CC, which it alleged had been granted against her but remained unsatisfied. Nedbank objected to the application on the basis that its monthly instalments are paid regularly.

The Body Corporate contended that it was not necessary for bodies corporate to prove actual or prospective pecuniary benefit to the general body of creditors. It contended that a body corporate only needs to establish that it has exhausted all reasonable execution remedies in respect of the movable assets and immovable properties of one of its members. This distinction is necessary because bodies corporate are not merely acting to protect their own financial interests, but have a statutory obligation to protect the interests of all the members who are prejudiced when a single member fails to pay their arrear levies.

THE DECISION

The purpose and effect of the sequestration process are 'to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that the creditors are treated equally'. It cannot fittingly be described as a mechanism to be utilised by a creditor to claim a debt due by the debtor to one single creditor. Once a sequestration order is made, a concursus creditorum comes into being. This means that the rights of the creditors as a group are preferred to the rights of the individual creditor.

The phrase 'advantage to creditors' is not defined in the Insolvency Act, but if the principle of concursus creditorum is taken into account, it means that there should be a reasonable prospect of some pecuniary benefit to the general body of creditors as a whole. A court cannot usurp the functions of the legislature and grant the immunity from the Insolvency Act being sought by the Body Corporate. There was no basis for a distinction to be made between bodies corporate and other creditors.

Another fundamental problem that the Body Corporate faced was the fact that the debt allegedly owed to Amazing Properties CC had not been proved, and Nedbank, both a major and preferential creditor,

objected to the application on the basis that its monthly instalments are paid regularly. There was no basis to conclude that a sequestration order would be to Nedbank's advantage, and hence to the general body of creditors. Simply put, the Body Corporate was seeking to obtain a preference that neither the Sectional Titles Act nor the Insolvency Act conferred upon it.

The application was dismissed.

MINISTER OF JUSTICE v SA RESTRUCTURING AND INSOLVENCY PRACTITIONERS ASSOCIATION

A JUDGMENT BY MATHOPO JA (MPATI P, WALLIS JA, SWAIN JA and VAN DER MERWE JA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2016

2017 (3) SA 95 (SCA)

THE FACTS

In 2001, the Minister of Justice introduced a policy which sought to regulate the appointment of insolvency practitioners, as well as appointments to certain other comparable positions under various statutes.

The policy made provision for a previously disadvantaged person to be appointed as a co-provisional trustee in every estate. The main rationale behind appointing a previously disadvantaged individual was that they could learn from the experienced trustee how properly to administer an estate, in order to gain sufficient experience and exposure in the industry. The Master of the High Court, in accordance with the policy, created a separate panel of names for this category of practitioner.

In terms of clause 6.1 of the policy every Master's list must be divided into various categories based on the race and gender of the practitioner . Each category was to be arranged in alphabetical order according to their surnames. A Master's list had to distinguish between senior practitioners, being insolvency practitioners who had been appointed at least once every year within the last five years and junior practitioners, being insolvency practitioners who have not been appointed as such at least once every year within the last five years but who satisfied the Master that they had sufficient infrastructure and experience to be appointed alone.

The appointment process was provided for in clause 7. It provided that insolvency practitioners were to be appointed consecutively in the ratio 4:3:2:1 which represented the number of insolvency practitioners to be appointed in that sequence in respect of each category referred to in clause 6.1. Having regard to the complexity of the matter and the suitability of the next-in-line insolvency practitioner but subject to any applicable law, the Master could appoint a senior practitioner jointly with the junior or senior practitioner appointed in alphabetical order. If the Master made such a joint appointment, the Master had to record the reason therefor and, on request, provide the other insolvency practitioner therewith.

When appointing within a

category, the Master had to proceed down the alphabetical list until the end was reached and then start again at the top. There was no power to depart from this, but the Master could in some circumstances, provided for in clause 7.3, appoint an additional trustee.

The policy was aimed at the discretionary appointments of insolvency practitioners by the Master. The policy further obliged the chief Master to issue directives to be used by all Masters in order to implement and monitor the application of the policy. The chief Master issued three such directives in 2014.

The SA Restructuring and Insolvency Practitioners Association challenged the policy on the grounds that the policy put in place a rigid regime in which the Master became a rubber stamp, compelled to appoint designated persons by rote from the Master's list. It contended that the policy constituted an unlawful fettering of the Master's discretion. It contended that the policy was inconsistent with the Constitution and invalid.

It applied for an order that the policy be set aside.

THE DECISION

The rigid and unavoidable appointment process prescribed by clause 7.1 is arbitrary. It is also in my view capricious because it has been formulated with no reference to its impact when applied in reality. One illustration of how capricious the system is arises from a consideration of the fact that it has no regard to the relative number of insolvency G practitioners falling into each category.

Nor is there any evidence that the implementation of the policy is even practical at present given the disproportion in numbers between the B four groups. The policy makes no allowance for a practitioner to refuse an appointment or for what the master is to do in that case. In a small largely rural area there may be only a handful of insolvency practitioners falling into category A, yet they are to be appointed in 40% of cases. It is unclear what is to happen if they are too busy to undertake more work. C The master has no discretion to appoint someone from category B without departing from the policy.

the policy fails to meet the test in Van Heerden, and is thus unconstitutional.

The fact that the policy requires the master to appoint the next-in-line H practitioner in each case is itself irrational. It fails to take into account factors such as the nature of the individual estate, and the industry-specific knowledge, expertise or seniority of the practitioner concerned. What this means is that absent consideration of these factors, which are not exhaustive, the master does so mechanically as per the I roster. The policy negates what was described by Bertelsmann J in Ex parte The Master of the High Court South Africa (North Gauteng) 2011 (5) SA 311 (GNP) para 26, as the 'institutional knowledge and expertise' of the master to assess the ability and integrity of the trustees and liquidators, and decide whether they are qualified to be appointed to a specific estate.

WISHART N.O. v BHP BILLITON ENERGY COAL SOUTH AFRICA (PTY) LTD

A JUDGMENT BY LEWIS JA (CACHALIA JA, MATHOPO JA, MOCUMIE JA and MAKGOKA AJA concurring)
SUPREME COURT OF APPEAL
16 NOVEMBER 2016

2017 (4) SA 152 (SCA)

The application of section 44(1) of the Insolvency Act (no 24 of 1936), and in particular, the proviso to it which deals with fixing a period for the proof of claims, and the late proof with the leave of the Master or the court, is excluded by the terms of section 366 of the Companies Act (no 61 of 1973).

THE FACTS

Wishart and the other appellants sought leave to prove a late claim in the winding-up of Euro Coal (Pty) Ltd in such manner and upon such terms and conditions as the Master might determine. They alleged that they had objected to the first liquidation and distribution account lodged by the liquidators with the Master, and asked, in terms of section 44(1) of the Insolvency Act, for special leave to prove their respective claims.

BHP Billiton Energy Coal South Africa (Pty) Ltd, a creditor, and the liquidators, raised an exception to the claim on the grounds that section 44(1) was not applicable in the winding-up of a company, and that section 366 of the 1973 Companies Act governed proof of claims in a winding-up. Section 339 of the 1973 Companies Act provides that the law of insolvency is to be applied mutatis mutandis in the winding-up of a company unable to pay its debts.

The question for decision was whether the application of section 44(1) of the Insolvency Act, and in particular, the proviso to it which deals with fixing a period for the proof of claims, and the late proof with the leave of the Master or the court, is excluded by the terms of section 366 of the 1973 Companies Act. Section 366(1) regulates the proof of claims in a winding-up, and section 366(2) gives the master a discretion to fix a time within which creditors are to prove their claims.

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

Billiton argued that, although section 44(1) did apply to claims in a winding-up, the balance of the proviso to section 44(1), which allows a late claim to be proved with the consent of the master or the court, did not, because section 366 was applicable in that regard.

Billiton also raised an exception to the claim on the grounds that an objection to an liquidation and distribution account is governed by section 407 of the 1973 Companies Act. Section 403 requires that the account be lodged with the master, and section 406 that it lies open for inspection. There was no allegation in the particulars that a decision had been taken by the Master, by which the appellants were aggrieved, the claim was excipiable. Objections to an L & D account must first be made to the Master: only when he or she has made such a decision can a review of it be undertaken by a court. In the absence of an allegation that the Master had made a decision, the particulars disclosed no cause of action.

THE DECISION

There is no inconsistency between section 44(1) of the Insolvency Act and section 366(2) of the 1973 Companies Act. As affirmed in *Mayo NO v De Montlehu* 2016 (1) SA 36 (SCA), the two sections are functionally different, and have different objectives. Section 366(2) of the Companies Act is a special provision intended to enable participation in a distribution under a particular account. It has no application to the late proof of claims in general, which is governed by the proviso to section 44(1) of the Insolvency Act. Its objective is to nullify an attempt by a creditor to delay proving his or her claim until a lodged account shows that a distribution is to occur. The proviso to section 44(1) of the Insolvency Act is to prevent proof of a claim after the expiration of a period of three months as from the conclusion of the second meeting of creditors, except with leave of the court or the master.

Accordingly, the exception to the claim for the leave of the court to prove a claim on the terms and conditions set by the Master was to be upheld.

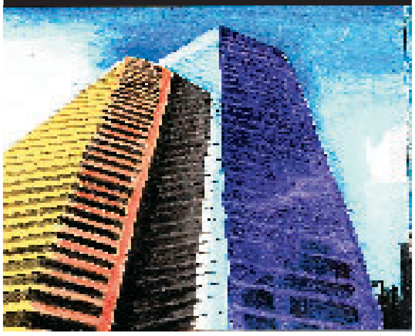
As far as the second exception was concerned, a trustee has first to comply with section 45 before a decision can be reviewed. This does not amount to an ouster of jurisdiction, if ever the court had the power to expunge a claim. The appellants should have invoked the procedures set out in section 407 of the 1973 Companies Act. The power to expunge a claim or to reduce it is conferred on the Master alone.

BP SOUTHERN AFRICA (PTY) LTD v INTERTRANS OIL SA (PTY) LTD

A JUDGMENT BY VAN DER LINDE J
GAUTENG LOCAL DIVISION, JOHANNESBURG
25 NOVEMBER 2016

2017 (4) SA 592 (GJ)

Companies



Although the obligations of a company may be suspended under section 136(2)(a) of the Companies Act (no 71 of 2008) this does not prevent a party which owes reciprocal obligations to that company from suspending its own obligations to that company.

THE FACTS

Intertrans Oil SA (Pty) Ltd and BP Southern Africa (Pty) Ltd concluded a ficw-year branded distribution agreement on 13 February 2014. It tied Intertrans into an exclusive purchase for resale arrangement with BP on 30 days' credit, and permitted Intertrans to use the BP brand. The supply of fuel was at an agreed price, the competitive element residing in the extent of discounts or rebates that BP allowed Intertrans. The agreement provided for the letting of premises at an agreed rental and the lending of storage and dispensing equipment such as tanks, dispensors and pipelines to Intertrans.

A three and a half year lubrication distribution agreement was entered into on 6 March 2014. Turnover was approximately R1 billion per year. Intertrans' creditors were mainly BP which provided a revolving-credit line of upwards of R80m, and banksin the amount of J approximately R1m each. Its only source of income was its debtors, and its margins were limited. According to its management accounts for 31 July 2016, its trade receivables were then R23m but its trade payables R69m.

Intertrans suspended all of its obligations to BP in terms of their contracts. BP disputed its entitlement to do so while at the same time insisting on performance by BP of its reciprocal obligations in terms of that agreement.

Intertrans Oil SA (Pty) Ltd was placed under business rescue by virtue of a resolution passed in terms of section 129 of the Companies Act (no 71 of 2008) by its only two directors and shareholders.

BP brought an application to liquidate Intertrans.

THE DECISION

Since the entitlement to suspend was founded in express terms in section 136(2)(a) of the Act, the real question was whether those provisions were to be read as excluding the power to suspend obligations when at the same time the company insists on performance by the creditor of the latter's reciprocal obligations in terms of the same contract; or whether instead the position was simply that the creditor's reciprocal obligations are automatically and equally suspended as a matter of law; or whether the creditor's reciprocal obligations are not suspended without more but the creditor acquires the right to elect either to rely on the exceptio non adimpleti contractus — and so in effect procures a suspension of its counter-prestation, protected against mora — or instead to cancel the agreement for breach.

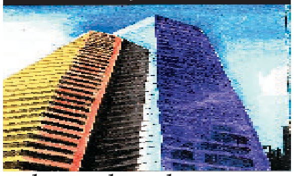
Section 136(2)(a) provides that despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may —

(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that —

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and

(ii) would otherwise become due during those proceedings.

BP's obligation to avail product was obviously reciprocal with Intertrans' obligation to pay for it, and also with Intertrans' obligation to purchase exclusively from BP. It followed that the suspension of all Intertrans' obligations entitled BP to withhold product, access to the premises and access to the equipment. BP could also cancel



the branded distribution agreement, provided the appropriate notices were given. However, BP could not simply ignore the suspension and insist on performance contrary to it.

