Current Commercial Cases

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A SURVEY OF THE CURRENT CASE LAW

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2019 (1) SA 204 (GJ)

Contract

To make out a case on review on the basis of mistake of fact, an applicant must show that the decision was vitiated by error as to a material fact that is uncontentious and objectively verifiable.

THE FACTS

The Airports Company South Africa (Acsa) awarded a tender to provide grass- cutting and vegetation services to Tswelokgotso Trading Enterprises CC (TTE). It alleged that in doing so, it made certain errors. These were firstly, that it disqualified bidders when it should not have done so, and secondly, that it permitted TTE's bid to be considered and ultimately awarded the tender to it, when TTE should have been disqualified from consideration because, at the time that TTE submitted its bid and had its bid evaluated, Acsa had issued letters of non-performance to TTE in respect of TTE's subsisting agreement with Acsa to render the services.

Acsa also alleged that the tender originally required compliance with a standard — ISO 9001. Acsa sought to replace this requirement, obliging bidders rather to submit their own Quality Management System. This amendment was effected by an addendum. Acsa required the addendum to be signed and returned by bidders with their bids. Acsa averred that it failed to inform bidders that their failure to sign and return the addendum would result in disqualification. One class of bidders was disqualified because they failed to sign and return the addendum. But this class of bidders was not informed that their failure would result in their disqualification. A second class of bidders did sign and return the addendum, but were nevertheless wrongly disqualified.

The second ground of review was based on the fact that it had prescribed that as at the date of bid specification, advertisement, evaluation or adjudication, no letter of non-conformance or non-performance should be in effect in respect of a bidder. If this prescription was not met, a bidder was disqualified from consideration. There were three non-conformance letters issued by Acsa against TTE at the relevant dates. TTE should have been disqualified. But its bid was evaluated and the tender was awarded to it. This, it contended, was a reviewable error.

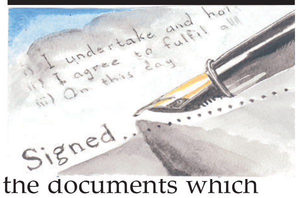
In the course of awarding the tender, certain members of Acsa's Bid Evaluation Committee, including the chairperson, were not aware that non-conformance letters had been issued and were in effect in respect of TTE so as to disqualify it from consideration. However, one member of the Committee, Mr Tladi, did know of the non-conformance letters issued to TTE but failed to bring them to the attention of the chairman because he thought they had been withdrawn.

Acsa contended that it proceeded in error to consider TTE's bid when it should have been disqualified because the members of the Committee were ignorant of the letters of non-conformance, save for Mr Tladi, who was mistaken as to the fact that the letters had been withdrawn.

Acsa brought proceedings for judicial review to set aside its own decision to award the tender to TTE. Its grounds of review were stated to be errors of fact committed by Acsa in awarding the tender to TTE.

THE DECISION

To make out a case on review on the basis of mistake of fact, an applicant must show that the decision was vitiated by error as to a material fact that is uncontentious and objectively verifiable.



The disqualification of 13 bidders on the basis that they signed but did not complete the addendum was said to be irregular. But this irregularity was not that these bids were in fact compliant but rather that these bidders were not informed of the consequence of non-compliance.That is not an irregularity concerning an error of fact but a complaint of unfairness. The pleaded ground of review by Acsa was error of fact. Accordingly, this irregularity could not be sustained because unfairness was something different from error of fact.

In any event, this irregularity could not succeed even if a case of unfairness had been made out. The unfairness, if any, was done to the excluded bidders. They did not complain of their exclusion. It was not unfair to Acsa. The exclusion of these bidders only affected Acsa if it skewed the competitive bidding so as to impact the outcome of the tender. No such case was made by Acsa.

It followed that the exclusion of the 13 bidders for failure to complete the addendum was in any event permissible.

Acsa failed to put up the Committee Report, though it promised to do so. It failed to reference the documents which would bear out the contention that three excluded bidders did indeed return the addenda, duly completed and signed. The documents in the record that do reflect signed addenda are not correlated with the named bidders who were excluded. Nor was there any explanation given as to how the error was made by the Committee. Acsa failed to make a case on the basis of facts that are uncontentious and verifiable. Accordingly, if the Committee did fall into error, that error was not shown to be based on material facts that met the required standard.

The application failed.

A court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.

ORIGO INTERNATIONAL (PTY) LTD v SMEG SOUTH AFRICA (PTY) LTD

A JUDGMENT BY VAN OOSTEN J
GAUTENG LOCAL DIVISION, JOHANNESBURG
25 JUNE 2018

2019 (1) SA 267 (GJ)

A tender to pay is a promise or an undertaking to pay and, accordingly, does not constitute actual payment. Such a tender, although not constituting payment, is not without legal effect. It has the consequence that should it be found that the admitted amount was in fact the true amount owing, the tendering party will be protected from the consequences of non-compliance set forth by the other party.

THE FACTS

In terms of a written agreement, on 8 July 2014 Smeg South Africa (Pty) Ltd appointed Origo International (Pty) Ltd as its exclusive retailer of all its unboxed, discontinued, damaged and B-grade appliances that had been returned to it from its existing retailers.

By letter dated 14 August 2017 Smeg demanded payment from Origo, within seven days, of the sum of R419 310,65 in respect of goods sold by Origo on consignment during December 2016, which in terms of the agreement had become due and owing by 16 January 2017. The claim amount arose from four invoices rendered by the respondent in December 2016 in respect of which two subsequent credits were passed. The demand further stated that, failing payment, the agreement would be cancelled.

Origo denied the alleged indebtedness and made reference to an 'on-going dispute in respect of certain variances as from January 2017'. Origo stated that it had called upon Smeg to resolve the matter by way of a joint reconciliation. Origo stated: 'Please be advised, to the extent that it is properly determined that any amounts are due to your client, same will be paid by our client.' Smeg replied in providing some calculation of its claim and reiterated that, failing payment thereof by 21 August 2017, the agreement would be cancelled.

On 18 August 2017 Origo prepared a detailed reconciliation of the account which showed that a lesser amount of R78 053,29 was due to Smeg. Origo disputed the correctness of the amounts reflected in Smeg's invoices but, based on its own reconciliation, acknowledged that the admitted amount was payable to Smeg. On 21 August 2017, Origo stated that it tendered payment of the lesser amount, which payment would be effected upon confirmation that this amount constituted full and final settlement of the dispute.

By letter dated 22 August 2017 Smeg cancelled the agreement. On 23 August 2017 Smeg instituted action against Origo for payment of R419 310,65. The action was defended by Origo.

On 6 September 2017, Origo applied for an order declaring Smeg's purported cancellation invalid and that Smeg be ordered to comply with the agreement, in particular to provide Origo with stock as ordered on 2 August 2017.

THE DECISION

The question was what was the validity and legal effect, in a contractual setting, of a tender to pay in lieu of actual payment? The dispute between the parties concerned the correctness of the amount claimed by Smeg. The issue was whether Origo's tenders constituted compliance with the demand. Origo contended that a proper tender was made in regard to an admitted and subsequent duly proven amount of indebtedness, which disentitled Smeg from cancelling the agreement. Smeg disputed that a proper tender was made and in any event contended that a tender for payment does not constitute payment, which is what Origo was required to do in order to avoid cancellation of the agreement pursuant to the demand.

The question was whether the tender, in stipulating that payment would be effected upon confirmation by Smeg that the admitted amount was accepted in full and final settlement of the

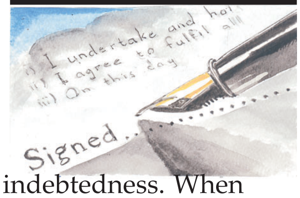
dispute, was conditional. Although the tender was made in tandem with confirmation required aimed at a full and final settlement, in the context used it was not intended as an offer of compromise. A full reconciliation had been done by then and the amount found owing was tendered which, upon acceptance thereof, in any event, would have resulted in a full and final settlement of the dispute. Accordingly, the tender was unconditional.

The tender had to be considered against the background facts. A tender to pay is a promise or an undertaking to pay and, accordingly, does not constitute actual payment. Origo's tender, leaving aside the correctness of the amount tendered, accordingly, did not constitute payment. The tender, although not constituting payment, was not without legal effect. It had the consequence that should it be found that the admitted amount (or the lesser amount subsequently paid) was in fact the true amount owing, Origo would be protected from the consequences of non-compliance set forth in the demand for payment, which was cancellation of the agreement. The dispute concerning the exact amount owing had not been resolved and remained in dispute. The dispute could only be resolved upon proper ventilation thereof in the action that had already been instituted. The validity of Smeg's cancellation of the agreement was wholly dependent upon proof of the amount claimed and that, failing such proof, Smeg's purported cancellation ought to be declared invalid in accordance with the relief sought by Origo.

The tender in the present matter must be considered against the background facts and in particular that the applicant was in terms of the agreement liable to pay the December invoices by 16 January 2017. A tender to pay is a promise or an undertaking to pay and, accordingly, does not constitute actual payment. The applicant's tender, leaving aside the correctness of the amount tendered, accordingly, did not constitute payment.

The matter, however, does not end there. The applicant's tender, although not constituting payment, was not without legal effect.

BASSON *v* HANNA



A JUDGMENT BY ZONDI JA (SHONGWE JA, WILLIS JA, DAMBUZA JA AND MATHOPO JA concurring)
SUPREME COURT OF APPEAL
6 DECEMBER 2016

2017 SACLR 12 (A)

Despite doubts ostensibly created by* ISEP Structural Engineering & Plating Ltd v Inland Exploration *2001 (4) SA 159 (SCA) a party who is, prima facie entitled to specific performance may claim in the alternative damages as surrogate for specific performance.

THE FACTS

During 2002 Hanna, Basson and Dreyer concluded an oral agreement relating to the development of a property, and a sale by Basson to Hanna and Dreyer of one third of his member's interest in the CC. At the time of the agreement Basson was the sole member of Plot 31 Vaalbank CC. The CC owned the property concerned. Basson undertook to develop the property by building three separate houses each with a cottage on the property.

The parties took occupation of each of the three residential units which were constructed on the property on 1 December 2002. During January 2003 Basson issued to Hanna a tax invoice confirming the purchase price of R624 953 for the sale of a one-third share of the member's interest in the CC, payable in monthly instalments of R8229.32. In addition to paying the monthly instalments Hanna was also obliged to pay a third of the CC's monthly operating expenses and maintenance costs. Hanna regularly paid the monthly instalment of R8 229.32, together with his portion of the CC's expenses. This continued until June 2007. In a letter dated 6 August 2007 Basson's attorneys informed Hanna's attorneys that there was no valid agreement between the parties. In a further letter dated 20 February 2008 they were informed by Basson's attorneys that the agreement was null and void, because of its non-compliance with the Property Time-Sharing Act and the Share Blocks Control Act.

Subsequently, Hanna elected to hold Basson to the terms of the agreement. He asked Basson to furnish him with the total outstanding amount so as to settle his indebtedness. When Basson threatened to cancel the agreement because Hanna was allegedly in arrears with his monthly instalments and contributions towards the expenses of the CC, Hanna made payment of the amount that was alleged to be owing.

Hanna, instituted an action against Basson and the other appellants seeking an order compelling Basso to transfer one third of the member's interest in the CC to him against payment of the outstanding balance, alternatively payment of the sum of R2 650 824.72 as damages in lieu of specific performance.

Basson and the CC defended the action and denied that Hanna was entitled to an order for specific performance or damages as a surrogate for performance. They contended that by failing to pay all amounts due by him in terms of the agreement timeously and in full, Hanna repudiated the agreement. In consequence, Basson cancelled the agreement; alternatively no agreement came into being as there was no consensus between the parties regarding the rate of interest which would apply in respect of the agreement.

THE DECISION

Basson contended that in the absence of a determination on what the parties agreed upon as far as the interest rate is concerned, it was impossible to determine the quantum of damages. This was crucial as the determination of the balance outstanding was dependent on the nature of the interest.

However, in general, parties' failure to agree on the rate at which the amount payable under an agreement is to be calculated, does not render the agreement invalid. If no rate has been agreed

on, expressly or impliedly, and the rate is not governed by any other law, the rate of interest is that prescribed in terms of the Prescribed Rate of Interest Act (no 55 of 1975).

As far as the defence based on repudiation was concerned, Basson's actions after June 2007 constituted conduct from which the only reasonable inference that could be drawn was that he did not regard himself bound by the agreement and that he was not prepared to perform its terms. This was apparent from the correspondence which exchanged between the parties in 2007 and 2008, and the subsequent events.

Despite doubts ostensibly created by *ISEP Structural Engineering & Plating Ltd v Inland Exploration* 2001 (4) SA 159 (SCA) the principle, that a party who is, prima facie entitled to specific performance may claim in the alternative damages as surrogate for specific performance, has been consistently followed by the courts. Hanna was ready to carry out his own obligation under the agreement and had a right to demand either literal performance, or monetary value of the performance. His claim for damages, to the extent that he sought the monetary value of the performance, was akin to a claim for the replacement value of the lost property.

Hanna was entitled to the order he sought. The appeal was dismissed.

In general, the parties' failure to agree on the rate at which the amount payable under the agreement is to be calculated, does not render the agreement invalid. If no rate has been agreed on, expressly or impliedly, and the rate is not governed by any other law, the rate of interest is that prescribed from time to time by notice in the gazette by the relevant Minister in terms of the Prescribed Rate of Interest Act 55 of 1975.

DE VILLIERS v THE TRUSTEES FOR THE TIME BEING OF THE GJN TRUST

A JUDGMENT BY VAN DER MERWE JA (SHONGWE ADP, SERITI JA, ROGERS AJA and SCHIPPERS AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2018

2019 (1) SA 120 (SCA)

Companies

In an application in terms of section 420 of the Companies Act (no 61 of 1973) a court may avoid the dissolution of a company in any circumstances where the interests of justice warrant such a cause. Section 420 provides the court with a wide discretion that defies precise definition.

THE FACTS

On 8 March 2013, Cape Animal Health Brokers (Pty) Ltd was finally liquidated. The only shareholder in the company was the Francois de Villiers Share Trust. De Villiers was the trust's duly authorised trustee.

Only the Standard Bank proved a claim against the company in liquidation. This was a secured claim of approximately R340 000 and concurrent claims of approximately R370 000. Further unproved concurrent creditors of the company amounted to some R308 000. The first and final liquidation and distribution account was confirmed by the Master on 11 February 2014. A dividend equal to its secured claims and a very small concurrent dividend were distributed to Standard Bank. Concurrent debts of the company of some R7,4m remained unpaid.

The Master reported that the affairs of the company had been completely wound up. The company was thereafter dissolved in terms of section 419(2) of the Companies Act (no 61 of 1973). The liquidators were discharged.

Thereafter, the GJN Trust averred that, according to the financial records of the company, Cape Veterinary Wholesalers CC owed the company a debt in the amount of R1 232 847. 04, but that during December 2012 that debt had been written off on the instruction of De Villiers, the sole member of the CC. The GJN Trust also alleged that trading stock of the company to the value of R650 000 had, on the instruction of De Villiers been transferred first to the CC and then to another business of De Villiers. The GJN Trust accordingly contended that it had presented sufficient evidence to justify an order in terms of section 420 of the Act for purposes of appointment of new liquidators to investigate these matters with a view of retrieving assets for distribution to creditors.

GJN then brought an application for an order declaring the dissolution of the company to have been void in terms of section 420. An order was granted. Paragraph 2 of the order provided that the Master was authorized and directed to appoint new liquidators, which liquidators were to be clothed with all powers and competencies as if the company was liquidated de novo. The Master of the High Court appointed liquidators. De Villiers and the other appellants applied to have the section 420 order set aside on the ground that it had erroneously been made without notice to any of them, but this application was dismissed.

De Villiers appealed against the dismissal of the rescission application.

THE DECISION

The central issue was whether any of the appellants (De Villiers, the CC and the trust) should have been joined in the section 420 application. The determination of the issue called for an analysis of the ambit of section 420 of the Act and the effect of the section 420 order.

Section 420 (which is similar to section 83(4) of the new Companies Act) provides that 'When a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, upon such terms as the Court thinks fit, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the

company as might have been taken if the company had not been dissolved.'

A court may avoid the dissolution of a company in any circumstances where the interests of justice warrant such a cause. Section 420 provides the court with a wide discretion that defies precise definition.

The effect of an order under s 420 is to revive the company and to restore the position that existed immediately prior to its dissolution. Thus the company is recreated as a company in liquidation, with the rights and obligations that existed upon its dissolution. Property of the company that passed to the state as bona vacantia is automatically re-vested in the company by operation of law. An order under s 420 is only retrospective in this sense and does not validate any corporate activity of the company which may have taken place during the period of its dissolution.

In the light of these considerations and of the explicit purpose of the section 420 application, namely investigation aimed at distribution of assets not dealt with in that account, para 2 of the section 420 order had to be interpreted to mean that the liquidators were to have the powers in terms of the Act to deal with further assets of the company. It followed that further assets of the company recovered by the liquidators were to be dealt with in a further liquidation and distribution account in terms of section 403 of the Act.

In the rescission application DeVilliers averred that the section 420 order adversely affected his and the other appellants' interests in that they were not afforded the opportunity to respond to the serious allegations of impropriety that had been made in the section 420 application. This missed the point. Although the purpose of the section 420 application was to enable the liquidators to claim from the appellants, the subject matter of that application was the restoration of the dissolved company to a company in liquidation and not the enforceability of the alleged claims against the appellants. The prosecution of those claims would take place by due process, during which the appellants would be afforded the full opportunity to protect their rights.

As unproved creditors, De Villiers and the CC also had no legal interest in the section 420 order. The rights of unproved creditors could clearly not be adversely affected by the revival of the company to a company in liquidation. The same had to apply to the mere fact that the section 420 order restored De Villiers and the CC as the director and shareholder respectively of the company in liquidation.

REEZEN LTD *v* EXCELLERATE HOLDINGS LTD

A JUDGMENT BY MEYER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
22 JUNE 2018

2018 (6) SA 571 (GJ)

For purposes of determining whether a transaction constitutes a 'series of integrated transactions' as referred to in section 41(3) of the Companies Act (no 71 of 2008), the particular transactions in question must be examined with a view to determining whether they form a composite whole.

THE FACTS

On 13 February 2018, Excellerate Holdings Ltd, Zanmet Trading 7 (Pty) Ltd and Boundary Terraces No 15 (Pty) Ltd (BT) concluded a written share sale and subscription agreement. In terms thereof, BT in one indivisible transaction, would purchase 19 000 000 treasury shares at a price of R5,40 per share from Excellerate's wholly owned subsidiary, Zanmet, and subscribe to 56 892 489 new shares that would be issued to BT at a price of R5,40 per share.

Once the share sale and subscription agreement had been concluded and implemented, the total issued shares increased to 247 168 371 shares. The total issued voting shares also increased to 247 168 371. The voting rights attached to the 19 000 000 treasury shares could then be exercised by BT. The total management voting shares remained 28 050 000 shares (reduced to 11,35% of the voting shares) and BT then owned 105 657 799 voting shares (42,75%). The independently owned voting shares remained 113 460 572 (reduced to 45,90% of the voting shares). Reezen held 19,05% of the voting shares before BT's involvement and 13,20% after the conclusion and implementation of the share sale and subscription agreement. The treasury shares were reduced to nil.

The share sale and subscription agreement had the effect of creating a cluster of shareholders, consisting of management and BT, that could control Excellerate: it could not only pass any ordinary resolution, but it could also veto any ordinary or special resolution. Furthermore, there was a dilution of the minority shareholdings from 66,24% to 45,90% of the total issued voting shares.

Reezen Ltd contended that the share sale and subscription agreement contravened section 41(3) of the Companies Act (no 71 of 2008) and that the directors of Excellerate exercised their power to sell and to issue the shares contrary to their fiduciary duties; they did not exercise their power bona fide for the benefit of Excellerate and for a proper purpose.

Reezen acontended that the transactions comprising the share sale and subscription agreement constituted a 'series of integrated transactions' as contemplated in section 41(3), read with the definition of the phrase in sections 1 and s 41(4)(b) of the Companies Act. The exact moment of calculating the 30% restriction in respect of the new shares that were issued as a result of the series of integrated transactions was the moment immediately before the share sale and subscription agreement was concluded. Excellerate, BT and Zanmet argued that the sale agreement and the subscription agreement should be regarded as two independent agreements, the former having been effected before the latter.

Reezen brought an application for an order that the sale and subscription be set aside.

THE DECISION

The only questions to be determined were (a) whether the share sale and subscription agreement was concluded in contravention of section 41(3) of the Companies Act and, if so, (b) whether it ought to be declared void, in whole or in part.

Section 41(3) provides that an issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires

approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.

The two transactions embodied in the share sale and subscription agreement — the sale transaction between Zanmet and BT and the subscription agreement between Excellerate and BT — conformed to the definition of 'series of integrated transactions' as contemplated in section 41(3) read with section 41(3)(b) of the Companies Act. Both transactions were entered into within a 12 – month period and involved related persons as contemplated in section 41(4)(b)(ii)(aa). They were entered into on the same day. BT was the acquirer in both transactions. Zanmet, being a wholly owned subsidiary of Excellerate and therefore a related person to Excellerate, sold the treasury shares to BT pursuant to the sale transaction and Excellerate was the entity that issued the new shares to BT pursuant to the subscription transaction. Both transactions involved the acquisition or disposal of an interest in one particular company — the shares of Excellerate.

The sale transaction and the subscription transaction embodied in the share sale and subscription agreement, therefore, amounted to a 'series of integrated transactions'. The 56 892 489 new shares that were issued as a result of the 'series of integrated transactions' constituted 33,2% of the voting power of all the shares held by the shareholders immediately before the series of transactions. The approval of the shareholders by special resolution was not obtained and section 41(3) of the Companies Act was thus contravened.

In the circumstances, the share sale and subscription agreement was to be declared void and the issue by the Excellerate of its shares to BT and the sale of its treasury shares to BT were set aside.

Section 38(1) of the Companies Act empowers the board of a company to issue shares. Section 41(3) limits that power and requires shareholder approval, inter alia, for (a) the issue of shares if the voting power of the class of shares that are issued or issuable as a result of the transaction will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction; or (b) the conclusion of 'a series of integrated transactions' if the voting power of the class of shares that are issued or issuable as a result of the series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction. The board of directors of a company, therefore, has the power to issue shares without shareholder approval up to a maximum of 30% of the voting power of all shares of that class. The moment of calculating the voting power of all the shares of the relevant class held by shareholders is 'immediately before the transaction or series of transactions'. Nothing in the context of the Companies Act detracts from the clear and unambiguous meaning of s 41(3). Its purpose is to protect shareholders in relation to share issues from and beyond the 30% level.

ABSA BANK LTD v MOKEBE

JUDGMENT BY TSOKA J, PRETORIUS J AND WEPENER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
12 SEPTEMBER 2018

2018 (6) SA 492 (GJ)

Credit Transactions

1. In all matters where execution is sought against a primary residence, the entire claim, including the monetary judgment, must to be adjudicated at the same time.
2. Execution against movable and immovable property is not a bar to the revival of the agreement until the proceeds of the execution have been realised.
3. Any document initiating proceedings where a mortgaged property may be declared executable must contain a statement in a reasonably prominent manner setting out the defendant's rights under the National Credit Act.
4. A reserve price should be set by a court in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify such an order.

THE FACTS

After the court was presented with a number of foreclosure matters, the Judge President of the Gauteng Local Division issued a directive in terms of section 14(1)(a) of the Superior Courts Act setting out issues requiring determination by the Full Court. These were:

(a) Does a court have a discretion, when postponing an application for executability to afford the mortgagor an opportunity to remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue under the National Credit Act, and the mortgagee asks for an immediate money judgment for the accelerated full outstanding balance under the bond, to decline that request and postpone it too so that it too is ultimately dealt with at the same time and in the same enquiry when the executability application is dealt with?

(b) If the court does have such a discretion, meaning that the court may in its discretion decline immediately to grant a default money judgment for the accelerated full outstanding balance, should the Practice Manual request uniformity of treatment, meaning uniformity of manner of exercise of discretion, by the judges in this Division?

(c) If so, what should that uniformity of treatment be? In particular, is the current suggested manner of dealing with the issue, as stated in the latest version of the Practice Manual, being the postponement of the application for the money judgment as well, objectionable/ desirable?