Whenever Intertrans' book debts arose, now or in the future, they belonged to BP. They could not be 'disposed of' without BP's consent, as provided in section 134(3)(a). This was a consideration that had to be weighed in considering whether the business rescue had prospects of success.

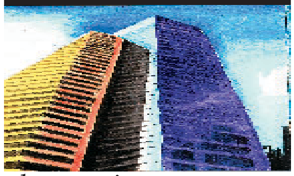
It was accepted that there was no regulatory framework that entitled Intertrans to the rebates which it claimed. This left only the indebtedness of Intertrans to BP in approximately the amount of R80m. There was no credible case that BP owed Intertrans anything in respect of rebates not afforded.

BP had made it clear that it would not surrender its security. That meant that unless the business rescue practitioner could propose recourse to short-term capital of the order of R80m, it would not be able to trade at all. In these circumstances it was difficult to conceive of a business plan that would rescue the business in the face of the extraordinarily large short-term debt, underwritten by the security cession.

An order for the liquidation of Intertrans was granted.

Where a company is distressed, it is not always the solution to deny principal creditors — without whose preparedness, to have extended working capital in the first place, the business would not have existed at all — the entitlement to realise the very security that persuaded them to extend the working capital in the first place. If courts are not prepared to enforce commercial securities, investment, the essential precursor to employment opportunities, will seek other pastures.

FIRSTRAND BANK LTD v KJ FOODS CC



JUDGMENT BY SCHOEMAN AJA (MPATI AP, THERON JA and VAN DER MERWE JA concurring, SERITI JA dissenting)
SUPREME COURT OF APPEAL
26 APRIL 2017

2017 (5) SA 40 (SCA)

It is appropriate for a court to set aside a creditor's vote made at a meeting of creditors of a company under business rescue if it is reasonable and just for the court to do so.

THE FACTS

KJ Foods CC produced and supplied bread to the informal sector of the community, and cash-and-carry wholesalers. It banked with FirstRand Bank Ltd, and had done so for more than 20 years. On 17 July 2013 KJ commenced business rescue proceedings after it had experienced financial distress. A first meeting of creditors took place on 6 August 2013, and on 28 August 2013 a business rescue plan was published. The second meeting of creditors was postponed and, after further claims were proved and claim figures revised, the final revised business rescue plan was published on 21 November 2013.

In terms of this business rescue plan KJ owed a total amount of R40 992 192,42. The secured creditors were Absa Bank Ltd and FirstRand. Firstrand's claim consisted of a secured loan to KJ in an amount of approximately R6m, and motor vehicle finance agreements in a total amount of approximately R5,5m. Absa's claim was for an amount of R141 541,95. The main concurrent creditor was Pioneer Foods. Its claim was in excess of R12m. The total claims of the independent concurrent creditors were R17 152 435,30.

FirstRand held 29% of the creditors' voting interests. It voted against the adoption of the plan. Due to its vote, the business rescue plan could not be approved on a preliminary basis as 75% of creditors' voting interests that had voted had to approve the business rescue plan. The practitioners advised the meeting that application would be made to court in terms of section 152(3)(a) of the Companies Act (no 71 of 2008) to set aside the result of the vote on the grounds that it was inappropriate. Thereafter the meeting was adjourned.

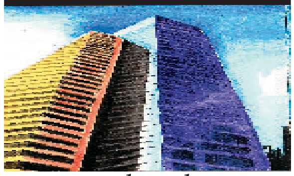
Firstrand contended that the plan would fail to achieve the result postulated due to erroneous arithmetic and assumptions and conditions that will cause one creditor to be preferred over the others. It submitted that forecasts made in the plan were not workable, that the plan was vague and erroneous and that its failure to deal with the disputed claims exacerbated these. It attacked the plan on the grounds that it caused preferences and relegated secured creditors to a subordinate status of concurrent creditors because they were paid last and could not rely on their security as they would have been entitled to in liquidation proceedings.

On 13 December 2013 KJ brought an application for a declaratory order that 'the result of the vote by the holders of voting interests . . . rejecting the revised business rescue plan, be set aside' on the grounds that it was inappropriate, and that the business rescue plan be adopted.

THE DECISION

Section 153(1) of the Act provides that if a business rescue plan has been rejected as contemplated in section 152(3)(a) or (c)(ii)(bb) the practitioner may (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan, or (ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

The dictionary definition of 'inappropriate' was 'not suitable or proper in the circumstances'. Section 153(7) provides that a court may order that the vote on a business rescue plan be set aside



if the court is satisfied that it is reasonable and just to do so. A determination that a vote is inappropriate is therefore a value judgment made after consideration of all the facts and circumstances.

In the present case, the allegations made by Firstrand could not be sustained. It argued that liquidation would not negatively affect the position of the employees. However, the winding-up of a company results in the suspension of all employee contracts without remuneration. Business rescue, on the other hand, protects employees as they continue, subject to certain provisions, to be employed by the company on the same terms and conditions that applied prior to the company being placed under business rescue. It was clear that the allegation that the creditors would be worse off with business rescue was wrong.

It was clear from the implementation of the plan that FirstRand's reservations were unfounded. It was reasonable and just to set aside FirstRand's vote.

In opposing the application FirstRand averred that its vote against the business rescue plan was 'appropriate'. It argued that the employees of the company would not lose their employment as the business would be sold as a going concern. Furthermore, the deponent to the answering affidavit stated that the creditors would not receive a substantially better return as compared to liquidation, but that the 'creditors would be in a far worse position if the plan is approved and implemented'.

The argument that liquidation would not negatively affect the position of the employees is fallacious. The winding-up of a company results in the suspension of all employee contracts without remuneration. Business rescue, on the other hand, protects employees as they continue, subject to certain provisions, to be employed by the company on the same terms and conditions that applied prior to the company being placed under business rescue.

BRODSKY TRADING 224 CC v CRONIMET CHROME MINING SA (PTY) LTD

A JUDGMENT BY SWAIN JA (CACHALIA JA, PETSE JA, MATHOPO JA AND MOCUMIE JA concurring)
SUPREME COURT OF APPEAL
25 NOVEMBER 2016

2017 (4) SA 610 (SCA)

Property

An estate agent cannot claim commission for performance of a mandate when no valid certificate has been issued to it in terms of the Estate Agency Affairs Act (no 112 of 1976).

THE FACTS

On 6 May 2005, a certificate was issued to Brodsky Trading 224 (Pty) Ltd in terms of the Estate Agency Affairs Act (no 112 of 1976). This certificate was valid until the end of that year. On 20 March 2006, the company was converted to Brodsky Trading 224CC. No valid certificate was issued to the company or its directors, or to the close corporation or its members, for any period during 2006.

On 6 May 2007 a certificate was issued to Brodsky Trading 224 (Pty) Ltd, a company which did not exist, but not to Brodsky Trading 224CC. On the same date a certificate was issued to Mr Maree in his former capacity as a director of Brodsky Trading 224 (Pty) Ltd and not in his capacity as a member of the appellant, Brodsky Trading 224CC.

On 15 March 2007, Cronimet Chrome Mining SA (Pty) Ltd gave a mandate to the CC to find a buyer for its mining operations. Pursuant to this mandate the CC commenced marketing the seller's interests to potential purchasers. It found a Mr Niemöller as a potential purchaser, and introduced him to the sellers. Under the ensuing sale agreement, what was acquired were the shares in Cronimet, certain immovable property and a crushing permit owned by an associate company.

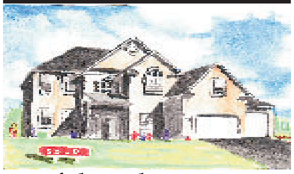
The sale agreement provided that the purchasers were interested in completing the proposed transaction 'in order to jointly establish a new, independent chrome mining and refining beneficiation site'. Clause 2.2 provided that the sale of the shares included 'the right to receive profits for the current and all future financial years of the company (being Platinum Mile Investments 594 (Pty) Ltd) and the right to receive any profits of the company which have not yet been distributed'. Under the heading 'interim period' it was recorded that the sellers and or the company, would ensure during the period between the signing date and the closing date, that 'all necessary steps are taken to protect the assets and business prospects of the company and to preserve and retain the mining permits and the goodwill of the business'.

Maree alleged that as a result, the mandate had been fulfilled and commission was earned when the introduction took place. The CC brought an action for payment of the commission.

THE DECISION

The mandate was allegedly granted to and accepted by the CC on 15 March 2007. The certificate that was issued was however, not issued to the CC, but to the non-existent company. In addition, no valid certificate was issued to Mr Maree in his capacity as a member of the close corporation; it was issued to him in his capacity as a former director of the non-existent company.

Section 16(4) of the Act provides that any certificate issued in contravention of the Act shall be invalid. The issue of the certificate to the non-existent company was accordingly invalid. In addition, the issue of a certificate to Mr Maree in his capacity as a director of the non-existent company, and not in his capacity as a member of the appellant, did not comply with section 16 of the Act and was also invalid. In terms of section 26 of the Act, every director of a company and every member of a close corporation, is required to have a valid certificate. In their absence the company or close corporation concerned is not



entitled to receive any remuneration in terms of section 34A of the Act. This is not simply an issue of nomenclature, or a misdescription in the name of the certificate holder, but one of substance. The objectives of the Act are not fulfilled by the issue of invalid certificates by the Board as they play a central role in ensuring that estate agents comply with its provisions.

On this basis, the CC was precluded from recovering any remuneration.

A secondary issue was whether the sale of the shares constituted the sale of a 'business undertaking' as contemplated in section 1(a)(i) of the Act. If not, the CC would only be precluded from receiving commission in respect of the sale of the immovable property, and not in respect of the sale of the shares and permits.

The clauses of the sale agreement were consistent with the subject of the sale being a 'business undertaking'. The sale of the shares therefore fell within the ambit of a business undertaking as contemplated in section 1(a)(i) of the Act.

On this basis, the CC was not entitled to any remuneration in terms of section 34A of the Act with regard to the performance of the mandate.

It is quite clear on the evidence that Mr Niemöller was not authorised to represent Cronimet at the meeting on 14 May 2007. Ms Novak's evidence was that neither she nor her husband, Mr Pariser, attended the meeting as representatives of Cronimet, but were there to gather information about the chrome-mining operation and to assess what was offered. This is consistent with the function of her company, being to look for chrome-mining opportunities worldwide, on behalf of clients. Her evidence that Cronimet did not know she was at the meeting and no representatives of Cronimet were present, is also consistent with this function of her company. That she would object to Mr Niemöller saying that Cronimet would buy the mine at this initial meeting, is supported by the lengthy negotiations that followed, before the successful sale was concluded. This evidence also refutes the submission made by the appellant, that because Ms Novak and Mr Pariser met with Mr Niemöller and Mr Herman Viljoen before the meeting, it can be inferred that a joint venture between Mr Niemöller's company, Niemcor, and Cronimet was informally agreed in principle. The only evidence led in this regard by the appellant was Mr Maree's, that Mr Niemöller had said that he represented 'die Duitsers'. This evidence also refutes the appellant's alternative submission that Mr Niemöller, Ms Novak and Mr Pariser had informally agreed in principle at this stage to a joint venture between themselves. There is accordingly no basis for a finding that Mr Niemöller represented a joint venture at this meeting, or that it was bound by Mr Niemöller's acceptance of the liability to pay commission.

The conclusion that Mr Niemöller was not authorised to represent Cronimet and that he could not have been at the meeting as a representative of a joint venture, as none had been formed, renders it unnecessary to consider whether any agreement to pay commission by Mr Niemöller was an unenforceable pre-incorporation contract, vis-à-vis the second respondent. In addition, whether any joint venture was able to avoid an obligation to pay commission by adopting a company structure, does not have to be considered. The most probable conclusion on the evidence is that Mr Niemöller was only representing his own company, Niemcor, at the meeting.

JACOBS v COMMUNICARE NPC

Property

A JUDGMENT BY GAMBLE J
(KOSE J concurring)
WESTERN CAPE DIVISION,
CAPE TOWN
14 MARCH 2-17

2017 (4) SA 412 (WCC)

A court may evict a tenant enjoying the protection provided for in Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) in circumstances where it is just and equitable that the tenant should be evicted, despite the lack of a report from a local authority regarding the proposed eviction.

THE FACTS

Jacobs was a tenant in premises let by Communicare NPC. Because he objected to an increase in his rent, he approached the Rental Housing Tribunal for assistance. He received a letter from the Tribunal informing him that a hearing had been set down for 17 June 2016. During July 2015, he received a letter from the Tribunal informing him of a default ruling which had been made in his absence as he had failed to appear on 17 June 2015. He made enquiries and established that the date furnished to him by the Tribunal was erroneous, and should have been 2015.

Jacobs attempted to persuade the Tribunal to reconsider the matter but it remained resolute that its ruling was fixed. Jacobs did not seek review of the new rental determination, and continued paying the rental which had been in place immediately before the Tribunal's ruling. He fell further behind with his rent, and on 8 October 2015 he received a letter demanding arrears in the sum of R3788,95. He was afforded a week to rectify the breach and when he failed to do so, Communicare cancelled the lease later that month. It thereafter approached the magistrates' court for an order evicting him.