(d) Does such an immediate money judgment for the accelerated full balance qualify as any other court order enforcing that agreement for purposes of section 129(3) and (4) of the National Credit Act? If it does so qualify, does it have the consequence of prohibiting the credit provider from reinstating or reviving the credit agreement — despite the arrears having been paid up — once the mortgagee bank, on the strength of such a judgment for the accelerated full balance, will have attached and sold in execution movable property of the mortgagor?

(e) Even if such a judgment could be given on the basis that it would be capable of subsequently being set aside or declared null and void if the mortgagor does remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, is it desirable that the court makes such an order, given —

(i) its potential for attachment and execution of movables in the meantime? and

(ii) that it may be undesirable to make an order which is not final in that it may potentially be set aside/declared null and void later?

The Full Court was also to consider under what circumstances a court should set a reserve price and how this was to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.

THE DECISION

There is a duty on banks to bring their entire case, including the money judgment, based on a mortgage bond, in one proceeding simultaneously. Should the matter require postponement for whatever reason, the entire matter should be postponed.

Question (a)

Because the claim for payment and the claim for execution must

be heard simultaneously, it stood to reason that in the event of the claim for execution not being finalised and being postponed, the monetary claim should be dealt with in the same way. There was no argument against the court's power to exercise its discretion to postpone the granting of an order declaring property executable or to defer its operation where the property is a debtor's primary residence because the order implicates a constitutional right — the constitutional s 26 right to adequate housing.

Question (b)

The Practice Manual should be amended to remove the reasons therein stated why the money judgment must be heard together with the claim for executability.

Question (c)

The postponement of the money judgment was both desirable and necessary and should be heard together with the question of executability, should any part of the matter be postponed.

Question (d)

This issue had partially been resolved by the critical finding in this matter. However, the question whether a money judgment for the accelerated full balance qualified as 'any other court order enforcing that agreement' for purposes of section 129(3) and (4) of the NCA was implicit in the directive issued by the Judge President and required consideration. It was necessary to have regard to the provisions of section 39(2) of the Constitution which enjoins courts when interpreting any legislation, such as the National Credit Act to promote the spirit, purport and objects of the Bill of Rights.

Question (e)

The attachment of movables after judgment and before the realisation of the sale in execution of the mortgaged property is of no consequence due to the interpretation of section 129(4)(b) of the National Credit Act.

Reserve price

Setting a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property but yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realisation of the property. In all the circumstances, a reserve price should be set in all matters where facts indicate it. It will not be possible to set out a numerus clausus of factors to be considered in each case as the reserve price will depend on the facts of each individual matter.

1. In all matters where execution is sought against a primary residence, the entire claim, including the monetary judgment, must be adjudicated at the same time.
2. Execution against movable and immovable property is not a bar to the revival of the agreement until the proceeds of the execution have been realised.
3. Any document initiating proceedings where a mortgaged property may be declared executable must contain the following statement in a reasonably prominent manner:

   'The defendant's (or respondent's) attention is drawn to section 129(3) of the National Credit Act (no 34 of 2005) that he/she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.'
4. Save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property which is the primary residence of a debtor, where the facts disclosed justify such an order.

ABSA BANK LTD *v* NJOLOMBA*

A JUDGMENT BY FISHER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
5 MARCH 2018

2018 (5) SA 548 (GJ)

A home loan creditor may obtain a money judgment against a defaulting debtor and postpone an application for executability of the mortgaged property.

* Similar cases were heard simultaneously with this one

THE FACTS

Absa Bank Ltd applied for judgment against Njolomba and others following default in repayments of a home loan.

The loan agreement had not been cancelled by the bank. It sought a money judgment in respect of the accelerated debt. It did not ask that the property be declared executable. The bank acknowledged that it was not entitled to such an order. It contended that it was entitled to a money judgment for the debt owing under the agreement, given the default, and given that all the legal and contractual requirements for such judgment had been met.

The court raised the question whether the order sought could be granted separately from a declaration of executability.

THE DECISION

Pivotal to the court's function in preserving the credit agreement and thus the debtor's home, is section 129(3) of the National Credit Act, which provides that notwithstanding that a debtor has fallen into arrears he 'may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied'.

This means that, even after judgment, the debtor is entitled to remedy any default by paying the arrear amounts together with default charges and reasonable costs of enforcing the credit agreement.

An applicant who has not yet been able to comply with the requirements for obtaining a declaration of executability in terms of Rule 46 but who has in terms of its agreement the right to seek judgment, will generally seek to obtain judgment for the accelerated indebtedness and to postpone the declaration of executability.

The bank argued that Rules 46 and 46A, far from militating against the granting of a judgment before a declaration of executability, in fact, envisage a procedure where a money judgment has already been taken. In terms of rule 46(1)(a), a return of process against movable property is to be a first step of execution against immovable property. It was argued thus, that this could not be in contemplation if the taking of a money judgment separately should not be entertained. It was contemplated that judgment be taken under the credit agreement before the execution process set out by the Rule is implemented.

To attach the right to enforce contractual terms to the discretionary question of whether the mortgaged property should be declared executable, created an uncertainty as to when or even if judgment could ever be granted for the indebtedness under the contract. In effect, it sought to create a discretion in relation to the application of the substantive law where none exists. This struck at the very heart of these commercial contracts. It is not merely a procedural regulation of process. What was posited was that a postponement of uncertain duration and effect be given across the board in each instance where the debtor's residence is the security for the debt and without consideration of any other factor. This failed to draw a distinction between the right to judgment on the one hand and the right to execute on the other.

Whilst the National Credit Act aims to correct imbalances by providing additional rights and protections to the consumer, it also aims to ensure that South Africa's credit market becomes and remains 'competitive, sustainable, responsible and efficient'.

In the present case, the bank was entitled to the order that it sought in relation only to the money judgments. There was no reason to dictate that there be judicial oversight in relation to these matters as there was no danger of foreclosure at this stage.

In these matters before me, it is argued on behalf of all the applicants that rules 46 and 46A, far from militating against the granting of a judgment before a declaration of executability, in fact, envisage a procedure where a money judgment has already been taken. In terms of rule 46(1)(a), a return of process against movable property is to be a first step of execution against immovable property. It is argued thus, that this could not be in contemplation if the taking of a money judgment separately should not be entertained. Furthermore, on a linguistic and sensible reading thereof, rule 46A proceeds from the assumption that a 'judgment debt' already exists. Rule 46A(1) provides: 'This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.' Rule 46A(2)(a)(ii) enjoins a court to consider alternative means of 'satisfying the judgment debt'. Reference is pertinently made to 'judgment debtor' and 'judgment creditor' throughout the rule. All this strongly conveys that it is contemplated that judgment has been taken under the credit agreement before the process set out by the rule is implemented.

WITZENBERG PROPERTIES (PTY) LTD v BOKVELDSKLOOF BOERDERY (PTY) LTD

A JUDGMENT BY CLOETE J
WESTERN CAPE DIVISION, CAPE TOWN
28 JUNE 2018

2018 (6) SA 307 (WCC)

Property

If a dispute is subject to an appeal, an interdict based on the assertion that the right whose determination is subject to appeal is premature. An expert opinion which is based on speculation cannot establish that a party has or will suffer harm.

THE FACTS

On 24 April 2018 the Minister of Water Affairs and Sanitation issued a final determination of the extent and lawfulness of Bokveldskloof Boerdery (Pty) Ltd's existing water uses in terms of section 35(4) of the National Water Act (no 36 of 1998), limiting its use of groundwater on its property to 161 400 cubic metres per annum. Bokveldskloof was then taking water from three boreholes on its property, which was situated in close proximity to one of Witzenberg Properties (Pty) Ltd''s dams.

The Minister's determination made no reference to a specific number of boreholes or to any specifically identified boreholes on Bokveldskloof's property. It determined that the existing lawful water use for Bokveldskloof was 1 012 925 cubic metres per annum for surface water and 161 400 cubic metres per annum for groundwater.

Bokveldskloof appealed that determination in terms of section 148 of the Act. Section 148(2)(b) of the Act suspended the operation of the Minister's determination pending conclusion of the internal appeal in the Water Tribunal. Bokveldskloof did not, and would not, limit its taking of groundwater from the three boreholes to any of the uses permissible under the Act. These pertained to the taking of groundwater for domestic use, small gardening (other than for commercial purposes), and watering of grazing cattle in certain instances.

Over the 19-week period spanning 11 December 2017 to 23 April 2018, Bokveldskloof abstracted groundwater from the three boreholes in a total volume of 458 430 cubic metres. This constituted 82,8% of the total volume abstracted from all operating boreholes on Bokveldskloof's property during this period.

Witzenberg was concerned about the negative effect which the abstraction of groundwater from boreholes that had been sunk in close proximity of its dam might have on the volume of water that had been collected in and was being stored in the dam itself. As the dam was not lined, Witzenberg was concerned that stored water would be abstracted or siphoned off via the boreholes concerned.

A specialist hydrogeologist, Mr D Barrow, determined that, given the proximity of the new borehole to the dam and the shallow depth of the first water strike, it was likely that a borehole and the dam were connected and that abstraction of water from that borehole would increase the flow from the borehole to the dam and that the taking of water by means of the other boreholes would be likely to have a direct detrimental effect on the volume of water which was being stored in the dam.

Photographs of the dam on Witzenberg's property in close proximity to the boreholes showed that it was already almost empty. Bokveldskloof stated that this had been the case for almost a year before because Witzenberg had been constantly and continuously pumping water in the dam to one of the other storage dams on the farm. This allegation was not challenged by Witzenberg in reply.

The Barrow report stated that the borehole drilled in October 2017 'intersected water strikes' on Bokveldskloof's property, that the dam was 'reportedly unlined', and that 'the eastward dipping lithological contacts were likely to be recharged by the dam, and

the newly drilled borehole had most likely intersected water bearing zones that were directly recharged by the proximal dam'. It concluded that the abstraction from the newly drilled production borehole would result in a drop in water level at the borehole. This would increase the hydraulic gradient towards the borehole. Flow was directly proportional to hydraulic gradient, and assuming a constant hydraulic conductivity, this would result in increased flow from the dam towards the borehole. Given the proximity of the borehole to the dam and shallow depth of the first water strike, it was likely that the borehole and dam were connected, and that abstraction from the borehole would increase the flow from the borehole to the dam. This assumed that there were no impermeable layers or flow barriers between the dam and the borehole, or underlying the dam.

Witzenberg sought an interdict against Bokveldskloof to prevent it from taking water from the three boreholes on Bokveldskloof's property, which were situated in close proximity to its dam, for any purpose other than the uses permissible under schedule 1 of the Act.

THE DECISION

The determination of the dispute was not a 'discrete issue' pertaining to the lawfulness or otherwise of Bokveldskloof's abstraction of groundwater from three specific boreholes in close proximity to one of Witzenberg's dams. The abstraction of water from these boreholes was inextricably linked to whether or not Bokveldskloof was entitled to abstract groundwater exceeding 161 400 cubic metres per annum. One could not be determined to the exclusion of the other. This was Witzenberg's fundamental problem in persisting with relief on the merits, in the knowledge that this very issue was the subject of an internal appeal and might in future be the subject of judicial review. It was not appropriate for the court to make any such determination at this stage.

The Act was enacted for the benefit of the general public and not in the interests of a particular person or class. That Witzenberg coincidentally is an entity forming part of the general public took the matter no further.

It was thus necessary to consider whether Witzenberg had demonstrated that it had sustained or apprehended actual harm.

It was significant that Witzenberg had not challenged Bokveldskloof's allegations concerning the reasons for its empty dam. It was also significant that the Barrow report was merely a desktop study. Barrow's opinion was self-evidently speculative. The glaring material contradiction in his report concerning the increased flow from the borehole to the damremained unexplained. Accordingly little if any weight could be attached to the Barrow report.

Witzenberg did not not put up any further expert opinion on the issue of connectivity based on independently obtained scientific evidence. At best for Witzenberg, all that it had demonstrated was a theoretical possibility that the three boreholes were siphoning off water from the dam. Witzenberg had according failed to show, on a balance of probabilities, that it had sustained or apprehended actual harm.

XANTHA PROPERTIES 18 (PTY) LTD v NATIONAL HOME BUILDERS REGISTRATION COUNCIL

Property

A JUDGMENT BY NUKU J
WESTERN CAPE DIVISION, CAPE TOWN
16 MAY 2018

2018 (6) SA 320 (WCC)

The provisions of section 14, read with the definition of 'home' and 'housing consumer' in section 1 of the Housing Consumers Protection Measures Act (no 95 of 1998) do not require the enrolment of a proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

THE FACTS

Xantha Properties 18 (Pty) Ltd owned fixed property in Cape Town. It was in the process of developing 223 residential apartments, as well as two ground-floor retail shops, on the property. Xantha stated that it would not be selling any of the residential apartments to third parties but would retain ownership of the entire building, including the residential apartments. It also stated that it intended to earn rental income from these residential apartments by renting them out upon completion.

During February 2017 Mr Smith, a D director of Xantha, made enquiries with the National Home Builders Registration Council about the requirement for the enrolment of the residential apartments. Employees of the Council, advised him that the Council required every construction project undertaken by a registered home builder to be enrolled, irrespective of whether or not there was a third-party housing consumer involved. In addition to this, the Council's legal advisor telephonically advised Xantha that it would not be able to apply for exemption under section 29 of the Housing Consumers Protection Measures Act (no 95 of 1998).

Smith submitted the application for enrolment of the residential apartments to the Council on 22 February 2017. An employee of the Council advised him on 14 March 2017 that the application was incomplete. She requested him to submit a schedule of prices in respect of all the residential apartments, as well as a completed form. In response Smith advised the employee that there were no individual schedules of prices in respect of the residential apartments as Xantha did not intend selling them. Smith also pointed to the fact that the Council did not have forms designed for the enrolment of the type of residential apartments under construction. The Council did not respond to the issues raised by Smith, but on 6 April 2017 forwarded a 'pro forma' invoice to him requiring payment of the enrolment fee in the sum of R1 583 143,90. Xantha paid the enrolment fee on 11 April 2017.

In enrolling the residential apartments, Xantha did so without prejudice to its right to challenge the lawfulness of the requirement for the enrolment of the apartments.

Xantha challenged the lawfulness of the requirement to register the residential apartments on the basis that, properly interpreted, the relevant provisions of the Act, read with the relevant provisions of the Regulations, did not require the enrolment of the residential apartments under construction. The Council and the Minister of Human Settlements contended that the relevant provisions of the Act and Regulations required the enrolment of the residential apartments.

Xantha sought an order declaring that the provisions of section 14 of the Act, read with the relevant provisions of section 1, 10 and 10A of the Act, and regulations 1(2) and 1(4) of the Regulations, do not require the enrolment of the proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

THE DECISION

The central issue was whether section 14(1) of the Act requires

the enrolment of the residential apartments that Xantha was constructing.

Section 14(1) of the Act provides that a home builder shall not commence the construction of a home falling within any category of home that may be prescribed by the Minister for the purposes of this section unless (a) the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner, (b) the Council has accepted the submission contemplated in paragraph (a) and has entered it in the records of the council, and (c) the Council has issued a certificate of proof of enrolment in the prescribed form and manner to the home builder.

Section 1 defines a home as any dwelling unit constructed or to be constructed by a home builder for residential purposes or partially for residential purposes, including any structure prescribed by the Minister for the purposes of this definition or for the purposes of any specific provision of this Act, but does not include any category of dwelling unit prescribed by the Minister'.

The purpose of the Act is to provide protection to housing consumers. This appears from the name of the Act as well as the preamble which states: 'To make provision for the protection of housing consumers; and to provide for the establishment and functions of the National Home Builders Registration Council; and for matters connected therewith.'

Regulation of the home building industry is a legitimate government business. This, however, has to be understood in context: the context being the protection of housing consumers through various measures. The regulation of the home building industry must, thus, be aimed at achieving the protection of housing consumers. Where there are no housing consumers, as in the case of the residential apartments that Xantha was constructing, there could no longer be any legitimate business that the regulation of the home building industry would serve.

To interpret the definition of 'home' by limiting it to homes acquired or to be acquired by housing consumers achieves the purposes of the Act, namely to protect housing consumers. This interpretation also aligns with the entire scheme of the Act in that the Act is predicated on a building contract.

To require the enrolment of homes in circumstances where there are no housing consumers to protect would be irrational and unconstitutional.

The order sought by Xantha was granted.

SHAIKH v TRAFFORD TRADING (PTY) LTD

JUDGMENT BY D PILLAY J
KWAZULU NATAL DIVISION, DURBAN
29 NOVEMBER 2016

2017 SACLR 1 (KZD)

Insolvency

The Master of the High Court controls any interrogation process brought against a director of a company in liquidation. Such a process cannot be contested if it is brought in order to obtain material information concerning the company or its affairs. Once the Master has issued the subpoena to secure the director's attendance, any creditor or the liquidator is entitled to invoke their rights to interrogate the director.

THE FACTS

The National Bargaining Council for the Leather Industry of South Africa brought a claim against Trafford Trading (Pty) Ltd for underpayment of remuneration due to the Council on behalf of the latter's former employees. An arbitrator declared the amount of the claim to be R282 853.53.

Trafford failed to pay this amount. The Council obtained a final order liquidating Trafford. It then took steps in terms of sections 414, 415, 416 of the Companies Act (no 61 of 1973) with to interrogate Shaikh, Trafford's sole director and manager.

Shaikh applied for an interdict preventing the Council from interrogating him on the grounds that the interrogation was illegitimate, as its purpose was to enable the Council to establish whether it had a claim against Mr Shaikh in order to sue him personally in terms of section 424 of the Act, and as such, would be an oppressive, vexatious, unfair and/or impermissible use of section 414.

THE DECISION

The Master of the High Court controls the interrogation process, not the Council and the liquidator. Shaikh made no criticism of the Master. Consequently, any contention that the Master would not afford him a fair hearing was unfounded and premature. If the Master or the presiding officer had no grounds for issuing the subpoena, Shaikh could have applied to the court to have it set aside on review under section 151 of the Insolvency Act (no 24 of 1936) read with section 339 of the Companies Act. Mr Shaikh did not resort to this avenue, since it was clear that the sole director and manager of Trafford could 'give material information concerning the company or its affairs'. Once the Master issued the subpoena to secure Mr Shaikh's attendance, the Council and the liquidator were entitled invoke all their rights flowing from it to interrogate Mr Shaikh.

Aside from constitutional and statutory obligations aside, the profound moral principle, based upon good faith and foundational human values embedded in the common law prescript pacta servanda sunt meant that agreements had to be kept. As the mind and manager of Trafford, Shaikh did everything to avoid his legal and moral obligations. Trafford's business was so structured that its survival was premised on avoiding its liability to the Council from the outset.

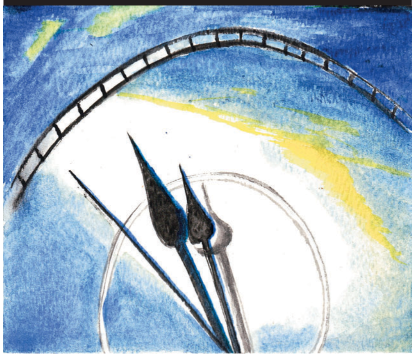
Section 424 can be invoked even without liquidating the company. With liquidation comes the opportunity and tactical advantage of interrogating 'any person… able to give material information concerning the company or its affairs'. Consequently, the next predictable step after confirming the order for liquidation has always been the interrogation in terms of sections 414, 415, 416 of the Companies Act. Shaikh should have been in no doubt that the Council would implement its plan to interrogate him as pleaded in the liquidation proceedings and, depending on his responses, proceed to hold him personally liable in terms of section 424. If Mr Shaikh did not carry on the business 'recklessly or with intent to defraud creditors …or for any fraudulent purpose' there were no grounds upon which he should have no concerns about the interrogation.

DEEZ REALTORS CC *v* SOUTH AFRICAN SECURITISATION PROGRAM (PTY) LIMITED

A JUDGMENT BY PETSE JA
(BOSIELO JA AND FOURIE JA,
MAKGOKA JA AND NICHOLLS
AJA concurring)
SUPREME COURT OF APPEAL
2 DECEMBER 2016

2017 SACLR 27 (A)

Prescription



The amendment of the basis of a claim for payment does not constitute a new cause of action if the claim relates to the same debt as originally claimed.

THE FACTS

South African Securitisation Program (Pty) Limited (SAS) leased certain printing equipment to Deez Realtors CC. Clause 14.1 of the lease agreement provided that upon default by Deez, SAS was entitled to cancel the contract. Upon cancellation, SAS would be entitled to sue for: (a) the amounts in arrears as at the date of cancellation; (b) liquidated damages representing the aggregate of all rentals which would, but for the cancellation, have been payable for the remaining period of the agreement; and (c) the market value of the goods, as determined in accordance with one or the other of the ways provided for in the agreements, would be deductible from the quantum of the liquidated damages.

SAS averred that Deez had breached the agreements in material respects. It brought an action for payment, alleging that Deez had defaulted in the punctual payment of moneys as they fell due in terms of the agreements. In consequence, SAS was entitled to claim immediate payment of all the amounts which would have been payable in terms of the agreements until the expiry of the rental period regardless of whether or not such amounts were then due for payment.

In response, Deez alleged that SAS had, on 16 July 2010, elected to terminate the agreements and communicated its decision to Deez. SAS then amended its particulars of claim, and alleged that on 16 July 2010 and as a result of Deez's breach of the agreement it had elected to cancel the agreement and communicated such election to Deez. It further alleged that pursuant to their cancellation of the agreement it was entitled to payment of all arrear amounts outstanding as at the date of cancellation together with the aggregate amounts of rentals which would, but for the cancellation, have been payable to it for the unexpired period of the agreements. The amount representing the value of the goods on cancellation was, in respect of each claim, to be deductible from the aggregate amount of rentals claimed.

Deez then gave notice of intention to amend its plea by contending that SAS's claims had prescribed in that by the time SAS's amendment was effected on 23 June 2014, a period of more than three years had, since 16 July 2010, elapsed.

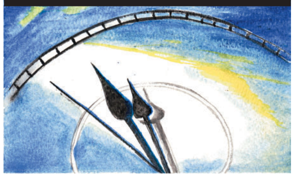
SAS objected to the proposed amendment.

THE DECISION

The essential question was whether the debt sought to be recovered prior to and post SAS's amendment was substantially the same. To determine this, it was necessary to compare the allegations and relief claimed in both instances

If the service of the plaintiffs' summons on 8 September 2010 did not interrupt the running of prescription of SAS's claim, then its claim had long become prescribed by the date on which the amendment was effected.

In the context of clause 14.1, whichever way the election was exercised, it gave rise to a single debt. This therefore necessarily meant that the debt owed by the debtor did not change its essential character. In reality, what SAS did was invoke a wrong remedy in their particulars of claim – one which was not available to them having previously elected to cancel the agreements – to sue for the debt then due by the defendants.



Deez's plea alerted them to this mistake. What SAS then sought to achieve with their amendment was to allege, the correct 'material facts that begot the debt' owed to them in the first place. That self-same debt flowed from the breach of the two agreements.

The effect of the amendment of SAS's particulars of claim was merely to cure a defective cause of action, ie mistakenly claiming accelerated rentals when they had already cancelled the contracts, by introducing the correct cause of action for liquidated damages pursuant to the election that they had exercised. The nature of the debt claimed remained the same. In substance, the remedies provided for in clause 14.1 both sought to place SAS in the position in which it would have been, had the breach not intervened.

> *In the context of clause 14.1, whichever way the election is exercised, it gives rise to a single debt. This must therefore necessarily mean that the debt owed by the debtor does not change its essential character. In reality, what the plaintiffs did in this case was to invoke a wrong remedy in their particulars of claim – one which was not available to them having previously elected to cancel the agreements – to sue for the debt then due by the defendants. The defendants' plea alerted them to this mistake. What they then sought to achieve with their amendment was to allege, in the words of Jones AJA in* CGU Insurance*, the correct 'material facts that begot the debt' owed to them in the first place. That self-same debt flowed from the breach of the two agreements.*

COMPASS INSURANCE COMPANY LTD v COBUS SMIT PROJEKBESTUUR CC

A JUDGMENT BY MEER J
WESTERN CAPE HIGH COURT,
CAPE TOWN
10 SEPTEMBER 2018

2019 (1) SA 413 (WCC)

Contract

A contractor under a construction guarantee has an interest in the guarantee even though it is not a party to it, and may on that ground apply for rectification of the guarantee.