The court then heard an application for eviction in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Jacobs gave evidence that he was a 55 year old single male, unemployed and received a State disability grant, had no alternative accommodation and an eviction would render him homeless; he was afflicted by a disability. He offered no medical explanation or report relating to his alleged disability or the prognosis in that regard.

Communicare purported to give notice to the City of Cape Town of the proceedings against Jacobs. There was however, no proof that the application was in fact served on the City, nor was there any indication of any participation in the proceedings by the City.

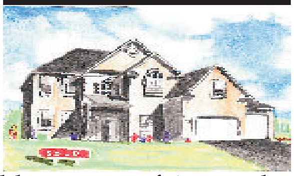
The court granted an order for his eviction. Jacobs appealed.

THE DECISION

Jacobs had to be treated differently to a normal residential tenant renting in the more affluent suburbs of Cape Town. The property was made available to him on the strength of his limited financial means and his resultant need for affordable housing. If a person in his position could not afford to rent from Communicare, he was not going to be able to easily afford to rent elsewhere, other than perhaps in accommodation provided by the City of Cape Town. In such circumstances, a report from the City as to alternative accommodation was imperative before a court could make a determination as to what notice period was just and equitable.

The failure of the magistrate to consider a report by the local authority was a procedural defect which had the effect that the magistrate did not properly discharge his constitutional obligations. However, the responsibility for that failure did not lie at the door of Communicare alone. The magistrate also had a duty to respond proactively and to call for a local authority report in a matter such as this.

Jacobs had no defence on the merits of the claim for eviction and the lease had been validly cancelled. The real issue was whether a fair notice period had



been granted or not. On the facts before the court, and in the absence of a report from the local authority, it was not possible to say with any degree of certainty whether the procedural defect was fatal or not.

However, Jacobs had known for a considerable period of time that his lease has been terminated. And throughout that time he had known of the necessity to seek alternative accommodation. Communicare had had to wait patiently for the litigation to come to a conclusion, all the while being unable to earn a fair rental from its much-needed accommodation. In such circumstances the prejudice to Communicare in sending the matter back to the magistrate to reconsider the period of notice, far outweighed the prejudice to Jacobs who had been enjoying a roof over his head at a significantly reduced rental.

In the light of the conclusion that the matter should not remitted to the magistrates' court, it would be just and equitable to order Jacobs to vacate the premises by the end of April 2017.

Mr Fischer, for the appellant, fairly conceded that his I client had no defence on the merits of the claim for eviction and that the lease had been validly cancelled. The real issue was whether a fair notice period had been granted or not. On the facts before the court at this stage, and in the absence of a report from the local authority, it is not possible to say with any degree of certainty whether the procedural defect was fatal or not.

However, the appellant has known for a considerable period of time that his lease has been terminated. And throughout that time he has known of the necessity to seek alternative accommodation. He has been the beneficiary of more than one indulgence in this court — his appeal was reinstated after it had been struck from the roll for failure to prosecute it timeously and his counsel was permitted to argue the matter notwithstanding the fact that his heads of argument had been filed late.

The first respondent on the other hand has had to wait patiently for the litigation to come to a conclusion, all the while being unable to earn a fair rental from its much-needed accommodation. In my view, in such circumstances the prejudice to the first respondent in sending the matter back to the magistrate to reconsider the period of notice in the light of that which has been stated above, far outweighs the prejudice to the appellant who has been enjoying a roof over his head at a significantly reduced rental for quite some while. Both counsel were agreed that in the event that the matter was not remitted to the magistrates' court, it would be just and equitable to order the appellant to vacate the premises by the end of April 2017. For the sake of clarity such an order will be made.

JIGGER PROPERTIES CC v MAYNARD N.O.

Property

A JUDGMENT BY SEEGOBIN J (JAPPIE JP AND VAN ZYL J concurring)
KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
13 MARCH 2017

2017 (4) SA 569 (KZP)

A right of access held in terms of an agreement with a property owner's predecessor in title does not entitle the holder thereof to a mandament van spolie restoring the threatened removal of that right.

THE FACTS

Jigger Properties CC owned unit 16 in Pineside Park, a sectional scheme, and had exclusive use of an area where there were tanks used for the purpose of storing solvents. Maynard was a trustee of a trust which owned units 14, 15 and 23 in the sectional scheme. The trust had installed the tanks in the exclusive area allocated to unit 16, and had access to the exclusive use area in order to service and maintain the tanks. It held this right initially by arrangement with the developers of the sectional title scheme, and then in terms of agreements concluded with Jigger's predecessors in title.

After some years had passed, Jigger demanded a rental for the trust's right of access to the tanks.

The trust brought an application compelling Jigger to allow it access to the exclusive use area. Jigger counter-applied for an order that no servitude or right of access to the exclusive use area existed in favour of the trust.

THE DECISION

The main issue was whether the trust's access to the exclusive use area amounted to a quasi-possessio which was deserving of protection by means of a mandament van spolie. An ancillary issue was whether a threat of spoliation amounted to an act of spoliation entitling a party to relief by way of a mandament van spolie.

The trust's rights of access to the underground tanks arose initially from a prior agreement which the trust had with the developers of the sectional scheme for the installation of such tanks in the exclusive use area allocated to unit 16, and for the trrust to access this area in order to service and maintain the tanks. The trust's right to access the tanks flowed from a contractual arrangement which the parties had with each other over the years. This was the right which the trust was exercising and which Jigger threatened to stop. The trust's claim amounted to nothing more than a claim for specific performance of its contractual rights. This was not permissible by way of a mandament van spolie.

The trust was therefore not entitled to the relief it sought. Its right of access to was for a limited purpose and occurred as a consequence of a prior agreement with predecessors in title, and it was not an incident of actual possession and occupation.

MOBILE TELEPHONE NETWORKS (PTY) LTD v BEEKMANS N.O.

A JUDGMENT BY VAN DER MERWE JA (LEACH JA, PETSE JA, DAMBUZA JA and MATHOPO JA concurring)
SUPREME COURT OF APPEAL
1 DECEMBER 2016

2017 (4) SA 623 (SCA)

Whether or not a building is a temporary one as envisaged in regulation A23(1) promulgated under section 17(1) of the National Building Regulations and Building Standards Act (no 103 of 1977) must be determined by an objective assessment of whether the building in question is temporary or permanent.

THE FACTS

Mobile Telephone Networks (Pty) Ltd (MTN), applied to the City of Cape Town for approval of the erection of a cellular communications base station and mast on erf 10762, Dalham Road, Constantia. In terms of the application the base station was to be a temporary building.

In a letter dated 3 October 2013, the City informed MTN that the application for approval of the building plans had been evaluated and was refused in terms of section 7 of the National Building Regulations and Building Standards Act (no 103 of 1977) and that MTN had to submit a written application in terms of regulation A23(1) promulgated under section 17(1) of the Act. The period to be applied for as a temporary building was to be for a maximum of five years. This was to bring it in line with the Temporary Land Use Departure that had been granted for the property. This would then replace the earlier application.

Regulation A23(1) provides that on receipt of any application to erect a building which the applicant has declared to be a temporary building, the local authority may grant provisional authorisation to the applicant to proceed with the erection of such building in accordance with any conditions or directions specified in such authorisation.

As a result, MTN submitted the same building plans to the City for approval of the construction of the base station as a temporary structure in terms of the regulations. The City approved the application.

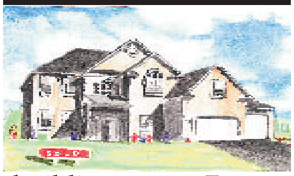
Beekmans and the other trustees of the Stemar Trust, the owner of property which adjoined erf 10762 applied for the review and setting-aside of the decision of the City to approve the erection of the base station.

THE DECISION

The interpretation of the definition of 'temporary building' in the regulations and the provisions of regulation A23 was central to the determination of the matter. In terms of the regulations, a temporary building is defined as 'any building that is so declared by the owner and that is being used or is to be used for a specified purpose for a specified limited period of time, but does not include a builder's shed'.

Ordinarily, a temporary building is a building that is not a permanent one. Whether a building is permanent or temporary is ordinarily determined by its objective nature, characteristics and purpose. The purpose of the base station was to serve the telecommunication needs of the community in the area. The location of the base station was carefully selected to serve this purpose. There was no evidence that these needs of the community would terminate within five years. All indications were to the contrary.

The definition of 'temporary building' and reg A23 also had to be read with regulation A1(7). Regulation A1(7) contains two important considerations. First, it provides that before granting provisional authority in terms of reg A23, the local authority must, inter alia, assess the building in relation to the intended use and life thereof. This clearly requires an objective assessment. Second, it indicates the type of building that should be regarded as temporary, such as an exhibition stall or a building for experimental, demonstration, testing or assessment purposes.



It was necessarily implicit in the regulations that an objective assessment of the nature and purpose of a building must determine whether it is a temporary building or not. For these reasons, the City materially erred in regarding the base station as a temporary building.

It followed that the appeal had to be dismissed.

The definition of 'temporary building' and reg A23 must also be read with reg A1(7). Regulation A1(7) contains two important considerations. First, it provides that before granting provisional authority in terms of reg A23, the local authority must, inter alia, assess the building F in relation to the intended use and life thereof. This clearly requires an objective assessment. Second, it indicates the type of building that should be regarded as temporary, such as an exhibition stall (reg A1(7)(b)) or a building for experimental, demonstration, testing or assessment purposes (reg A1(7)(c)).

In my judgment it is necessarily implicit in the regulations that an objective assessment of the nature and purpose of a building must determine whether it is a temporary building or not. For these reasons, the court a quo correctly concluded that the City materially erred in regarding the base station as a temporary building. It follows that the appeal must be dismissed. As the judgment of the court a quo suggested, MTN may apply to the City for approval of the building plans of the base station in terms of s 4 of the Act. For this reason it is not only unnecessary, but undesirable, to express an opinion on the Trust's second review ground.

KAKNIS v ABSA BANK LTD

A JUDGMENT BY SHONGWE JA (WILLIS JA, MATHOPO JA, VAN DER MERWE JA and NICHOLLS AJA concurring)
SUPREME COURT OF APPEAL
15 DECEMBER 2016

2017 (4) SA 17 (SCA)

Credit Transactions

Section 126B(1)(b) of the National Credit Act (no 34 of 2005) does not have retrospective effect.

THE FACTS

During the period March 2006 to March 2008 Kaknis concluded ten instalment sale agreements with Absa Bank Ltd. At first, Kaknis paid the instalments due, but later experienced financial difficulties. He applied for debt review, and on 12 June 2010, obtained an order from the Magistrate's court in terms of which his obligations to his various credit providers were re-arranged in accordance with the provisions of sections 86(7)(c)(ii) (aa) and (bb) of the National Credit Act (no 34 of 2005). Kaknis complied with the court order, until 8 July 2011 when the last payment was made by the payment distribution agent.

The claims against Kaknis became prescribed on 8 July 2014 in terms of section 11(d) of the Prescription Act (no 68 of 1969), more than three years having lapsed since the last payment was made in reduction of his indebtedness under the sale agreements. On 3 October 2014, Kaknis concluded an acknowledgement of debt in favour of the bank. In terms of this agreement, he acknowledged his indebtness to the bank in an amount over R2.7m, plus interest, and an amount of R702 496, plus interest, in respect of another debt. The appellant failed to pay in terms of the acknowledgement of debt, and he also did not surrender any of the assets as was agreed in the agreements. On 30 April 2015, the bank and the other creditor issued summons against Kaknis claiming confirmation of the cancellation of the sale agreements, return of the assets and leave to prove damages later.

The appellant entered an appearance to defend. The bank and the other creditor brought applications for summary judgment. Kaknis opposed the applications on the grounds that the claims had become prescribed. He also contended that by virtue of the provisions of section 126B(1)(b) of the Act, the plaintiffs were precluded from continuing the collection of the debt by relying on the acknowledgement of debt which they alleged revived the prescribed debt. This section came into force in March 2015. It provides that no person may continue the collection of, or re-activate a debt under a credit agreement to which the Act applies (i) which has been extinguished by prescription under the Prescription Act, and (ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence.

The court gave summary judgment against Kaknis. It held that section 126B of the Act did not apply retrospectively.

THE DECISION

Before the commencement of section 126B(1)(b) an agreement that revived a prescribed debt of this kind was perfectly valid. The legislature must be taken to have been aware that retrospective application of section 126B(1)(b) would nullify agreements that had validly been entered into and would take away existing rights. There is no indication in section 126B(1)(b) of any intention to do so.

Kaknis contended that the retrospective application of s 126B(1)(b) was expressly stipulated for in Schedule 3 of the Act. Schedule 3 deals with 'Transitional Provisions'. Item 4 of Schedule 3 makes specified provisions of the Act applicable to certain credit agreements that had been entered into before the commencement of the provisions.