THE FACTS

Compass Insurance Company Ltd issued a construction guarantee in favour of the Malik Trust. In an action brought by Compass against Malik and Cobus Smit Projekbestuur CC, the contractor, Compass alleged that the guarantee was issued on behalf of Cobus Smit, that the guarantee was issued pursuant to an application for such guarantee, submitted to Compass by Cobus Smit's brokers acting on behalf of Cobus Smit, and that the guarantee was issued pursuant to Cobus Smit complying with all of the internal requirements for the issue thereof, which included payment by Cobus Smit of the premium in respect of the guarantee, and the provision of collateral security.

Cobus Smit wished to amend its plea in order to establish a case for rectification of the guarantee. Compass opposed the amendment on the grounds that Cobus Smit was not a party to the guarantee, the parties being only itself and the Malik Trust.

THE DECISION

The guarantee contract was an autonomous, independent contract. The defendants' stance was, however, that the contract, although autonomous, was founded on the common intention of the insurer, the beneficiary and the contractor. The guarantee contract ensured that the beneficiary, Malik Trust, would be able to claim from the guarantor, Compass Insurance, a specific amount, should the contractor, Cobus Smit, not carry out its obligations in terms of the construction contract.

The guarantee contract thus arose as a result of the underlying construction contract between Malik Trust and Cobus Smit. The common intention of Compass, Malik Trust and Cobus Smit was for the guarantee contract to guarantee the contractor's performance. In these circumstances, that the guarantee contract reflected the common intention of all three parties. Thus, the guarantee contract, although autonomous, reflected the common intention of the Malik Trust, the plaintiff and Cobus Smit, even though the latter was not a signatory to the agreement.

Cobus Smit's interest in the guarantee contract, and its part in the arrangements leading thereto was apparent.

DU BRUYN N.O. v KARSTEN

A JUDGMENT BY NICHOLLS AJA (SHONGWE ADP, MAKGOKA, SCHIPPERS JJA AND MOKGOHLOA AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2018

2019 (1) SA 403 (SCA)

Credit Transactions

The requirement to register as a credit provider is applicable to all credit agreements once the prescribed threshold is reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction.

THE FACTS

Du Bruyn made an offer to purchase Karsten's interest in two companies and a close corporation for R2m. Pursuant thereto separate sale agreements in respect of the three entities were drawn up. In two of them, Karsten sold his shares and loan account to the DBF Trust, of which Du Bruyn and his wife were beneficiaries. In the third, the purchaser was Vaal Steam Black Empowerment Trust and Marius Fouche. Mr Du Bruyn and Mr Karsten were the trustees of the latter trust.

The three sale agreements were identical, apart from the purchaser which was different in one of them. They were all signed on 26 April 2013. The amount payable for the shares in the different entities differs but in total they amounted to R2m. An addendum to each agreement dealt with all three entities and the purchase price recorded was of the globular amount of R2m. The same terms of payment were applicable to all three agreements of sale: a deposit of R500 000 was to be paid by 1 May 2013; thereafter instalments of R30 000 to be paid on a monthly basis, subject to an identical amortisation table for a period of 5 years; and interest to be levied on the deferred amount.

Karsten was not registered as a credit provider in accordance with section 40 of the National Credit Act (no 34 of 2005) at the date of the conclusion of the agreements of sale. Karsten accepted that he had to be registered as a credit provider in order to facilitate the registration of a covering bond over Du Bruyn's property. He therefore made an application to be registered as such on 22 October 2012 and his registration occurred on 27 November 2013. The Du Bruyns registered the covering bond in early 2014.

Du Bruyn defaulted on the instalment payments. In November 2014, Karsten instituted proceedings for the balance of the purchase price, the sum of R1 133 169.39. He alleged a breach of the agreements of sale. Du Bruyns' defence was that the agreements were null and void due to non-compliance with the National Credit Act. It was contended that Karsten was obliged to have been registered as a credit provider at the time the agreements were concluded on 26 April 2013. His subsequent registration on 27 November 2013 was insufficient. The non-compliance of sections 40(3) and 40(4) of the Act rendered the agreements, as well as the mortgage bond registration and suretyship undertakings unlawful and void.

THE DECISION

In *Friend v Sendal* 2015 (1) SA 395 (GP), it was held that notwithstanding the fact an agreement may be a credit agreement in terms of the Act, this did not necessarily mean that the credit provider was obliged to register in terms of section 40(1)(b). The court found that the provisions of the Act were meant to regulate those participating in the credit industry and persons who frequently provide credit, and was not applicable to once-off transactions.

The approach adopted in *Friend* was pragmatic and made good sense. However, it was inconsistent with the unambiguous text of the Act. Section 40 of the Act sets out the circumstances under which registration as a credit provider is applicable. A plain reading of section 40(1)(b) made it clear that a person must register as a credit

provider if the total principal debt exceeds the prescribed threshold in terms of section 42(1). While it might have been reasonable, and indeed eminently sensible, to interpret section 40 as being inapplicable to once-off transactions where the role players are not participants in the credit market, it was difficult to reconcile this interpretation with the language of the provision, its context and purpose. The legislature had set thresholds that triggered the obligation to register where a single transaction was in excess of the prescribed amount. To conclude that this does not apply to once-off transactions or to those who are not regular participants in the credit market, was, however attractive and sensible it might sound, not being true to the text and the context of the statute. To find otherwise would be to substitute what was justifiably seen as regulatory overreach with judicial overreach.

The only conclusion to be drawn was that the requirement to register as a credit provider was applicable to all credit agreements once the prescribed threshold was reached, irrespective of whether the credit provider is involved in the credit industry and irrespective of whether the credit agreement is a once-off transaction.

A plain reading of s 40(1)(b) makes it clear that a person must register as a credit provider if the total principal debt exceeds the prescribed threshold in terms of s 42(1). At the time this section provided that the Minister must, at intervals of not more than five years, determine an applicable threshold of not less than R500 000, for the purpose of determining whether a credit provider is required to register in terms of s 40(1). There is no dispute that R500 000 was the applicable threshold at the conclusion of the sales agreements.
While it may be reasonable, and indeed eminently sensible, to interpret s 40 as being inapplicable to once-off transactions where the role players are not participants in the credit market, it is difficult to reconcile this interpretation with the language of the provision, its context and purpose. The legislature has set thresholds that trigger the obligation to register where a single transaction is in excess of the prescribed amount. To conclude that this does not apply to once-off transactions, or to those who are not regular participants in the credit market, is, however attractive and sensible it may sound, not being true to the text and the context of the statute.

NKOLA *v* ARGENT STEEL GROUP (PTY) LTD

A JUDGMENT BY LEWIS JA (SALDULKER JA, SWAIN JA, PILLAY AJA and MAKGOKA AJA concurring)
SUPREME COURT OF APPEAL
26 MARCH 2018

2019 (2) SA 216 (SCA)

The common law and the rules of court place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available.

THE FACTS

In July 2011, Argent Steel Group (Pty) Ltd applied for and was granted a default judgment against Nkola in the sum of R914 712.

Argent first tried to execute against the movable property of Mr Nkola. The sheriff attached household furniture at one of his houses in October 2013. His return stated that Mr Nkola was unable to pay the judgment debt, and that goods described by him in an inventory had been attached. Nkola's wife filed an affidavit shortly after the sheriff's return was made claiming that the furniture and household goods belonged to her. The goods were released from attachment.

In January 2014, Argent brought an application for a declaration that two immovable properties be declared specially executable. Four months later, the parties entered into a settlement agreement, in terms of which Nkola would pay R100 000 per month to Argent to settle the debt. The agreement was made an order of court and Nkola consented to execution in the event of his default. Nkola failed to pay a single instalment.

Nkola argued that before the immovable properties could be sold in execution, his movable assets should have been attached and sold in execution. He claimed that he had more than sufficient movable assets of significant value against which Argent could execute should it choose to do so, without having to execute against of his immovable properties.

THE DECISION

The question was why Nkola, possessed of such wealth, did not dispose of his incorporeal property and pay the admitted debt to Argent.

The common law and the rules of court place no obligation on a creditor to execute against movable assets where a judgment debtor has failed to point these out and make them available. Rule 46(1)(a)(i) provides that no writ of execution against immovable property shall issue until a return has been made that the debtor does not have sufficient movable property to satisfy the writ, or (ii) the immovable property is declared specially executable by a court.

Nkola argued that the requirements of subrules (i) and (ii) had not been met since there was no nulla bona return. The submission was that subrules (i) and (ii) have as a matter of practice been read to require that there must be a nulla bona return before immovable property can be declared specially executable.

However, there was no justification to read the requirements of Rule 46(1)(a) conjunctively. 'Or' need not be read as 'and' save where a debtor is indigent, has insufficient assets to satisfy the debt and is at risk of losing his or primary residence. In any event, the sheriff's return of service, which preceded the agreement of settlement, made it clear that he had demanded payment of the debt by Nkola who did not make any movable asset available for execution such that there would be satisfaction of the debt. The return met the requirements of rule 46(1)(a)(i).

There was no justification for interfering with the exercise of the discretion by the judge who ordered execution against the immovable property.

SHAW *v* MACKINTOSH

A JUDGMENT BY MATHOPO JA (SHONGWE ADP, WALLIS JA, DAMBUZA JA and DAVIS AJA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2018

2019 (1) SA 398 (SCA)

If the National Credit Act (no 34 of 2005) does not apply to a primary debt, it will not apply to any guarantee given in respect of that debt.

THE FACTS

Mackintosh lent Mabili Search & Selection (Pty) Ltd an amount of R2m. The parties signed a written acknowledgement of debt in terms of which Mabili acknowledged its indebtedness to Mackintosh in the sum of R2m payable over a period of 12 months from the date of advancing the said amount. It was a term of the agreement that the sum of R2m would attract interest at the rate of R50 000 per month with effect from October 2012 until the date of final payment. It was further agreed that should Mabili make a part payment of the capital to Mackintosh, the interest payable would be pro-rated. Mabili further acknowledged being indebted to Mackintosh in the sum of R100 000 representing interest for the months of August and September 2012.

When Mabili defaulted on its repayments in terms of the agreement, Mackintosh obtained default judgment against it. Mabili was subsequently liquidated. Invoking the provisions of clause 5 of the agreement, Mackintosh sued Shaw and the other appellants as sureties. In view of the amount involved and Mabili's turnover, insofar as Mabili was concerned, the agreement fell outside the area of operation of the National Credit Act (no 34 of 2005).

Clause 5 of the agreement provided that Shaw and Taylor bound themselves jointly and severally in favour of Mackintosh as joint and several co-principal debtors with Mabili for the repayment of any amounts which became owing by Mabili to Mackintosh.

Mackintosh contended that the effect of clause 5 of the agreement was to constitute the appellants as sureties for Mabili's indebtedness. He contended that the agreement between himself and the appellants was a credit guarantee as defined in the Act and was excluded from the operation of the Act by section 8(5) thereof, because it was a credit guarantee in respect of an agreement that was not itself subject to the NCA.

The appellants argued that the agreement was a stand-alone credit agreement falling within the ambit of the Act and that clause 5 did not constitute them as sureties because they became parties to the agreement as co-principal debtors in respect of the admitted debt as defined in clause 2.1.1 of the agreement. Clause 2.1.3 described them and Mabili as 'the Debtors'. They further contended that the agreement between them and Mackintosh was not a credit guarantee, but a credit transaction as defined in section 8(4)(f) of the Act and that there had been no compliance by Mackintosh with his obligations under the Act. They alleged that the failure of Mackintosh to register as a credit provider in terms of the Act rendered the agreement between them void.

THE DECISION

It could be accepted that the appellants became co-principal debtors with Mabili for the repayment of the admitted debt. The proper question was whether the contract between them and Mackintosh was a credit guarantee in terms of section 8(5) of the Act, in which event it was an agreement to which the Act did not apply, or a credit transaction in terms of section 8(4)(f) as contended by the appellants.

Section 8(5) provides that an agreement constitutes a credit guarantee if, in terms of that agreement, a person undertakes

or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which the Act applies.

If the agreement between the appellants and Mackintosh was not a credit guarantee as defined, it did not fall within the Act because section 4(2)(c) provides that the Act applies to a credit guarantee only to the extent that the Act applies to a credit facility or credit transaction in respect of which the credit guarantee is granted.

If the appellants bound themselves in terms of a credit guarantee as defined, the credit transaction in respect of which the credit guarantee was granted was the transaction between Mabili and Mackintosh. If the Act did not apply to that credit transaction, it would not apply to the credit guarantee.

It was clear that the appellants were not granted any loan nor was any credit advanced to them and neither were they parties to the agreement between Mabili and Mackintosh. Their involvement only arose when they undertook or promised to pay on demand the admitted indebtedness of Mabili to Mackintosh. The agreement expressly stated that the sum of R2m was advanced to Mabili and not the appellants. That brought the obligations of the appellants squarely within the language of section 8(5). Section 4(2)(c) then applied, and its effect was to render Mackintosh not a credit provider in terms of section 40 of the Act. He was not in the business of providing credit. The agreement was a once-off transaction and not falling within the ambit of the provisions of the Act.

The appeal was dismissed.

It is clear that the appellants were not granted any loan nor was any credit advanced to them and neither were they parties to the historical agreement between Mabili and Mackintosh concluded in 2009. Their involvement only arose when they undertook or promised to pay on demand the admitted indebtedness of Mabili to Mackintosh. The agreement expressly stated that the sum of R2 million was advanced to Mabili and not the appellants. That brings the obligations of the appellants squarely within the language of s 8(5). However, s 4(2)(c) of the NCA provides that this Act applies to a credit guarantee only to the extent that this Act applies to a credit facility or credit transaction. Mackintosh was not a credit provider in terms of s 40 of the Act. He was not in the business of providing credit. The agreement was a once-off transaction and not falling within the ambit of the provisions of the NCA.

FISCHER v UBOMI USHISHI TRADING CC

A JUDGMENT BY SALDULKER JA and SCHIPPERS JA (SHONGWE ADP, CACHALIA JA and MOTHLE AJA concurring)
SUPREME COURT OF APPEAL
19 NOVEMBER 2018

2019 (2) SA 117 (SCA)

Property

A settlement agreement in which a spouse relinquishes ownership of a half-share in fixed property does not have the effect of vesting ownership of the property in the other spouse with immediate effect. However, it does have the effect of conferring on that spouse a greater claim to the half-share in the property in preference to that of a creditor of the other spouse.

THE FACTS

The second and third respondents, Mr and Mrs Haynes, were the registered owners of certain immovable property. Their marriage in community of property was dissolved by an order of divorce dated 10 December 2012. In terms of a settlement agreement incorporated in the divorce order, Mr Haynes waived his right, title and interest in the property in favour of Mrs Haynes.

In 2015 Fischer, obtained default judgment against Ubomi Ushishi Trading CC and Mr Haynes for payment of the sum of R566 500, and applied for an order declaring Mr Haynes' undivided half-share in the property specially executable. At that time, Mr Haynes was still reflected as a co-owner of the property in the Deeds Registry.

The court dismissed the application. It held that, upon the granting of the decree of divorce, dominium of the property vested with immediate effect in Mrs Haynes. Mrs Haynes supported the court's reasoning, but also put up an alternative defence that her right to full ownership of the property preceded Fischer's claim.

The issue on appeal was whether that court was correct in dismissing the application.

THE DECISION

The starting point in deciding whether ownership of the property vested immediately on divorce was section 16 of the Deeds Registries Act (no 47 of 1937). It provides that ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by the registrar, and other real rights in land may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar.

The effect of the registration of transfer of immovable property is that the owner and the public are protected. It enables the registered owner of land to prove its right of ownership by presentation of a registered title deed. Furthermore, as a result of the publicity that goes together with ownership, registration also provides adequate protection to members of the public wishing to conclude transactions involving land.

On first principles and a proper construction of s 16 of the Deeds Registries Act, derivative acquisition of ownership in land requires registration. Mrs Haynes' acquisition of Mr Haynes' interest in the property was derivative: it arose from the settlement agreement which gave Mrs Haynes a personal right to enforce registration of Mr Haynes' undivided half-share in the property. That agreement, though binding on the contracting parties, did not by itself vest ownership of Mr Haynes' half share in the property in Mrs Haynes, any more than a contract of sale of land passes ownership to the buyer. It followed that thevesting of ownership of the property in Mrs Haynes required an act of transfer by way of an endorsement on the title deed of the property in terms of section 45bis(1)(a) of the Deeds Registries Act.

Common-law principles of co-ownership, as well as the requirement in section 26 of the Deeds Registries Act that co-ownership in land is only terminated on attestation of deeds of partition transfer by the registrar ensure that ownership is conveyed to the respective owners of the land. Spouses

married in community of property automatically become bound co-owners of immovable property in their joint estate. Upon termination of the joint estate, the bound co-ownership is replaced by free co-ownership.

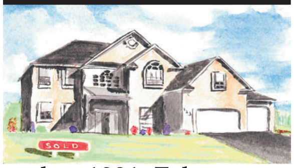
But for Mrs Hayne's alternative defence, he result would have been that Fischer's claim should succeed. However, Mrs Haynes' alternative defence that her right to full ownership of the property preceded Fischer's claim was a good defence. Properly understood, this was a personal right against Mr Haynes to compel transfer of his half-share in the property into her name. At the time that Mrs Haynes acquired this right, there was no other greater or competing right to defeat her claim. When Fischer applied for an order declaring the property executable, Mr Haynes had already alienated his half-share in the property to Mrs Haynes by way of the settlement agreement.

The appeal was dismissed.

Thus, on first principles and a proper construction of s 16 of the Deeds Registries Act, derivative acquisition of ownership in land requires registration. Mrs Haynes' acquisition of Mr Haynes' interest in the property was derivative: it arose from the settlement agreement which gave Mrs Haynes a personal right to enforce registration of Mr Haynes' undivided half-share in the property. That agreement, though binding on the contracting parties, did not by itself vest ownership of Mr Haynes' half share in the property in Mrs Haynes, any more than a contract of sale of land passes ownership to the buyer. It follows that Middleton was correctly decided. 17 The vesting of ownership of the property in Mrs Haynes required an act of transfer by way of an endorsement on the title deed of the property in terms of s 45bis(1)(a) of the Deeds Registries Act.

STAUFEN INVESTMENTS (PTY) LTD v MINISTER OF PUBLIC WORKS

Property



A JUDGMENT BY REVELAS J
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH
24 SEPTEMBER 2018

2019 (2) SA 295 (ECP)

Expropriation of land may be acceptable when the land has been occupied by a public body over a long period of time and used for a public purpose, and objection to such occupation has not been made by owners of the land.

THE FACTS

During 1997 Eskom began the construction of the electrical substation on the farm Nooitgedacht. The farm was then owned by a Mr Hitge. By the time Staufen Investments (Pty) Ltd bought the farm in 2014, the substation had been in existence on Nooitgedactht for 17 years. The substation site occupied approximately 10 000 square metres of the farm.

In 2007, Eskom had noticed that there was an omission on the part of the land surveyor concerned to ensure that servitude rights were captured on a diagram of the subdivided properties. Consequently the substation and power lines were not reflected on the diagram attached to the relevant title deed and the error was thereafter repeated in each subsequent transfer. A servitude K884/985 was endorsed on page 9 of the title deed entitling Eskom to a 6 metre right of way. The right to use an area of 1240 square metres in extent or the right to lead electricity on or over the farm was contained in paragraphs 2 and 3 of the notarial deed of servitude. The last-mentioned two servitudes were not endorsed against the title deed of the servient land. The endorsement in respect of the right of way servitude was carried forward as a condition in all the subsequent title deeds, but the servitudes created in paras 2 and 3 of the notarial deed of servitude were not endorsed against or carried forward in any subsequent deed.

In terms of K884/985, a right of way six metres wide was granted to Eskom over the original farm. In terms of the same deed, Eskom had the right to lead electricity over the farm. The rights referred to were purportedly derived from an option granted by Hitge and purportedly exercised by Eskom on 27 September 1991. Eskom was unable to provide any proof that the option was indeed exercised. In terms of the written option, the option to acquire servitude would have lapsed in May 1992. Neither of these two agreements was registered and Hitge never deposed to an affidavit to confirm that there were such agreements.

It was accepted by all the parties that Eskom had no legal right entitling it to have access to and maintain and operate the substation on the farm then under its control.

On 13 August 2014 Staufen wrote to Eskom with the request for a written undertaking to cease its unlawful conduct and proposed that it compensate Staufen for the area occupied unlawfully. It also demanded that certain works be done in connection with the substation and that a proper servitude be registered.

Eskom resolved that it would obtain a proper servitude registered over the farm to legalise its occupation of a portion of the farm, and offered Staufen a sum of just over R220 000 as compensation for its granting Eskom the option to acquire such a servitude. The applicant was not amenable to consent to the registration of any servitude over its property in favour of Eskom or to grant the option desired by Eskom.

Staufen demanded that Eskom vacate the farm within a reasonable period and make good any damage caused to the farm. Eskom had no intention of leaving, and on 7 November 2014 Staufen brought an eviction application. Eskom opposed the application on the basis that it had until recently believed it had real rights over the farm to maintain and have access to its substation site, and that its usage of the farm had been in practice

for many years. Eskom also pointed out that the evacuation of the substation would have an enormous impact on the citrus and tourism industries and all the townships that relied on the electricity supplied to them by this particular substation.

THE DECISION

Staufen's insistence that Eskom vacate its farm and move its whole infrastructure elsewhere had to be scrutinised in order to strike a fair balance between its property rights and Eskom's public purpose.

When Staufen bought the farm, the substation had already been there for seventeen years. Eskom's failure to establish real rights in respect of the substation was most certainly a bona fide error. It conducted its operations on the farm in the bona fide belief that it had a legal entitlement to do so. At that point the owners of the farm could not have been aware that Eskom had no real rights on the farm. Its predecessors in title also accepted the substation without demur.

Eskom's lack of rights was the result of an error. Eskom did not wilfully and grossly violate the principle of legality and Staufen's property rights or 'seize' the land as Staufen contended. The decision to expropriate was the correct decision to take in the circumstances. The substation served the public. The costs and effort involved in dismantling, relocating and installing a new substation a short distance away on a neighbouring farm could rather be applied elsewhere on building a new substation where there was a greater demand for electricity.

Eskom considered these factors and the decision to expropriate was not irrational, given the facts before it, albeit that the decision had the effect of regularising Eskom's unlawful occupation of the farm. The decision therefore did not fall foul of sections 26(1) and (3) of the Electricity Regulation Act (no 4 of 2006). The expropriation was a bona fide one, for a public purpose and enhanced the electricity infrastructure for the benefit of the public. Eskom's decision was not arbitrary.

When Amber Bay bought Nooigedacht in 2007, the substation had already been there for ten years. Eskom's failure to establish real rights in respect of the substation was most certainly a bona fide error. It conducted its operations on Nooitgedacht in the bona fide belief that it had a legal entitlement to do so. At that point Mr Barnes could not have been aware that Eskom had no real rights on Nooitgedacht. Amber Bay purchased Nooitgedact. Its predecessors in title also accepted the substation without demur. At that point Mr Barnes could not seriously have contemplated that it was possible to get rid of the substation and let zebras roam under pecan trees where the substation used to stand. If he bought the farm because he knew Eskom had no legal entitlement, he took a serious risk.

Eskom's lack of rights was the result of an error. Eskom did not wilfully and grossly violate the principle of legality and the applicant's property rights or 'seize' the land as the applicant contended.

The decision to expropriate was the correct decision to take in the circumstances. The substation serves the public. The costs and effort involved in dismantling, relocating and installing a new substation a short distance away on a neighbouring farm could rather be applied elsewhere on building a new substation where there is a greater demand for electricity.

JEEVAN'S PROPERTY INVESTMENT (PTY) LTD v REUNION CASH AND CARRY CC

JUDGMENT BY MADONDO DJP
KWAZULU NATAL DIVISION, PIETERMARITZBURG
23 NOVEMBER 2015

2017 SACLR 63 (KZP)

In the absence of a clear indication that a tenant intends to continue occupation of leased premises after termination of the lease, an application for eviction cannot be brought against the tenant before termination of the tenancy.

THE FACTS

On 2 November 2010 Jeevan Property Investments (Pty) Ltd and Reunion Cash & Carry CC entered into a partly oral and partly written lease agreement in respect of business premises at 34 Rana Road, Isipingo Rail, Durban, for a period of five years commencing on 1 January 2011 and ending on 31 December 2015.