There is no basis for the contention that unless Schedule 3 was amended, all amendments of the provisions of the Act that applied to pre-existing agreements, would operate retrospectively. On any interpretation of Schedule 3, it has no effect on credit agreements entered into after the commencement of the Act. It would follow that if Schedule 3 was to provide for retrospective operation, it would do so only in respect of pre-existing credit agreements and not in respect of credit agreements entered into after the commencement of the Act. This was an absurd result that could not have been intended.

Summary judgment was correctly given.

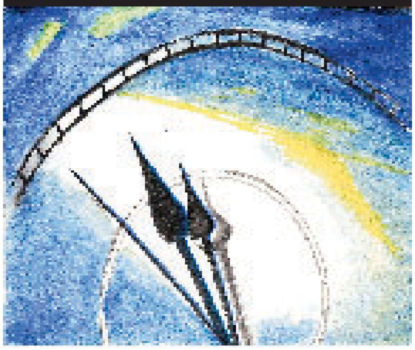
The defence of prescription ought to be raised in response to a demand by the credit provider; it can be raised during the proceedings, as in the present case, when it was raised in opposition to a summary judgment application. If the consumer were aware of the defence of prescription, he should raise it, but if he or she were not aware the consumer must show that he or she would reasonably have raised it. The prescription period must have lapsed and the consumer must not have been responsible for preventing the credit provider from knowing of the debt. And also that the consumer has not acknowledged liability for the debt during the running of the prescription period as contemplated in s 14 of the Prescription Act, thereby interrupting the running of prescription, and that s 13(2) of the Prescription Act is not applicable (dealing with a reciprocal non-prescribed contractual debt). Lastly, that the consumer did not waive the defence of prescription. Section 126B(1)(b)(ii) in essence extends the protection of the defence of prescription to consumers who are not aware of the existence of the defence. If the consumer were made aware, for instance by the credit provider, this protection falls away, as they would have waived the defence.

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

JUDGMENT GIVEN IN THE SUPREME COURT OF APPEAL ON 30 MARCH 2017 BY ZONDI JA (TSHIQI JA, VAN DER MERWE JA, NICHOLLS AJA AND COPPIN AJA concurring)

2017 (4) SA 495 (SCA)

Prescription



A mortgage bond referred to in section 11 of the Prescription Act (no 68 of 1969) is an instrument hypothecating immovable property and other goods.

THE FACTS

The Land And Agricultural Development Bank of South Africa lent R250 000 to Factaprops 1052 CC. The loan was secured by the registration of a special notarial bond over a number of specified movable assets owned by Factaprops, in favour of the Land Bank as continuing covering security.

In terms of the loan agreement, Factaprops was to repay the loan together with interest as determined by the Land Bank, from time to time in five annual instalments. The full balance outstanding would immediately become due and payable, in the event of Factaprops failing to make payment of the amount due and owing on the various payment dates. The final instalment was due for payment on 15 June 2004. In breach of the loan agreement, Factaprops defaulted in its payment.

On 14 October 2010, the Land Bank issued a summons against Factaprops and the second appellant as surety, suing them for payment of the amount of R491 203.05, together with interest. The summons was served on them on 3 November 2010.

Factaprops defended the action on the grounds that payment of the amounts owing to the Land Bank under the loan agreement became due and payable between 15 June 2000 and 25 June 2004. It contended that by the time the summons was served on 3 November 2010, being more than three years from the dates on which the alleged debts became due and payable, the claim against them had become prescribed.

Land Bank delivered a replication in which it denied that its claim had become prescribed. It argued that its claim was for the payment of a debt which was secured by a special notarial bond and that the applicable prescription period is thirty years.

THE DECISION

Section 11 of the Prescription Act (no 68 of 1969) provides that the period of prescription of debts shall be thirty years in respect of any debt secured by a mortgage bond.

A close analysis of the language used in section 11(a)(i) and its history shows conclusively that a wider interpretation of these words must be the correct one. Accepting that in certain contexts, the phrase 'mortgage bond' might be given a narrow meaning that could exclude a notarial bond, there was no reason for adopting such a meaning in the interpretation of section 11(a)(i) of the Prescription Act. The preferable meaning is the one expressed by Van den Heever JA in *Oliff v Minnie* 1953 (1) SA (1) (A) that a mortgage bond is an instrument hypothecating immovable property and other goods.

The bank's claim was upheld.

OFF-BEAT HOLIDAY CLUB v SANBONANI HOLIDAY SPA SHAREBLOCK LTD

Prescription

A JUDGMENT BY MHLANTLA J (NKABINDE ACJ, CAMERON J, JAFTA J, KHAMPEPE J and ZONDO J concurring)
CONSTITUTIONAL COURT
23 MAY 2017

2017 (5) SA 9 (CC)

A claim under section 252 of the Companies Act (no 62 of 1973) does not constitute a debt that can prescribe in terms of the Prescription Act (no 68 of 1969).

THE FACTS

Off-Beat Holiday Club and the other appellant were two timeshare clubs. In 1991 the Clubs became minority shareholders in Sanbonani Holiday Spa Shareblock Ltd. Together, and through agreements with the Club Leisure Group, the Clubs effectively controlled 29,14% of the shareholding in Shareblock.

In 2000 and 2004, disputes arose between the parties as a result of the controlling shareholder of Shareblock having amended the articles of association of the company and having brought about the issue of certain shares in the company.

In October 2008, the Clubs brought an application for a declaration that in terms of section 252 of the Companies Act (no 61 of 1973) that the creation and allocation of the shares was invalid and that an amendment to the articles was liable to be cancelled. A second claim was brought under section 266 of the Companies Act.

Shareblock submitted that the Clubs' claims had prescribed as it constituted a 'debt' for purposes of sections 11 and 12 of the Prescription Act (no 68 of 1969).

In respect of the section 266 claim, the Supreme Court of Appeal held that the debt would arise only when the court granted the relief sought by the shareholder under that section and appointed a curator ad litem to launch the proceedings. It concluded that the section 266 claim had not prescribed as the appointment of the curator had just been made by the High Court. The Supreme Court of Appeal extended the ambit of the authorisation of the curator ad litem and authorised him to also recover damage or loss incurred as a result of the fact that the controlling shareholder had wrongfully allowed or caused Shareblock to unjustifiably pay VAT refunds in the sums of R2 169 897,04 and R120 309,13 to another company.

Regarding the section 252 challenge against Shareblock's articles and allocation of shares, the Supreme Court of Appeal held that the meaning of the term 'debt' had a wide and general meaning, which included an obligation to do or refrain from doing something that entails a right on one side and a corresponding obligation on the other. It rejected the Clubs' attempt to amend their claims to include the rectification of a contract. It concluded that those claims were not susceptible to prescription as they did not alter rights and obligations but merely concerned erroneous reflections of these rights and obligations. The allocation of Shareblock's shares was done pursuant to the articles that the Clubs now sought to amend and substitute with a new contract.

Off-beat appealed. It contended that the controlling shareholder's unlawful conduct which included improperly amending Shareblock's articles of association and then implementing decisions taken under the new articles operated unfairly, prejudicially, unjustly and inequitably. It contended that the section 252 remedy was incapable of prescription, and that the Supreme Court of Appeal erred in giving the term 'debt' a wide and general meaning. In the alternative, the Off-beat contended that their claim constituted a continuing wrong that was also incapable of prescription.

THE DECISION

Section 252 provides that any member of a company who

complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may make an application to the court for an order under the section. The court may make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company.

The issue was not about the merits of the section 252 claim, but whether that claim is a debt for the purposes of the Prescription Act or not.

The correct characterisation of a claim for purposes of the Prescription Act is the characterisation arising from the relevant legal provisions on which the claim is based. Here the claim was based on section 252 of the Companies Act, the plain text of which discussed an entitlement to an equitable judicial determination. Thus, according to section 252, the applicants' claim is for declaratory relief, not an alteration of the terms of a contract or a money award. Shareblock's alternate proposal that attention should be given instead to the ultimate effects or aims of the relief sought was less desirable because it requires that a court perform a complicated causal or psychological inquiry that is certain to yield disparate results for what is essentially the same type of claim across cases. This would undermine the purposes of the Prescription Act which assumes that claims can be readily classified as one kind or another.

Courts should restrict themselves to the text of the legal provision on which the claim is based. In order to identify what the relevant claim is, the court should use the applicants' cause of action as guidance. However, the court is not beholden to the applicants' characterisation of the claim, which might be at variance with the relevant legal provision. The latter governs.

In the light of *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) the Supreme Court of Appeal's reliance on the broader test in finding that the Clubs' section 252 claim was capable of prescribing was therefore misplaced. An application of the narrow test would bring the claim outside of the purview of 'debt', and therefore would be incapable of prescribing under the Prescription Act. The Clubs' claim under section 252 could not constitute a 'debt'.

The Prescription Act was therefore not the proper mechanism to bar the Clubs from exercising their section 252 right. Not only did their claim fall outside of the scope of 'debt' under *Makate*, but section 252(3) already contained an equitable mechanism that answered the practical objections to the Clubs' tardiness.

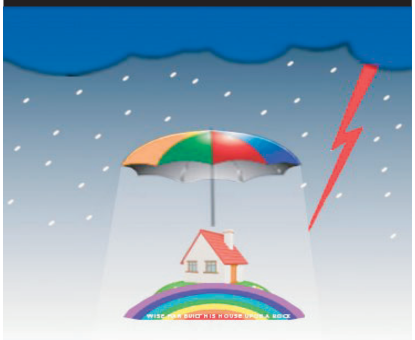
It followed that the wording of section 252 indicated that a claim under this section is not a debt that can prescribe.

HUYSER v QUICKSURE (PTY) LTD

A JUDGMENT BY PRINSLOO J
GAUTENG LOCAL DIVISION, PRETORIA
3 FEBRUARY 2017

2017 (4) SA 546 (GP)

Insurance



A distinction could be made between joinder which does not finally dispose of some elements of the claim but would merely make it possible, from a procedural perspective, for the plaintiff to institute a claim against the defendant who had been joined and a case, where, if the relief sought were to be granted, there would be no question of or need for a further claim to be instituted.

THE FACTS

Huyser and Quicksure (Pty) Ltd entered into a written agreement of insurance in terms of which Quicksure undertook to insure Huyser's motor vehicle.

The policy was headed, in much bigger, bold letters, 'Quicksure Personal Insurance Policy'. Underneath this heading, in fine print, it was stated: 'Issued and administered by Quicksure (Pty) Ltd, an authorised Financial Services Provider (FSP number 16902), on behalf of the insurance companies named in the schedule which forms part of this policy. We agree to provide insurance in terms of this policy during any period for which a premium has been paid. The proposal and declaration made by you are the basis of and form part of this policy.'

Under the 'definitions' it was stated that 'we/us the insurer' means the insurance company named in the schedule. In very fine print underneath the heading of the policy were the words 'onderskryf deur New National Assurance Co Ltd'.

On 1 October 2010, at a time when the policy was of full force and effect, Huyser's vehicle was damaged as a result of an accident. Then, the value of the motor vehicle was R630 000. Huyser gave written notice of the incident and loss to Quicksure and complied with all other obligations under the policy. Despite this, Quicksure refused to make any payment to Huyser in respect of the loss of the motor vehicle.

In December 2012, Huyser brought an action against Quicksure claiming payment of R630 000 with interest and costs.

Quicksure entered an appearance to defend the action and its plea was served on 20 March 2013. Paragraph 3 of the plea denied that Quicksure undertook to insure the motor vehicle as it acted as insurance administrators on behalf of New National Assurance Co Ltd. Huyser did not know of the identity of New National until the plea was served.

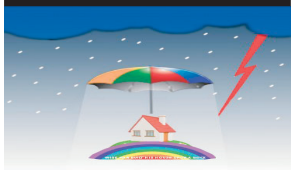
On 17 October 2013 Huyser brought an application to join New National as a defendant to the action. New National opposed the application on the grounds that the claim against it had prescribed.

THE DECISION

New National rejected Huyser's allegation that he did not have knowledge of the identity of his debtor until the plea was served on 20 March 2013. New National alleged that Huyser could have ascertained the identity of the debtor by making enquiries to Quicksure in view of the reference in the Quicksure policy to insurance companies listed in the schedule.

New National contended that prescription started running on 20 March 2013 when the plea was received. Three years later, on 19 March 2016, the claim became prescribed in terms of section 11(d) of the PrescriptionAct. It contended that the fact that the joinder application was served in November 2013 did not assist Huyser, because service of the joinder application did not interrupt the running of prescription as provided for in section 15(1) of the Act. As authority for this proposition, counsel for New National depended on the judgment in *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA).

In *Peter Taylor*, it was held that it would be stretching the interpretation of the Act too far to say that the application for joinder



constituted a 'process whereby the creditor claims payment of the debt' and that its service therefore interrupted prescription. This was because firstly, it could not be said that judgment in the joinder application would finally dispose of some elements of the claim — indeed, it would not dispose of any. Secondly, the causes of action in the joinder application and the claim for damages had nothing in common — it certainly could not be said that the two processes involved the selfsame, or substantially the same, cause of action.