In April 2015, in contemplation of the termination of the agreement on 31 December 2015, Jeevan's attorney sent Reunion's attorney an email reminding them that the lease would expire on 31 December 2015 and requesting Reunion to indicate whether or not it would vacate the premises timeously. If it failed to make such an indication, Jeevan would bring an application for an eviction order.

On 28 August 2015 Reunion purported to renew the lease agreement for a further period of five years by addressing a written notice to Jeevan. On 9 December 2015 Jeevan's attorneys sought an undertaking from Reunion that it would vacate the premises upon termination of the lease agreement on 31 December 2015. Notwithstanding all such notifications and reminders, Reunion did not make any undertaking or show any intention to vacate the premises on termination of the lease agreement.

On 17 December 2015 Jeevan brought an application for an eviction order against Reunion.

THE DECISION

The two questions at issue were (a) whether Reunion was entitled to remain in occupation of the premises after the expiry of the lease; and (b) whether the law relating to eviction allowed Jeevan to anticipate the holding-over of the leased property by Reunion.

Notification of acceptance of renewal was necessary to constitute a binding contract between the parties. Such notification had to be communicated to Jeevan. However, such communication did not take place, and as a consequence, no renewal of the lease agreement came into existence between the parties. The first question therefore had to be answered in favour of Jeevan.

At the time of the institution of the eviction proceedings Reunion had a right to hold the property in terms of the lease agreement. In order forJeevan to succeed on its claim it had to prove that such right had by then terminated. At the time of the institution of the eviction proceedings the lease had not terminated. Consequently, Jeevan's statement of claim did not have any cause for action or application.

The fear of the applicant that on termination of the lease Reunion would refuse to vacate the premises was still imaginary. There was no basis for such a conclusion save the assumption that since Reunion had failed to respond to reminders and letters notifying it to vacate the property on termination of the lease. Reunion had made no indication that it would hold the property after termination of the lease.

For Jeevan to succeed on its claim, it had to prove that at the time of institution of the eviction proceedings the lease had terminated and that Reunion had no lawful basis for remaining in occupation of the property. It had not done so. The application for eviction therefore failed.

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

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

2017 SACLR 74 (SCA)

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.

The issue is placed beyond doubt by several provisions in the sale agreement. Paragraph G of the Recitals records that the purchasers are interested in completing the proposed transaction 'in order to jointly establish a new, independent chrome mining and refining beneficiation site'. Clause 2.2 provides that the sale of the shares includes '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 is recorded that the sellers and or the company, shall 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'. These clauses are consistent with the subject of the sale being a 'business undertaking'.

[29] The court a quo was therefore correct to conclude that the sale of the shares fell within the ambit of a business undertaking as contemplated in s 1(a)(i) of the Act.

RAND WATER BOARD v BIG CEDAR TRADING 22 (PTY) LTD

JUDGMENT BY WALLIS JA (CACHALIA JA, SERITI JA, PILLAY JA AND SCHIPPERS AJA concurring)
SUPREME COURT OF APPEAL
25 NOVEMBER 2016

2017 SACLR 104 (SCA)

Failure to comply with the requirements of a statute does not necessarily render action taken in terms thereof unlawful resulting in the invalidation of such action.

THE FACTS

Big Cedar Trading 22 (Pty) Ltd owned property over which ran two underground water pipelines installed by the Rand Water Board. Big Cedar was unaware of the existence of the pipelines on its property. When it became aware of them, it brought claims against the Board, and sought an order that Rand Water remove the pipelines, alternatively that it register a servitude in respect of that portion of its property, or take transfer of that land against payment of the amount of R6.6m.

The installation of the pipelines had been done by the Board in terms of the Rand Water Board Statutes (Private) Act (no 17 of 1950). Section 24(j) of that Act gave the Board the right to 'lay or carry through, over, on or across any land, public or private, and any public road, public place or outspan, within the Republic, and from time to time repair and maintain any pipes for the supply of water with any necessary valves, cocks, meters or other accessories in connection with the same, and enter upon any such land, road or place for such purpose as aforesaid, provided that (i) at least seven clear days' notice, except in the case of urgent repairs, shall be given to the authority under whose management or control the said public land or road may be, or to the owner or occupier of any private land or road, before making any such entry as aforesaid'.

It was accepted that the Board did not comply with section 24(j)(i) when it installed the pipelines.

THE DECISION

The essential question was whether the Board's failure to comply with section 24(j)(i) rendered its actions in laying the pipelines unlawful and unauthorised.

In its plea, the Board had stated that in laying the pipelines it exercised its pipe-laying powers in terms of section 24(j) of the Act after the required notice had been given to the owners of the property at the relevant times. Big Cedar had not replicated to this. By not doing so, it indicated that it did not attack this assertion.

The clear purpose of the requirement that notice be given to the owner of a property before entering upon the property and undertaking work, is to enable the owner to engage with the Board over the impact that the work of laying the pipeline will have upon the owner's activities. It also affords the owner an opportunity to make arrangements to ensure that its own activities are disturbed as little as possible by the proposed work upon its property. But the period of notice is short, so that planning for any extensive work, such as the laying of the two pipelines in this case, and the decision to undertake that work, would have occurred and been finalised long before the notification to the owner. That means that the notice's purpose was not to enable the owner to dissuade Rand Water from laying the pipeline, or in any significant degree to cause it to alter its plans. It was rather to ensure that when workmen came on site to undertake the laying of the pipeline, inconvenience to the owner would be minimised. There was nothing in this to suggest that a failure to give notice to the owner invalidated the act of laying the pipeline.

It followed that the Board acted lawfully in installing the two pipelines.

As far as the alternative claim

was concerned, for a court to order the registration of a servitude over property, which would necessarily extend to determining the extent of the servitude and the conditions attaching thereto, would amount to making a contract for the parties that they have not made for themselves. This a court will not do.

The claims were dismissed.

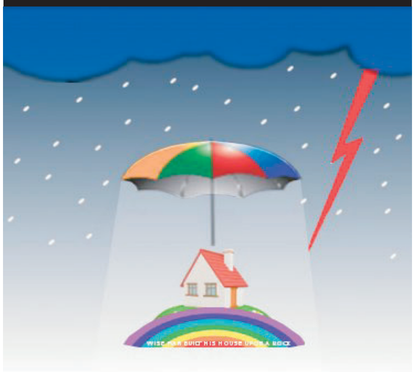
The clear purpose of the requirement that notice be given to the owner of a property before entering upon the property and undertaking work, is to enable the owner to engage with Rand Water over the impact that the work of laying the pipeline will have upon the owner's activities. It also affords the owner an opportunity to make arrangements to ensure that its own activities are disturbed as little as possible by the proposed work upon its property. But the period of notice is short, so that planning for any extensive work, such as the laying of the two pipelines in this case, and the decision to undertake that work, would have occurred and been finalised long before the notification to the owner. That means that the notice's purpose was not to enable the owner to dissuade Rand Water from laying the pipeline, or in any significant degree to cause it to alter its plans. It was rather to ensure that when workmen come on site to undertake the laying of the pipeline inconvenience to the owner would be minimised and the owner would be given an opportunity to, for example, move stock or goods away from the working area and take other steps to protect its own property. There is nothing in this to suggest that a failure to give notice to the owner invalidates the act of laying the pipeline.

PROPELL SPECIALISED FINANCE (PTY) LTD *v* ATTORNEYS INSURANCE INDEMNITY FUND NPC

A JUDGMENT BY ZONDI JA (LEWIS JA, SALDULKER JA, MATHOPO JA and MOKGOHLOA AJA concurring)
SUPREME COURT OF APPEAL
28 SEPTEMBER 2008

2019 (2) SA 221 (SCA)

Insurance



The repudiation of a claim by the insurer does not afford the insured the right to cede the rights under the policy. Whether or not the insured may cede the rights under the policy must be determined by an analysis of the terms of the policy.

THE FACTS

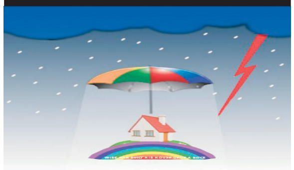
During the period April 2010 and April 2011 Propell Specialised Finance (Pty) Ltd, a private company carrying on a moneylending business instituted six separate actions in the magistrate's court against Buurman Stemela Lubbe Incorporated (BSL), a law firm, arising from a number of bridging finance transactions. In terms of these bridging finance transactions, Propell lent and advanced to certain clients of BSL monies against funds accruing to BSL's clients from certain property transactions. Propell paid the loan amounts into BSL's trust account. BSL undertook to repay to Propell such loans from the proceeds of the property transactions. BSL failed to make payment as undertaken because Mr Buurman and/or BSL's employee, Ms van der Merwe misappropriated the proceeds of the property transactions.

BSL notified Attorneys Insurance Indemnity Fund NPC of Propell's claims and sought indemnification from it under a professional indemnity insurance contract issued by Attorneys Insurance (the policy). Attorneys Insurance repudiated liability in respect of Propell's claims on the ground that the money that was paid into BSL's trust account was entrusted to it as contemplated by section 26 of the Attorneys Act (no 53 of 1979) and the loss that Propell suffered was a loss that was excluded in terms of clause 5.1.5 of the Policy.

In terms of clause 5.1.5 of the Policy, excluded from cover was 'any loss, destruction or damage whatsoever or any legal liability of whatever nature . . . arising from theft by any principal, partner, director, candidate attorney, employees or "in-house" consultant of the insured . . . of any money or other property referred to in section 26 of the Act'. The specific group or class of people for whose benefit the insurance was established was specifically defined in clause 2.5 of the policy. The insured was defined as every individual practitioner who, on the date on which the claim was made, was practising as such in the Republic and was in possession of or would have been obliged to apply for a current Fidelity Fund Certificate. Clause 6, provided for further circumstances other than those set out in clause 5, in which Attorneys Insurance could repudiate liability. These conditions were set out in clause 6.1, which required the insured to give immediate written notice to the insurer of any claim or intimation of a claim; clause 6.7.2 which provided that all benefits afforded under the policy could be withdrawn by the insurer should the insured fail or refuse to provide assistance. Clause 6.9 stipulated that the insured would forfeit benefits should the insured use fraudulent means to obtain benefits in respect of the claim under the policy. Clause 6.8 stipulated that '[u]nless otherwise expressly stated nothing contained in this Policy shall give any rights against the insurer to any person other than the insured'.

Following repudiation by Attorneys Insurance of Propell's claims, BSL purportedly ceded to Propell its indemnification rights against Attorneys Insurance under the policy. The agreement embodying the cession was entered into without Attorneys Insurance's consent.

Attorneys Insurance argued that the purported cession on which Propell relied, was invalid as BSL's rights of recourse and/or claims against it arising out of the policy were not capable of being ceded and that, for that reason Propell lacked locus standi to sue it.



THE DECISION

The question was whether the nature of contractual rights flowing from the policy was such that it excluded the transfer of the personal rights created. In general, all contractual rights can be transmitted unless their nature involves a delectus personae or the contract itself shows that they were not intended to be ceded. To determine whether the nature of indemnification rights under the policy involved a delectus personae and whether the policy itself showed that the rights were not capable of being ceded, it was necessary to interpret the terms of the policy.

Propell submitted that after Attorneys Insurance had repudiated the claims submitted to it by BSL, the latter had no option but to deal with the actions instituted against it by Propell and, in the exercise of its discretion, BSL concluded the cession agreement with Propell.

It was clear from the terms of the policy that the rights flowing from it were not cedable. This was clear from the terms of clause 2.5 as well as clause 6.8.These factors viewed cumulatively showed that the nature of the contractual rights under the policy indicated that the insured was a delectus personae. The contract gave no rights of indemnity to anyone but a legal practitioner. These contractual provisions ensured that Attorneys Insurance would not be exposed to the risk of defending actions at the suit of unknown claimants.

The nature of the legal relationship between Attorneys Insurance and BSL was such that it bound the determined specific creditor and debtor. Attorneys Insurance's obligation to BSL was to indemnify it against legal liability arising from its professional conduct. In turn BSL had to be in possession of a Fidelity Fund Certificate for the relevant period to enjoy cover. From the point of view of Attorneys Insurance the identity of the insured mattered to it.