In this case, the judge adopted the reasoning that if judgment were to be obtained, the application itself in no way would have grounded such judgment: it would exist simply as a preliminary process by means of which the plaintiffs had placed themselves in a position by means of the subsequent service of the process constituted by the amended summons and the amended particulars of claim to claim payment of the damages suffered by them.

There was clear distinction between joinder which does not finally dispose of some elements of the claim 'but would merely make it possible, from a procedural perspective, for the plaintiff to institute a claim against the defendant who had been joined' and the present case, where, if the relief sought were to be granted, there would be no question of or need for a further claim to be instituted. To this extent, the present case was distinguishable from *Peter Taylor.*

Another distinguishing aspect between the two cases was the fact that, in the present case, when the prescription plea was raised in February 2014, the three-year period, which started running in March 2013, had not yet expired.

A further distinguishing aspect was that in *Peter Taylor*, the court came to the conclusion that it could not be said that judgment in the joinder application finally disposed of some elements of the claim.

For these reasons, he present case was distinguishable from *Peter Taylor*. It would be appropriate, and in the interests of justice, to grant the joinder application in the present matter.

In Peter Taylor the causes of action against the two proposed defendants were clearly quite different: the cause of action against the insurer was for indemnification in terms of an insurance contract between the insured and the first defendant, and the claim against the broker (Peter Taylor) was for damages on the grounds that the broker failed to properly advise his client. The same, of course, was the case in Naidoo. In the present case the causes of action are identical: in both cases the applicant claims indemnification on the basis of exactly the same contract of insurance. The only question is who the real insurer is. This issue has to be resolved by means of evidence. As an example of a case where the causes of action were different, the learned judge of appeal, at 319D, referred to Neon and Cold Cathode Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) where it was held that the signing of a lease as surety and co-principal debtor in respect of the due payment of rentals flowing from a lease agreement, does not transform the accessory obligation of the surety into a joint principal obligation as co-lessee with the lessee. In the result, I have come to the conclusion, and I find, that, on the second 'leg', the present case is distinguishable from Peter Taylor.

MOHAMED'S LEISURE HOLDINGS (PTY) LTD v SOUTHERN SUN HOTEL INTERESTS (PTY) LTD

JUDGMENT BY VAN OOSTEN J
GAUTENG LOCAL DIVISION, JOHANNESBURG
4 NOVEMBER 2016

2017 (4) SA 243 (GJ)

Contract

In enforcing rights established by contract, a court may have regard to the relative prejudice between the parties caused by enforcement or otherwise, and should not allow enforcement if this will result in a failure of humaneness, social justice and fairness, as would offend the values of the Constitution.

THE FACTS

Mohamed's Leisure Holdings (Pty) Ltd was lessor, and Southern Sun Hotel Interests (Pty) Ltd was lessee in terms of a lease agreement. Clause 4.5 provided that 'the lessee shall make monthly provisional rent payments to the lessor by not later than the seventh day of each month'. Clause 20 provided that the landlord had the right to terminate the lease and take possession of the property resulting from the lessee's failure to pay rent on due date.

In June 2014 Southern defaulted in paying rental on due date. On 20 June 2014 Mohamed demanded payment of the amount due within five days, failing which the agreement would be cancelled. In addition Southern was notified that in the event of future failures to pay rental on due date, no notice to remedy would be given and cancellation of the agreement would follow instantly.

Southern blamed Nedbank for the non-payment of the June rental, in omitting to process the rental payment to Mohamed, as it was instructed to do in terms of a stop- order instruction to Nedbank. Nedbank accepted responsibility for mishandling the stop-order.

The October 2014 rental was debited from Southern's bank account on 6 October 2014. However, on 20 October 2014, Mohamed's attorneys informed Southern of its breach of the agreement in failing to pay the October rental and further advised that Mohamed had elected to exercise its right in accordance with the provisions of clause 20 of the lease agreement to cancel the lease agreement with immediate effect.

Mohamed had not been paid because of a technical administrative error by Nedbank. On 21 October 2014 Southern transferred the amount of the October rental into Mohamed's bank account and the next day, 'in order to show the bona fides of the respondent', a further amount of R3844,65, as interest on the amount in regard to late payment of the October rental.

On 31 October 2014 a meeting was held between representatives of the parties and Nedbank. The late payment of the October 2014 rental was explained by Nedbank to have occurred due to a 'processing error' in depositing the amount into a wrong bank account. Southern stated that its ejectment would cause 'untold damages, both patrimonial and reputational' and would effectively sound the death knell for its hotel. The relocation of this business involved substantial costs, and required long-term planning, and termination of the lease would probably have a dire impact on its reputation in the marketplace.

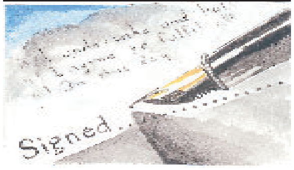
Mohamed applied for the eviction of Southern from the premises.

THE DECISION

Mohamed was entitled, in terms of clause 20 of the agreement, to cancel the agreement on the ground of non-payment of the October rental on due date. This triggered the right to be restored into possession of the leased premises.

The question was whether in the circumstances of the case, the implementation of the cancellation clause contained in the lease agreement would be manifestly unreasonable and offend against public policy.

The agreement in itself did not in any way offend public policy, nor were the terms invoked to effect the cancellation of the



agreement unreasonable, unfair or objectionable on any other ground. It is the implementation of the cancellation clause that the court was asked to give effect to, that had to be subjected to constitutional scrutiny.

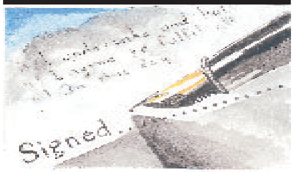
In considering the issue the court had to make a value judgment based on the constitutional concepts and values as enunciated in previous judgments. In particular and adopting an objective approach, the concepts of fairness and ubuntu were paramount. All the facts and circumstances disclosed by the parties were relevant and were to be weighed together with contractual principles such as freedom of contract and pacta sunt servanda. The final test was whether the circumstances of this case constituted sufficient cause for the relaxation of pacta servanda sunt.

Given Southern's description of the consequences of ejectment, it had been established that an order to vacate the premises would cause it irreparable harm. No prejudice had been shown to have been suffered by Mohamed. The court would have to balane the late payment of the October rental, on the one hand, juxtaposed with the bank solely having to bear the blame for the late payment, and the prospect of Southern suffering disproportionate prejudice in the event of eviction. The determinant criterion was the demonstrable unfairness in the implementation of clause 20, in granting an order for eviction as sought by the applicant. Applying the value of ubuntu, 'carrying with it the ideas of humaneness, social justice and fairness' to the facts of the matter, finally led to the conclusion that an order for the eviction of Southern would offend the values of the Constitution.

The application had to fail.

In considering the issue the court is enjoined to make a value judgment based on the constitutional concepts and values as referred to in the authorities quoted above. In particular and adopting an objective approach, the concepts of fairness and ubuntu are paramount. All the facts and circumstances disclosed by the parties are relevant and fall to be weighed together with contractual principles such as freedom of contract and pacta sunt servanda. The final test is whether the circumstances of this case constitute sufficient cause for the relaxation of pacta servanda sunt.

PHEPENG v ESTATE COMBRINCK



JUDGMENT BY NICHOLSON AJ
FREE STATE DIVISION, BLOEMFONTEIN
23 MARCH 2017

2017 (4) SA 266 (FB)

A suspensive condition will be considered to have been fulfilled by acceptance of an offer required by the condition despite the acceptor's later attempt to secure a better offer.

THE FACTS

Phepeng and the second application offered to purchase Combrinck's property at a price of R665 000. The offer was accepted. The offer was subject to the suspensive condition that Phepeng secure a bond for the purchase price within 30 days of the acceptance of the offer, ie on or before 10 November 2016.

Absa Bank sent a letter in which it offered the required loan. Combrinck's agent was duly notified of the offer in writing on 3 November 2016. On 10 November 2016 Phepeng notified the bond originator, the estate agent, of his acceptance of the offer from Absa Bank and that he would follow up on this acceptance the following day.

Phepeng then asked his employer, Eskom, for a competitive offer and requested Combrinck for longer period within which to ascertain whether or not the employer was able to make an offer on better terms with regard to interest than the Absa Bank offer already received. Combrinck indicated that it was unwilling to extend the time frames and that the contract of sale had been voided for non-fulfilment of the suspensive condition, and the property had in fact been sold to a new buyer.

Phepeng brought an application for an order compelling Combrinck to transfer the property. Combrinck contended that, as the suspensive condition in the contract was not fulfilled timeously, the contract never came into existence and Phepeng had no legal right upon which to found the application. Combrinck asserted that the contract lapsed after the 30-day period, within which Phepeng was to secure a bond, had passed without them having provided a letter of offer, a quotation and a pre-agreement from the financial institution as indicated in clause 4.1.2 of the agreement.

THE DECISION

Phepeng's confirmation on 10 November 2016 that he would accept the Absa loan offer in order to comply with the suspensive condition clearly reflected the bona fide belief that he had met the requirements set by the suspensive condition and that he had now secured their purchase.

The suspensive condition contained in clause 4 of the offer to purchase was for the protection of Phepeng. He clearly waived any protection of the further requirements stated in the condition offered on 10 November 2016, when they emailed their bond originator and indicated acceptance of the loan offer from Absa Bank. The suspensive condition was therefore fulfilled by acceptance of the loan offer on 10 November 2016, with the effect that the contract became of full force, with retrospective effect, on the date on which the offer to purchase was accepted.

Since the suspensive condition in the contract was fulfilled, the contract came into full force and effect. Phepeng was entitled to an order compelling transfer of the property.

BRAYTON CARLSWALD (PTY) LTD v BREWS

A JUDGMENT BY THERON JA (MAJIEDT JA, DAMBUZA JA, MATHOPO JA and COPPIN AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2017

2017 (5) SA 498 (SCA)

Credit Transactions

Cession of a debt is ineffective if made after the debt has been extinguished by payment.

THE FACTS

On 18 October 2004 FirstRand Bank Ltd obtained a judgment against Brayton Carlswald (Pty) Ltd and Mr JP Brews for payment of the sum of R3 227 582,44. In execution of this judgment, the bank attached certain immovable properties owned by Brayton. In order to avoid a sale in execution of the immovable properties, Brayton approached Mr GD Brews, with a request that he pay its indebtedness to the bank. Brews agreed to do so by way of a loan. As security for the loan, Brayton agreed to procure a pledge of shares in KGM 74 Investments (Pty) Ltd in favour of Brews, to pass a covering mortgage bond over the properties attached pursuant to the judgment, and Brews would take cession of the judgment from the bank.

In 2005, Brews paid a total amount of R4 439 675,80 to the bank in settlement of Brayton's indebtedness to it. On 29 August 2008 the bank, in writing, ceded its rights to the judgment, and any additional claims against Brayton, to Brews.

Brews then brought an application for an order directing that he be substituted as execution creditor in all execution documentation issued or reissued in the action between the bank and Brayton.

In opposing the application, Brayton contended that at the time when the deed of cession was executed and fulfilled on 2008, there was nothing to cede because the debt had been extinguished by payment.

THE DECISION

When the deed of cession was executed and fulfilled, there was nothing to cede because the debt had been extinguished by payment. Payment usually serves to extinguish a debt. When 'transfer' of the real right was effected, there was no right which could be transferred. Brews had paid the bank all that was due to it. Transfer of a 'right' which has been extinguished is a nullity as there is nothing which can be transferred. As a matter of logic, a non-existent right can never in law be transferred as the subject-matter of a cession. Brews, the bank and their legal representatives ought to have considered the effect of the payment of a debt, which had been ceded where the cessionary was not a surety. Brews was not a surety for Brayton's debt.

Cession of an action is an ex lege benefit afforded to a surety who pays a creditor, and that entitles a surety to claim cession of action from the creditor. This is a clear exception to the principle that once a liability has been extinguished by payment, the right to payment is extinguished and cannot be transferred.

Brews contended that correspondence exchanged between its legal representatives and the bank contained the cession itself and not merely an intention to cede. It was further contended that the intention of the parties should be ascertained with regard to such correspondence and that the deed of cession was merely a recordal of their previous agreement. However, it was clear from the correspondence that the deed of cession would be executed after payment was made and was not to be contemporaneous with payment. The correspondence between the parties was consistent with an intention on the part of the bank to execute the deed of cession after payment of the judgment debt.

The application failed.

MAN FINANCIAL SERVICES SA (PTY) LTD v PHAPHOAKANE TRANSPORT

A JUDGMENT BY WEPENER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
1 FEBRUARY 2017

2017 (5) SA 526 (GJ)

When a settlement agreement replaces a credit agreement which is not subject to the National Credit Act (no 34 of 2005) that agreement may become subject to the Act.

THE FACTS

Man Financial Services Sa (Pty) Ltd and Phaphoakane Transport entered into several written rental agreements. The transactions did not fall under the provisions of the National Credit Act (no 34 of 2005) because Phaphoakane was a juristic person as defined in section 4(1)(a)(i) of the Act, and it was a large agreement as defined in section4(1)(b) of the Act.

When Phaphoakane breached the rental agreements, they were all cancelled, and the trucks which formed the subject-matter of the rental agreements were returned to Man. An amount of approximately R5m remained outstanding and payable.

The parties and a surety, the second respondent, entered into negotiations for payment of the outstanding amount. The negotiations resulted in a settlement agreement. The agreement stipulated payment in several monthly instalments .The amount outstanding exceeded the capital amount of Rm as the amount to repay included additional fees or interest on the capital amount.

The settlement agreement entered into by the parties provided that Phaphoakane and the second respondent was liable jointly and severally for the debt therein described. The second respondent was no longer described or bound as surety.

In defending an action for payment, the second respondent contended that Man had failed to comply with the provisions of section 129 of the Act in that it failed to give notice to the defendants as required by the Act.

THE DECISION

The settlement agreement ended the relationship between the parties as far as the rental agreements and suretyships were concerned, and a new relationship commenced. The agreement reads that it is in full and final settlement of the claims with regard to the rental agreements in question. The agreement was consequently a transactio in the legal sense.

A settlement agreement constitutes a new credit agreement within the meaning of the Act. Therefore, although the first agreements were not subject to the Act, the new one was. Man was consequently obliged to comply with the provisions of the Act and give prior notice before instituting action.

The matter was postponed in order to give Man an opportunity to comply with the Act.

VENTER JOUBERT INC v DU PLOOY

A JUDGMENT BY WILLIAMS J (LACOCK J and LEVER AJ concurring)
NORTHERN CAPE DIVISION, KIMBERLEY
19 DECEMBER 2014

2017 (5) SA 439 (NCK)

Liability for interest payable in terms of the section 2A(5) of the Prescribed Rate of Interest Act (no 55 of 1975) is not based on fault of the person against whom such interest is claimed but on the fact that the debt in question has become due.

THE FACTS

Du Plooy instructed Venter Joubert Inc, a firm of attorneys, to sue the Minister of Police for damages sustained when a police officer shot her. Venter Joubert served a claim on the national commissioner of police in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act (no 40 of 2002). Venter Joubert failed to issue and serve summons timeously, with the result that the claim of R920 000.00 prescribed.

Du Plooy issued summons against Venter Joubert for damages based on a breach of the agreement to render competent professional services to her. The summons was not preceded by a demand. She claimed R920 000 plus interest thereon at the rate of 15,5% a tempore morae as well as costs of suit. Prior to the date of trial, she filed a notice of intention to amend her particulars of claim to the effect that she sought to introduce a claim for damages for loss of interest on the amount of R920 000.00, alternatively, interest on the amount to be awarded as damages, calculated at the prescribed interest rate from the date of the statutory notice, 3 August 2006 . A notice of objection to the proposed amendment was filed, after which Du Plooy chose not to pursue the amendment.

On 11 September 2012, Venter Joubert delivered an offer to settle the claim in the amount of R296 262,94, together with costs. The offer was accepted, but since it made no provision for interest, the parties agreed that the question of whether interest was payable on the amount of R296 262,94, and if so from what date, be submitted to the court for decision. . The court a quo, in exercising its discretion in terms of section 2A(5) of the Prescribed Rate of Interest Act (no 55 of 1975), awarded interest at the prescribed rate of 15,5% per annum on the amount of R296 262,94 to run from 3 September 2006, ie 30 days after the date of the statutory notice, to date of payment.

In an appeal, the question was whether the court a quo exercised its discretion judicially in awarding interest on the claim from 3 September 2006.

THE DECISION

Liability for mora interest is not dependent on fault or negligence. All that the claimant has to prove is that the debtor is in mora in that payment has not been made on the due date. There is thus a distinction between mora interest and interest as a component of damages.

For mora interest to be applicable, being an accessory or ancillary obligation to a principal debt, there has to be a principal debt. The principal debt in the present case was not the prescribed debt of the Minister, but the debt owed by Venter Joubert as a result of their breach of agreements to render competent professional services. This debt could only have become due after the prescription of the claim against the Minister. Before that there was no principal debt owing by Venter Joubert to which mora interest could attach. Mora interest could therefore not be awarded for the period before the debt became due.

The interest awarded by the court a quo was, in essence, interest as a component of damages, which Du Plooy, by abandoning her proposed amendment, had not claimed. The factors and circumstances taken into account by the court a quo, without any evidence, had no place in deciding from when mora

interest should run. It therefore misdirected itself by applying the wrong principles in the exercise of its discretion.

Du Plooy was entitled to be paid interest at the prescribed rate from date of service of summons to date of payment of the capital amount.

Liability for mora interest is not dependent on fault or negligence. All that the claimant has to prove is that the debtor is in mora in that payment has not been made on the due date — the second scenario described in the Jackson case referred to in the Bobroff judgment.

While it is clear that the court a quo was fully aware of the distinction between mora interest and interest as a component of damages, it unfortunately conflated the different legal principles involved under cover of the discretion afforded by s 2A(5) of the Act.

For mora interest to be applicable, being an accessory or ancillary obligation to a principal debt, there has to be a principal debt. The principal debt in this case is not the now prescribed debt of the minister, but the debt owed by the appellants as a result of their breach of agreements to render competent professional services. This debt of the appellants could only have become due after the prescription of the claim against the minister. Before that there was no principal debt owing by the appellants to which mora interest could attach. Mora interest could therefore not be awarded for the period before the debt of the appellants became due

MOKONE v TASSOS PROPERTIES CC

JUDGMENT BY MADLANGA J (NKABINDE ADCJ, JAFTA J, KHAMPEPE J, MHLANTLA J, MOJAPELO AJ, PRETORIUS AJ and ZONDO J concurring)
CONSTITUTIONAL COURT
24 JULY 2017

2017 (5) SA 456 (CC)

Property

When a lease is extended by the parties to the lease, all the terms and conditions of the existing lease are extended, including those collateral to the essential terms of the lease. Section 2(1) of the Alienation of Land Act (no 68 of 1981) does not apply to a right of pre-emption.

THE FACTS

Mokone entered into a written lease agreement with Tassos Properties CC. In terms of the agreement, Tassos leased premises to Mokone at a monthly rental of R4500. The lease was for an initial period of one year ending on 28 February 2005, renewable for a further period of a year at a rental to be agreed upon. Mokone conducted the business of a bottle store on the leased premises.

Clause 6 of the lease agreement provided that Mokone would have the right of first refusal to purchase the leased premises when Tassos wished to sell the leased premises, the purchase price to be negotiated at that time.

For the period 1 March 2005 to 3 May 2006 Mokone and Tassos concluded an oral agreement on the same terms and conditions as the written lease. On 3 May 2006 they agreed to an extension of the lease until 31 May 2014. This they did by means of a manuscript endorsement on the face of the first page of the original written lease signed only a representative of Tassos. The endorsement read: 'Extend till 31/5/2014 monthly rent R5500'.

On 15 July 2009 Tassos entered into a deed of sale with Blue Canyon Properties 125 CC in terms of which it sold the leased premises to Blue Canyon. Transfer to Blue Canyon took place on 1 March 2010.

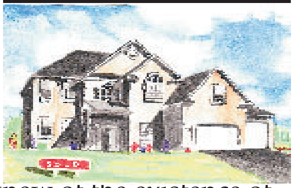
On 27 January 2012, Mokone notified Tassos in writing that she was exercising her right of pre-emption. She tendered payment of R55 886,60, this being the price at which Tassos sold the leased premises to Blue Canyon. Tassos contended that the right of pre-emption was no longer part of the lease. Mokone initiated action against Tassos and Blue Canyon in the High Court to set aside the sale and transfer of the leased premises and compel a sale of the property to her. In the alternative, she asked for damages. She alleged that Blue Canyon, knew of the existence of the right of pre-emption before it took transfer of the leased premises. She contended that the manuscript endorsement that extended the lease to 31 May 2014 had also extended clause 6 containing the right of pre-emption.

While the action was pending before the High Court, the latest period of the lease came to an end. Mokone continued to occupy the leased premises, and Blue Canyon continued to accept rent. On 10 December 2014 Blue Canyon gave Mokone written notice to vacate the leased premises by 31 January 2015. Mokone refused to vacate. Blue Canyon sought and obtained her eviction on the basis that: it was the owner of the leased premises, the lease had come to an end through effluxion of time and Mokone had been given due notice to vacate the premises.

THE DECISION

The issues were whether the right of pre-emption contained in the written lease agreement was renewed when the lease was extended on 3 May 2006, whether the endorsement on the face of the lease agreement extending the lease had to comply with the formalities contained in section 2(1) of the Alienation of Land Act (no 68 of 1981), and whether, despite the fact that the lease had ended through effluxion of time and Mokone had been given due notice to vacate the leased premises, there was a basis on which she could — in the meantime — resist eviction.

In general, when parties to a lease say their lease is extended, all the terms of the lease,



including terms that are collateral, and not incident, to the lease, are extended. Certain terms may be of such a nature that it is plain that it could never have been within the contemplation of the parties to extend them either at all or in this manner. If a term or terms are not meant to be extended, that must be made plain.

The endorsement 'Extend till 31/ 5/2014 monthly rental R5500' indicated the duration of the extended lease and the increased rental. It also indicated that the lease was extended.

This position was not in keeping with the existing common law, but it was open to the court to follow a different route: section 39(2) of the Constitution provides that '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 fact that the intervening extension before the one in issue resulted in an oral lease agreement did not detract from the view that the effect of the manuscript endorsement extended the period of the lease.

As far as the Alienation of Land Act was concerned, in the case of a right of pre-emption, an alienation takes place only when that right is exercised and a sale comes into being. Merely affording someone that right is not an alienation because that is simply not a sale, exchange or donation. Section 2(1) of the Alienation of Land Act does not apply to a right of pre-emption.

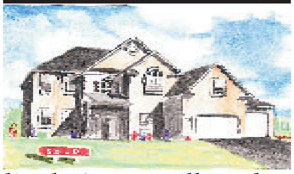
Section 173 of the Constitution provides:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into F account the interests of justice.'

In the litigation pending before the High Court, Mokone had pleaded that the purchaser, Blue Canyon, knew of the existence of the right of pre-emption before it took transfer of the leased premises. If that was indeed so, the purchaser's ownership obtained upon transfer to it could be attacked. It seemed unjust to require Mokone to be uprooted and her business brought to a halt or destroyed in circumstances where the purchaser might not have been an innocent player when it purchased or took transfer of the leased premises. The interests of justice dictated that the eviction proceedings be held in abeyance pending finalisation of the action in which Mokone was seeking to enforce the right of pre-emption.

It could therefore be held that the extension of the lease between Mokone and Tassos on 3 May 2006 resulted in the extension of the right of pre-emption in favour of Mokone. The action for the prosecution of the right of pre-emption was remitted to the High Court for the determination of the remaining issues.

EX PARTE WHITFIELD*



A JUDGMENT BY GOOSEN J (REVELAS J and ROBERSON J concurring)
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH
28 MARCH 2017

2017 (5) SA 161 (ECP)

An application to remove restrictive conditions of title in a title deed must show that the requirements of a statute under which the conditions were imposed have been satisfied.

THE FACTS

Whitfield applied for an order removing a restrictive condition over property he owned. The condition, recorded in the title deed that the condition which had been imposed by a Controlling Authority in terms of the Advertising on Roads and Ribbon Development Act (no 21 of 1940) was to the effect that 'not more than one dwelling house together with such outbuildings as are ordinarily required to be used in connection therewith shall be erected on the land except with the written approval of the Controlling Authority'.

The reason for seeking the removal of the restrictive condition was to make the permitted use of the property, which was described as agricultural property, consistent with the fact that more than one dwelling has been erected on the property. The second dwelling was erected at a stage when it was not known that building plan approval needed to be sought.

Whitfield also stated that he was unable to state with any authority the reason for the imposition of the restrictive condition. However, as was apparent from the title deed in question, the restrictive condition dated back to a time when there was no zoning scheme to regulate town planning and town planning was accordingly regulated by way of conditions contained in title deeds. It was further apparent from the title deed that the condition was not registered in anyone's favour but was registered against the property. Since the imposition of the restrictive condition, and in recent years, numerous property owners in the area had undertaken substantial renovations to their properties, including the erection of second residential dwellings, and accordingly 'same will not be out of character for J the area in which the property is located'.

Whitfield contended that there was no particular necessity for the retention of the restrictive conditions on the title deed for the property.

THE DECISION

The allegations in the papers reflected a widespread tendency, in applications of this nature, to assume that restrictive conditions are quaint, somewhat old-fashioned devices which preclude 'modern' approaches to land development and that they serve little or no purpose. On this basis such conditions can, without more, be deleted.

This assumption is entirely without substance or merit. Restrictive conditions of the kind in question enure for the benefit of all other erven in a township, unless there are indications to the contrary.

There was also a paucity of consideration given to the particular condition sought to be removed. The bald assertion was made that the applicants did not know why the condition was inserted. Yet there was no reference in the founding affidavit to the relevant legislation referred to in the condition itself. The relevant legislation, the Advertising on Roads and Ribbon Development Act, remained in force. Its purpose was to regulate the display of advertisements outside urban areas at places visible from public roads and inter alia to regulate the erection, construction or laying of structures near certain pubic roads. Section 11 of the Act extensively regulates the restrictions which may be imposed in relation to the establishment or extension of townships situated wholly or

partially outside of an urban area. The area where the property in question was situated was such an area. However, there were no allegations in the papers which dealt with this aspect. There were also no allegations addressing the question as to what steps had been taken to obtain the consent of the controlling authority.

Section 11(6), (7) and (8) of the Act made it clear that the condition could only be removed or cancelled with the consent of the controlling authority. The consent of the statutory body was necessary for the court to authorise the removal of a restrictive condition. Furthermore, the provisions of section 45(6) of the Spatial Planning Act (no 16 of 2013) could apply, thereby requiring that consent be obtained from the municipality. In that event the provisions of the Spatial Planning Act regulate the mechanism by which such consent had to be obtained. This required that an application be made to the municipal planning tribunal.

The jurisdiction of the court to authorise a deletion, variation or suspension of a restrictive condition arises from the fact that interested parties are vested with a common-law right to waive, vary or abandon their rights coupled with the fact of the exercise of such right by the parties concerned. The court does no more than enquire into and establish that such common-law right has been properly exercised by the parties who are entitled to exercise it. And, once it is satisfied in this regard, it issues a declarator which authorises the Registrar of Deeds to effect an appropriate endorsement of the title deeds in accordance with the provisions of the Deeds Registries Act. The only authority which is entitled to endorse any alteration upon a registered deed is the registrar whose authority is determined by the Deeds Registries Act.

A court's power to grant an order authorising the removal or amendment of a restrictive condition of title upon proof that all interested parties have consented thereto is not affected by the provisions of the Spatial Planning Act. In each instance it will be necessary to establish that all interested parties have indeed consented thereto.

MORAITIS INVESTMENTS (PTY) LTD v MONTIC DAIRY (PTY) LTD

A JUDGMENT BY WALLIS JA (LEACH JA, TSHIQI JA, SALDULKER JA and FOURIE AJA concurring)
SUPREME COURT OF APPEAL
18 MAY 2017

2017 (5) SA 508 (SCA)

Contract

In proving a lack of authority to conclude an agreement, the party alleging this must discharge the onus that such authority was in fact lacking.

THE FACTS

Moraitis Investments (Pty) Ltd and the Moraitis Trust held shares in Montic Dairy (Pty) Ltd and other related companies, the other respondents. In 2006, Moraitis Investments and the trust sought the liquidation of these companies, alternatively an order that the shares owned by Moraitis Investments be purchased by the respondents. They alleged that winding up the companies would be just and equitable, or that a purchase order would put an end to a deadlock that had ensued between the parties who ultimately controlled the companies, Mr Moraitis and Mr Kebert.

In 2007, pursuant to an agreement between the parties to that litigation, the court ordered that the Kebert group would purchase the shares owned by Moraitis Investments and the trust. The parties agreed, and the court ordered, that an independent third party, acting as a valuer, would determine the purchase price of the shares and loan accounts. The valuation, which would have involved the payment of a little over R5m to Moraitis Investments, satisfied no one. The companies whose shares were to be valued, together with their controlling shareholders, commenced proceedings to set aside the valuation and have a far lower valuation substituted for it. Moraitis Investments opposed those proceedings.

A third action was brought. This concerned a dispute between Moraitis and Kebert concerning payment for shares in an unrelated company.

The parties reached a settlement in respect of all three matters. All of the parties to the litigation were cited as parties to the settlement, but there were only two signatories, namely Mr Moraitis and Mr Kebert. Each signed on behalf of all the various entities which they controlled, and both warranted that they were duly authorised to sign on behalf of them. The settlement agreement was then made an order of court.

The settlement provided for the shares held by Moraitis Investments and the trust in Montic Dairy and the other respondents to be transferred to Kebert or his nominee against payment to Mr Moraitis of R600 000. That payment was made. Problems surfaced when transfer was demanded of the shares held by Moraitis Investments and the trust in the six companies.

On 30 September Moraitis brought an application for an order to set aside both the settlement agreement and the order of court. The basis was that the settlement agreement was invalid because Mr Moraitis had not been authorised by Moraitis Investments and the trust to conclude it.

THE DECISION

This was a substantial body of evidence that cast doubt on the claim that Mr Moraitis was not authorised by his co-trustees to negotiate a settlement of the disputes in which they and he were embroiled, and to cause the resultant agreement to be made an order of court. It was plain that he was the driving force behind all the litigation and acted on behalf of the Moraitis Trust and Moraitis Investments in instituting, conducting and, in the case of the liquidation application, settling the litigation. Accepting that his actions in all these matters were duly authorised by his co-trustees, the inevitable question was how that authority was conferred in those instances and what difference there was between them and the present

one. There was nothing to indicate that there was any difference.

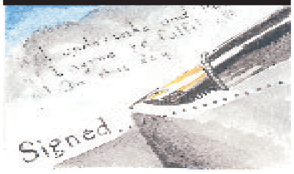
In executing the settlement agreement Mr Moraitis said expressly that he was authorised to represent his trust. In his affidavit he said that he was not so authorised. There was no reason to believe that he was lying when he signed the settlement agreement, but telling the truth in his affidavit. The onus rested on the Moraitis Trust to prove that Mr Moraitis lacked the authority to conclude the settlement agreement on its behalf and to agree to its being made an order of court. In the absence of any attempt to explain the workings of the trust or how issues of authorisation had been dealt with in the past, or any of the matters highlighted by Mr Kebert, that onus was not discharged.

The absence of any information concerning the process followed when these different pieces of litigation were instituted and conducted and the extent of the knowledge of the trustees concerning them, as well as the general manner of conducting the business of the trust, led to the conclusion that Mr Moraitis did not lack authority to conclude the settlement agreement on behalf of the trust.

As far as Moraitis Investments was concerned, authority to represent it could emanate from two sources. There could be a decision by its sole shareholder, the Moraitis Trust, that it should conclude the agreement, or there could be a decision taken by its two directors, Mr Moraitis and Mr Kebert. In order to succeed in establishing its case Moraitis Investments had to prove that neither source of authority was present when the settlement agreement was concluded. It did not discharge that onus on either ground. The same evidence that indicated that Mr Moraitis had authority to represent the Moraitis Trust served to indicate that he had authority to represent the trust in its capacity as sole shareholder of Moraitis Investments in concluding the settlement agreement. In addition, he and Mr Kebert were the two directors of Moraitis Investments. The suggestion that, because he did not say, when signing the agreement, that he was doing so in that capacity, Mr Kebert's manifest agreement to the settlement agreement could be disregarded, was without merit. The agreement did not need to be signed by both directors in order to bind the company. It sufficed if it were signed by one of them with the authority of the other. If Mr Moraitis lacked authority Mr Kebert would have known and intervened. The only inference from his not doing so was that he confirmed that Mr Moraitis had the authority that he warranted he had, to represent Moraitis Investments in concluding the settlement agreement.

The objection of lack of authority had to be rejected. The application failed.

PRIMAT CONSTRUCTION CC *v* NELSON MANDELA BAY METROPOLITAN MUNICIPALITY



A JUDGMENT BY LEWIS JA (TSHIQI JA, SALDULKER JA, SWAIN JA and MOLEMELA AJA concurring)
SUPREME COURT OF APPEAL
1 JUNE 2017

2017 (5) SA 420 (SCA)

A party to a contract which chooses not to accept the other party's repudiation of the contract may, in the face of continuing breach by the repudiating party, later choose to accept the repudiation and cancel the contract. It may do so without there being another act of repudiation by the repudiating party.

THE FACTS

Primat Construction CC concluded a contract with the Nelson Mandela Bay Metropolitan Municipality for the upgrade of roads in Port Elizabeth.

After work had begun, the municipality notified Primat that it was in breach of the contract because of the slow pace of the work, and work stoppages, and that the municipality might terminate the contract. On 17 January 2012, the municipality wrote to Primat purportedly terminating the contract with immediate effect in terms of various clauses of the contract. The letter did not constitute a proper termination and thus amounted to a repudiation of the contract by the municipality.

Primat responded to the purported notice of termination on 19 January 2012, and stated that Primat Construction would continue to service the contract until the matter was finalized. The municipality responded by repeating that the contract was terminated and requiring Primat to vacate the site with immediate effect. Primat wrote to the municipality explaining that it was entitled to rectify any alleged breaches by it after being given the requisite notice, and that since Primat had not been given notice, the termination was ineffective. Primat advised that it had been denied access to the site, and that the municipality itself was in breach of the contract.

On 3 February 2012 , Primat requested the municipality to remedy its own breaches, and asked for immediate access to the site. It said that unless the municipality agreed to meet in order to reach an amicable solution to the impasse before 8 February 2012, Primat would have no choice but to approach court to interdict it from putting other contractors on site and/or alternatively start proceedings against you to recover damages based on your repudiation.

On 9 February 2012 attorneys representing Primat, wrote to the municipality advising that the purported termination by it of the contract constituted a repudiation. They stated that the 'Contractor hereby gives notice of its election to now accept such repudiation and hereby cancels the contracts in question'.

When sued for damages, the municipality pleaded that once Primat had elected not to accept the repudiation, it was precluded from changing its election. It could not therefore cancel and claim damages.

THE DECISION

The letter of 8 February 2012 showed again that, at that stage, Primat elected not to accept the repudiation. The question was whether an additional act of repudiation was required before Primat was entitled to make a new election and claim cancellation and damages.

It is necessary to have regard to the nature of repudiation, and to the principles applicable to the doctrine of election, in determining whether an aggrieved party to a contract can change his or her election. The aggrieved party must choose between these different remedies and is bound by his or her election. But if the aggrieved party elects to abide by the contract and claim performance from the party who has repudiated, he or she may claim performance, and in the alternative, cancellation and damages. This is the so-called double-barrelled procedure referred to in *Custom Credit (Pty) Ltd v Shembe* 1972 (3) SA 462 (A).

The requirement of a new and independent act of repudiation by the municipality before Primat could change its election and exercise its right to cancel and claim damages is not one mentioned in any of the earlier authorities. Such a requirement would make no sense because it would allow the defaulting party who steadfastly refuses to comply with the contract to keep the contract alive until it commits another act of repudiation.

The Municipality persisted in its repudiation. It refused Primat access to the site, appointed new contractors and said that the contract was terminated. The objective construction of that conduct showed an unequivocal intention on the part of the municipality no longer to be bound. That was how Primat reasonably perceived it. After 3 February 2012, Primat's reasonable perception was that the municipality persisted in its repudiation. No further act of repudiation was necessary.

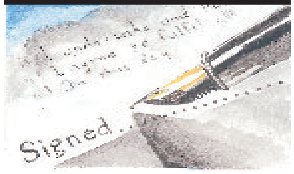
Another act of repudiation was not necessary. It was sufficient that Primat reasonably perceived that the municipality would not repent of its breach, despite the opportunities given to it to do so and then to change its election, as it did.

In my view, the Municipality persisted in its repudiation. It refused Primat access to the site, appointed new contractors and said that the contract was terminated. The objective construction of that conduct showed an unequivocal intention on the part of the Municipality no longer to be bound. That was how Primat reasonably perceived it.
In Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd A 2001 (2) SA 284 (SCA) ([2001] 1 All SA 581) Nienaber JA (para 16) observed that in determining whether there was an unequivocal intention not to fulfil contractual obligations, the —

'emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception. The perception is that of a reasonable person placed in the position of the aggrieved party.'

[30] There is no doubt that after 3 February 2012, Primat's reasonable perception was that the Municipality persisted in its repudiation: it showed in no uncertain terms that it would not comply with its obligations and would not allow Primat to continue to perform. No further act of repudiation was necessary.

SAHARAWI ARAB DEMOCRATIC REPUBLIC v OWNERS AND CHARTERERS OF THE CHERRY BLOSSOM



A JUDGMENT BY MBENENGE ADJP
(PLASKET J and GOOSEN J concurring)
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH
15 JUNE 2017

2017 (5) SA 105 (ECP)

A state-owned company cannot claim the defence of state immunity in an action brought against it since that defence relates to a state and not a company owned by the state.

THE FACTS

On 1 May 2017 the *Cherry Blossom* entered the port of Coega on the outskirts of Port Elizabeth. Aboard the vessel was a cargo of phosphate that had been mined in the Boucraa mine in the northern part of Western Sahara. The cargo was en route to New Zealand, having been sold to a manufacturer of fertiliser.

The Saharawi Arab Democratic Republic and the Polisario Front brought an application for an interdict restraining the owners of the ship and the other respondents from taking the cargo from the jurisdiction of the court in Algoa Bay, pending the determination of an action for delivery of the cargo.

Polisario, the second applicant, was a national liberation movement. It was established in 1973 with the aims of ending Spanish colonial rule of Western Sahara and of representing the people of Western Sahara. Polisario was recognised by the United Nations as representative of the people of Western Sahara in relation to their right to self-determination. In 1976 Polisario proclaimed Saharawi as a sovereign state. Article 17 of its constitution, adopted by the 14th Congress of Polisario provided that public property belonged to the people. Public property included 'the mineral wealth, energy resources, underground wealth, territorial waters and other resources defined by the law'.

Two of the respondents opposed the confirmation of the interdict, OCP SA and Phosphates de Boucraa SA. OCP was a company registered in accordance with the laws of Morocco. It was the largest exporter of phosphate rock and phosphoric acid, and producer of fertiliser extracts, in the world. The Moroccan government was its major shareholder, owning 94,12 % of OCP's shares. Phosboucraa was also a Moroccan company, and a wholly owned subsidiary of OCP. It operated the phosphate mine at Boucraa. The cargo of phosphate on the Cherry Blossom was mined by Phosboucraa from its Boucraa mine and sold to a New Zealand company.

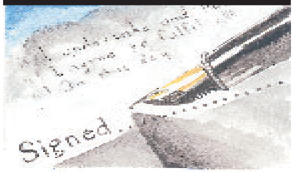
Saharawi and Polissario contended that the phosphate aboard the *Cherry Blossom* was part of the national resources of Western Sahara and belongs to its people, and that OCP and Phosboucraa misappropriated the phosphate and sold it, having no right to do so. They intended to institute a vindicatory action in respect of the cargo and the purpose of the interdict was to ensure that the cargo remained within the jurisdiction of the court until a vindicatory action was finalised.

THE DECISION

The central enquiry was whether Saharawi and Polissario had established a prima facie right to the cargo, even though open to some doubt.

Morocco had no claim to sovereignty over Western Sahara. Its claim to sovereignty as a result of its occupation of the territory was incompatible with the status of Western Sahara as a non-self-governing territory. It acquired control of the territory by force. This, as a means of acquiring sovereignty, was contrary to customary international law.

Saharawi and Polissario had established on a prima facie basis that sovereignty over the cargo of phosphate was vested in the people of Western Sahara, ie the people of Western Sahara owned the cargo. The defence on the merits that OCP and Phosboucraa



had raised was that they mined and sold the phosphate in accordance with the UN framework for the lawful exploitation of the natural resources of a non-self-governing territory. But Saharawi contended that the phosphate was exploited without consultation with the people of Western Sahara, without their consent and that they did not and would not benefit from its exploitation. A prima facie right to ownership of the phosphate, albeit open to some doubt, had been established by Saharawi.

The respondents pleaded that the act of state doctrine, a common-law ground of non-justiciability applied, and that the principle of state immunity, a customary-international-law rule incorporated in our statutory law by virtue of s 2 of the Foreign State Immunities Act, also applied.

In essence, a claim to state immunity, if successful, has the effect that a domestic court does not have jurisdiction to adjudicate the matter before it, whereas reliance upon the act of state doctrine concerns the justiciability of the suit before the domestic forum notwithstanding its jurisdiction to adjudicate on the matter before it.

As far as state immunity was concerned, Morocco exercised de facto administrative control over that portion of the territory of Western Sahara in which the mine was situated. Moroccan law was applied there by Morocco. The exercise of administrative control and the application of Moroccan law to the portion of the territory of Western Sahara under Moroccan control was the subject of dispute. OCP and Phosboucraa were corporate bodies with separate legal existence from the state of Morocco. They operated the Boucraa mine in accordance with Moroccan law, having been granted rights to do so in accordance with Moroccan law. Both claimed that the exploitation of the mineral accorded with the UN framework governing the exploitation of resources in a non-self-governing territory.

State immunity is a rule of international law which serves to preclude a state or its representatives from being sued or prosecuted in foreign courts. It accordingly precluded a domestic court from exercising jurisdiction in matters in which a foreign state is a party.

OCP and Phosboucraa contended that the determination by a South African domestic court that title in the phosphate cargo vests in Saharawi necessarily implied that the title conferred upon OCP and Phosboucraa by Morocco was invalid, and therefore that the legal rights of Morocco were thereby affected. However, Morocco was not a party to the proceedings. It was accordingly not bound by any finding or judgment to be made in relation to the issues between the parties. It had no proprietary interest in the matter .

It followed that the claim to state immunity could not be upheld.

SWART v STARBUCK

A JUDGMENT BY KHAMPEPE J (MOGOENG CJ, NKABINDE ADCJ, CAMERON J, FRONEMAN J, MADLANGA J, MHLANTLA J and PRETORIUS AJ concurring, JAFTA J, MOJAPELO AJ and ZONDO J dissenting)
CONSTITUTIONAL COURT
29 JUNE 2017

2017 (5) SA 370 (CC)

Insolvency

Once the Master authorises the sale of property in terms of section 80bis of the Insolvency Act (no 24 of 1936) there are no grounds for setting aside such a sale in terms of section 82 of that Act.

THE FACTS

Swart's estate was sequestrated At the time, he was the registered owner of certain immovable properties. The LJ Moller Trust submitted three conditional offers to purchase the properties to the trustees of the insolvent estate, Starbuck and the other respondents. At this point, Starbuck had not been officially appointed as a provisional or final trustee, but had already been advised by the Master of his intention to appoint him as a provisional co-trustee.

The three offers were accepted by Starbuck. Each was subject to the suspensive condition that the seller and/or Master grant the required consent. The agreement was subject to such consent being obtained and would fall away and be regarded as pro non scripto if such consent could not be obtained.

Before their formal appointment as provisional trustees, the trustees submitted a written application to the Master for the authority to sell the properties in terms of section 80bis read with section 18(3) of the Insolvency Act (no 24 of 1936). The application motivated the decision to sell the properties of the insolvent estate prior to the second meeting of the creditors, and included: (i) consents from the two secured creditors; B (ii) a circular that was sent to all known creditors regarding the sale of the properties; (iii) valuations of the properties; and (iv) the offers to purchase received from the Trust.

The trustees were appointed as provisional trustees of Swart's insolvent estate. Thereafter, the Master consented to the sale of the properties. The trustees executed written powers of attorney in which they declared that the properties had been sold when the offers were accepted, and authorised transfer to the purchaser. The properties were transferred to the Trust. Later that year, at the second meeting of the creditors, the creditors approved the trustees' report reflecting the sale and transfer of the properties to the Trust.

Swart instituted action against the Master and the trustees in the High Court for damages in the amount of R11 410 000. He contended that when Starbuck entered into the contracts, he was not a trustee and therefore lacked the necessary capacity to enter into the sale agreements. He also argued that the provisions of section 82(1) of the Act ought to have been complied with, and because that section was not complied with, the trustees were liable to pay statutory damages to him in terms of section 82(8) of the Act.

THE DECISION

The High Court held that the offers to purchase could only constitute valid offers once the suspensive condition had been complied with. It found that because the trustees had been granted the necessary authorisation by the Master to sell the properties in terms of section 80bis, section 82 was not applicable.

With regard to the allegation that the properties could have been sold for a much higher price the High Court found that there was no basis on which it could be said that the properties could have been sold at a higher price. Accordingly, there was no link between the conduct of the trustees and the alleged loss which Swart may have suffered.

This reasoning could not be faulted. Swart's claim was based on section 82(1) read with section 82(8) of the Act. The application of this section depends on, among

other things, the absence of a valid authorisation by the Master for the sale of the properties. The Master authorised the sale of the properties in terms of section 80bis. This authorisation had legally valid consequences until set aside. This authorisation had not been set aside. Section 82 did not apply. In the circumstances, there was no damages claim to be proved in terms of section 82(8) of the Act. In any event, even if there were a damages claim to be proved under any other branch of the law, the conclusion was inescapable that Swart had not been able to prove any damages.

As far as the validity of the section 80bis authorisation was concerned, there were no grounds for making a declaratory order that the Master's authorisation was unlawful. Such an order would be inappropriate. It was neither sought nor was it of any consequence. The authorisation in terms of section 80bis was an administrative act within the meaning of the Promotion of Administrative Justice Act. As a result, even if the Master's authorisation in terms of section 80bis were unlawful, it remained valid and binding, as it continues to have legally valid consequences until it is set aside. These legally valid consequences included the sale of the properties.

Subsection (1) makes it clear that nothing that has been done by the Master or the trustees pursuant to the provisions of the Act can be deemed invalid simply because of a formal defect unless, in the opinion F of a court, it has resulted in substantial injustice that cannot be rectified by an order of court. The directions of this court specifically asked Mr Swart to point to any substantial injustice which he may have suffered as a result of the purported formal defects in the granting of the Master's authorisation.

In this regard he merely contends that the properties could have been sold at a higher price. However, as already stated in this judgment, Mr Swart cannot prove this. Mr Swart has failed to point to any other substantial injustice.

In addition to ss (1), ss (2) makes plain that no defect or irregularity in the appointment of the trustees can vitiate anything done by them in good faith. If there were a defect or irregularity in the appointment of the trustees, this would not vitiate the sale of the properties if the sale of the properties were effected in good faith. Mr Swart makes no averments to indicate bad faith on the part of the trustees. On the contrary, the good faith of the trustees seems evident on the facts. At the time when the properties were sold the trustees had received the authorisation of the Master; they had received the consent of the two secured creditors; and they had issued a circular alerting all creditors of Mr Swart's insolvent estate of the intention to have the land sold.

WALLACE N.O. *v* WCP HOTEL PROPERTY (PTY) LTD

A JUDGMENT BY MEER J
WESTERN CAPE HIGH COURT
8 MARCH 2016

2016 SACLR 172 (WC)

In proving that a debt is not due, when faced with an application for liquidation based on the allegation that such debt is due, a respondent must show that the debt is disputed on bona fide reasonable grounds. Prescription of a debt which is conjoined to another debt runs from the date on which the later debt falls due.

THE FACTS

Western City Properties (Pty) Ltd acquired various properties in the central business district of Cape Town for R20 500 000.00. To enable developments on the properties, a joint venture agreement was concluded between Western City, WCP Hotel Property (Pty) Ltd and two other parties.

In terms of the joint venture agreement, Good Hope Palace Hotels (Pty) Ltd was created. It was agreed that West City would transfer the properties to Good Hope Palace. In return, Good Hope Palace would pay 'pre-development costs' in the sum of R12m, by settling a Nedbank loan secured by a mortgage bond over the properties for this amount, and credit Western City with a R50m loan account. Western City would assign this loan claim against Good Hope Palace to WCP so that WCP would be indebted to Western City in the sum of R50m, and Good Hope Palace would be indebted in that sum to WCP.

The properties were transferred to Good Hope Palace Hotels. It settled the Nedbank Loan of R12m on transfer of the property into its name. West City was credited with a R50m loan by Good Hope Palace Hotels. West City thereafter assigned the loan to WCP which then owed this to Western City.

The R50m loan account assigned to WCP against Good Hope Palace Hotels was paid in full to WCP in September 2012. Pursuant to a 'Sale of Shares and Claims' agreement WCP then disposed of its interest in Good Hope Palace Hotels for R500 to IHMS Hotels.

Western City was placed in liquidation. Wallace and the other liquidators contended that WCP was indebted to Western City in the sum of at least R9 492 374.00, being the balance owing on the R50m loan account. WCP denied that it was liable to Western City in this amount. It alleged that when the Nedbank loan was settled by Good Hope Palace, the correct amount was debited and it was reflected in the financial statements of Western City that the Nedbank loan had been settled in full. However, in Western City's financial records, this was erroneously credited costs of sales. Consequently, due to a bona fide posting error, the bookkeeping staff failed to take proper account of the payment of the sum of approximately R12m by Good Hope Palace and that mistake was perpetuated in the financial statements. In these circumstances the debt to Western City has been paid.

WCP also contended that Western City's claim prescribed on 1 March 2014, being 3 years after the last acknowledgment of indebtedness on 2 March 2011. If it was found that the debt became due when the order for the winding-up of Western City was granted., the debt prescribed in August 2015, three years after Wallace was appointed as Western City's liquidators in August 2012.

THE DECISION

The agreements and the implementation thereof did not bear out WCP's allegations. It was self-evident from the agreements that there were two separate undertakings by Good Hope Palace Hotels, the payment of agreed pre-development costs prior to transfer of the properties on the one hand and a loan by Western City on the other of R50m as payment for the properties. The agreements therefore made it abundantly clear that Western City was lending R50m and in addition,

Good Hope Palace Hotels would pay R12m pre-development costs.

It was also clear from the provisions of the agreements that the obligation to pay the R50m and the R12m were separate obligations. This was clear too from the recordal of the debt in the annual financial statements and the implementation of the agreements by the parties.

WCP had not shown that the debt was disputed on bona fide reasonable grounds.

As far as the defence based on prescription was concerned, WCP's argument was based on the premise that there was no conjunction between the debt that Good Hope Palace Hotels owed to WCP and the debt that WCP owed to Western City. This premise was incorrect. Both debts or loans had their origins in one transaction, namely, the transfer of property by Western City to Good Hope Palace Hotels for R50m, and one loan account of R50m flowing therefrom. It was that loan account, that was thereafter assigned to WCP in favour of West City. There was a conjunction between the debt Good Hope Palace Hotels owed to WCP and the debt WCP owed to Western City.