As regards the argument that after repudiation of BSL's claims by Attorneys Insurance, BSL's rights under the Policy became cedable, the simple answer to that proposition was that repudiation did not terminate the policy. BSL remained bound by the policy and was obliged to comply with its terms including the restriction on the transfer of its rights. BSL could contest the repudiation of liability in court and if the court were to find that the repudiation was unlawful, then Attorneys Insurance would need to step into the shoes of BSL in defending Propell's claims. The repudiation of a claim by the insurer does not afford the insured the right to cede the rights under the Policy.

The effect of the purported cession was that not only did Propell become the third party making the claim, but it would also be the insured applying for indemnity under the policy. Propell, a victim of fraudulent conduct, would step into the shoes of the fraudster. That would bring about an untenable situation which would undermine the significance of the unique nature of the legal relationship between the parties on which the Attorneys Act placed a premium.

The appeal was dismissed.

FIRSTRAND BANK LIMITED v NORMANDIE RESTAURANTS INVESTMENTS (PTY) LTD

JUDGMENT BY TSHIQI JA
(LEWIS, CACHALIA, WILLIS AND DAMBUZA JJA concurring)
SUPREME COURT OF APPEAL
25 NOVEMBER 2016

2017 SACLR 91 (SCA)

Insolvency

A business rescue plan cannot be supported if it does not show that there is a reasonable prospect of the company in question being rescued.

THE FACTS

Normandie Restaurants Investments (Pty) Ltd was a property owning company which leased its property to a company which conducted the business of a restaurant at the property. The tenant defaulted, resulting in Normandie experiencing financial difficulties.

Normandie owed Firstrand Bank Ltd R2.7m and SARS R1.6m. The bank brought an application for the winding up of Normandie. Normandie accepted that it was in financial distress and had failed to pay amounts due and payable to its creditors but alleged that there was a reasonable prospect of rescuing it through the rental it would receive from its tenant. It put forward a proposed business rescue plan compiled by potential business rescue practitioners.

At this time, the bank had not been paid for over a year and Normandie's interest obligations to the Bank were then in the region of R37 000 per month comprising. The amount available from the rental was R37 320 per month and the balance available after payment of the Bank's interest obligations would be R320.

The bank appealed a decision to place Normandie under business rescue.

THE DECISION

A court's assessment of whether there is a reasonable prospect for rescuing a company does not entail the exercise of a narrow discretion but involves a value judgment. In this case, a court of appeal is entitled to overturn a decision if it would have come to a different conclusion.

The bank illustrated convincingly why there were no reasonable prospects of rescuing Normandie. The small balance of R320 would clearly be inadequate as this would not be able to cover payment of the bank's capital amount or any reasonable instalments flowing therefrom and would also not cover payment for other creditors. If the full rental were to be applied to the capital owing to the bank, it would take Normandie approximately eight years to pay it. In the meantime interest accruing on the decreasing capital balance and the SARS debt, together with any possible penalties that might be imposed, would accumulate and remain unpaid with no plan in place on how to pay them. If only the interest due to the bank was paid, then the full capital amount would remain outstanding and there was no indication of how and when the capital amount would be paid.

A further concern with the proposed business rescue plan was that its viability was solely dependent on the continuity of the business relationship between Normandie and a single tenant. If for any reason the lease between the two parties came to an end, Normandie and the bank would be back to where they were now.

The proposed business rescue plan fell short of providing the information required in terms of section 150(2) and (3) of the Companies Act (no 71 of 2008) and providing information on which an assessment of reasonable prospects could be made.

There was accordingly no basis to find that there was a reasonable prospect of rescuing the business. The appeal succeeded.

BALENI *v* MINISTER OF MINERAL RESOURCES

A JUDGMENT BY BASSON J
GAUTENG DIVISION, PRETORIA
22 NOVEMBER 2018

2019 (2) SA 453 (GP)

Property

Persons holding rights in terms of the Interim Protection of Informal Land Rights Act (no 31 of 1996) may require a company applying for mining rights in respect of their land in terms of the Mineral Petroleum Resources Development Act (no 28 of 2002) to comply with the requirements of the former Act.

THE FACTS

Baleni and the other applicants held informal rights to land as defined by the Interim Protection of Informal Land Rights Act (no 31 of 1996) (IPILRA), and occupied the land in accordance with their law and custom.

Transworld Energy and Mineral Resources (SA) Pty Ltd, (TEM) wished to mine the titanium-rich sands under the land. To this end TEM applied for a mining right for titanium ores and other heavy minerals in the area. The area of some 2859 hectares comprised a strip of land over coastal land, some 22 kilometres long and 1,5 kilometres inland from the high-water mark. The vast majority of the applicants, together with their families, lived within or in close proximity of the proposed mining area.

Baleni contended that his and the other applicants' consent is required in terms of section 2(1) of IPILRA before they may be deprived of their land. The Minister of Mineral Resources contended that Mineral Petroleum Resources Development Act (no 28 of 2002) requires the Minister to consult with a community before granting a mining right, but no owner has a right to refuse consent to mining.

Section 2(1) of IPILRA provides that subject to the provisions of subsection (4), and the provisions of the Expropriation Act (no 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.

Baleni applied for an order that the Minister lacked any lawful authority to grant a mining right in terms of the Mineral Petroleum Resources Development Act, over land anywhere in the Republic of South Africa owned or occupied under a right to land in terms of any tribal, customary or indigenous law or practice of a tribe, as defined by the Interim Petroleum of Informal Rights to Land Act, unless the provisions of that Act had been complied with.

THE DECISION

The granting of a mining right amounts to a 'deprivation'. A plain reading of section 36 of the MPRDA also makes it clear that the holder of a mining right, which is a limited real right, may engage in far- reaching activities in furthering its mining activities, all of which have the potential of interfering with the use or enjoyment of land. Whether or not there has been a deprivation is a matter of degree and depends on the extent of the interference, and that 'at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'.

In the light of the facts that were placed before the court and the nature of the mining operations contemplated on the applicants' land, TEM's operations would interfere substantially with their agricultural activities and general way of life. Section 39 of the MPRDA further entitled the holder of mining rights to engage in invasive activities on the lands, including, but not limited to, using the water on the property. Baleni indicated that the applicants' means to provide for themselves and others in the community would be severely affected by the mining activities. The grant of the mineral right would constitute a 'deprivation' for purposes of IPILRA and for purposes of s 25 of the Constitution.The consent

requirement provided for in section 2(1) of IPILRA for such a deprivation appeared to have been triggered

The MPRDA and IPILRA had to be read together. In keeping with the purpose of IPILRA to protect the informal rights of customary communities that were previously not protected by the law, the applicants therefore had the right to decide what was to happen with their land. As such they may not be deprived of their land without their consent. Where the land is held on a communal basis — as in this matter — the community had to be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom and community on whether they consent or not to a proposal to dispose of their rights to their land.

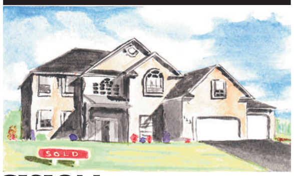
The order sought by Baleni was granted.

A plain reading of s 5 of the MPRDA also makes it clear that the holder of a mining right — which is a limited real right — may engage in far- reaching activities in furthering its mining activities, all of which have the potential of interfering with the use or enjoyment of land. In this regard I am in agreement with the sentiments expressed by the Constitutional Court in Mkontwana v Nelson Mandela Metropolitan Municipality that, whether or not there has been a deprivation is a matter of degree and depends on the extent of the interference, and that 'at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation'.

I am satisfied that, in light of the facts that were placed before the court and the nature of the mining operations (especially open-cast mining operations) contemplated on the applicants' land, those operations will interfere substantially with their agricultural activities and general way of life. Section 5 of the MPRDA further entitles the holder of mining rights to engage in invasive activities on the lands, including, but not limited to, using the water on the property.

LUANGA *v* PERTHPARK PROPERTIES LTD

Property



A JUDGMENT BY DAVIS AJ
(PAPIER J concurring)
WESTERN CAPE DIVISION, CAPE TOWN
20 SEPTEMBER 2018

2019 (3) SA 214 (WCC)

'one month's notice' as provided for in section 5(5) of the Rental Housing Act (no 50 of 1999) must be interpreted to mean one calendar month, running from the first day of the month and expiring on the last day of the month

THE FACTS

Perthpark Properties Ltd as lessor concluded a written lease agreement with Luanga and another party as the lessees. In terms thereof , Perthpark leased the premises to the lessees for a period of 12 months, commencing on 1 March 2016 and expiring on 28 February 2017.

Clause 9 of the lease provided that if the lease was not cancelled by either party before the lease expired, the lease would automatically continue on a month to month basis and could be cancelled by either party on at least twenty business days' notice to the other party.

On 19 July 2016 Perthpark notifiedLuanga in writing that all the apartments in the building, including the premises, were being sold, that current leases would not be renewed, and that notices to vacate the apartments would be sent in due course. In terms of that letter the lessees were also given the option to purchase the property.

After the lease expired on 28 February 2017 Luanga remained in occupation of the premises. On 4 May 2017 Perthpark's attorneys delivered a letter to the lessees which stated that with reference to clause 9 of the lease, that the lease was immediately cancelled and that they were required to vacate the property by no later than 5 June 2017.

The lessees failed to vacate the property. Perthpark applied to the Wynberg Magistrates' Court in September 2017 for an order evicting the lessees and all other occupants of the property. The application was brought in terms of section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (no 19 of 1998).

Luanga appealed against the granting of the order.

THE DECISION

The first issue was whether or not the notice of termination of the lease dated 4 May 2017 duly complied with section 5(5) of the Rental Housing Act (no 50 of 1999), as read with the common-law requirement that notice of termination of a monthly lease must run concurrently with a period of the lease and expire at the end of a month. The section provides that if on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease.

The Act must be interpreted in the light of the common law. There is no indication in the wording of section 5(5) that the legislature intended to alter the common-law rule that notice to terminate a monthly lease must expire at the end of a month. This rule is in line with constitutional values as it affords protection to both landlord and tenant, since it is easier to find replacement tenants and accommodation, respectively, from the beginning of the month as opposed to an arbitrary date in the middle of the month. It also serves to create desirable legal certainty.

It followed that the words 'one month's notice' in section 5(5) of the Act must be interpreted to mean one calendar month, running from the first day of the month and expiring on the last day of the month. It followed that the notice of 4 May 2017 did not comply with the requirements of section 5(5) of the Act, and was

accordingly invalid and of no force and effect. Instead of requiring the lessees to vacate the property on 5 June 2017, the lessees should have been afforded until 30 June 2017 to vacate.

Since the notice of termination of the lease was invalid for failure to comply with section 5(5) of the Act, Perthpark failed to discharge the onus resting on it of proving a valid termination of the lease. Luanga had therefore not been shown to be in unlawful occupation of the premises, and the magistrate accordingly erred when he granted an eviction order.

The Act must be interpreted in the light of the common law. There is no indication in the wording of s 5(5) that the legislature intended to alter the common-law rule that notice to terminate a monthly lease must expire at the end of a month. This rule is in line with constitutional values as it affords protection to both landlord and tenant, since it is easier to find replacement tenants and accommodation, respectively, from the beginning of the month as opposed to an arbitrary date in the middle of the month. It also serves to create desirable legal certainty.
Therefore, the words 'one month's notice' in s 5(5) of the Rental Act must, to my mind, be interpreted to mean one calendar month, running from the first day of the month and expiring on the last day of the month,

ORANJE v ROUXLANDIA INVESTMENTS (PTY) LTD

Property

A JUDGMENT BY NICHOLLS AJA (MAYA P, SWAIN JA, MATHOPO JA and CARELSE AJA concurring)
SUPREME COURT OF APPEAL
7 DECEMBER 2018

2019 (3) SA 108 (SCA)

The protection afforded by sub-sections 5 and 6 of the Extension of Security of Tenure Act (no 62 of 1997) is to ensure that an occupier will not be subjected to inhumane conditions violating human dignity. To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any circumstances.

THE FACTS

In 2000, Oranje started working fulltime as a general labourer on the farm Kaaimansgaat, which was owned by Rouxlandia Investments (Pty) Ltd. The Oranje family had the use of a house on the farm as part of Mr Oranje's contract of employment. In 2001, Oranje suffered serious injuries while driving a tractor in the course and scope of his employment. He continued working on the farm until he was declared medically unfit thirteen years later. Oranje's wife was herself medically boarded in 2007. Although she no longer worked there, she and the family continued residing on the farm with Oranje.

On 16 December 2013, Oranje entered into a housing agreement with Rouxlandia in terms of which he and his family became entitled to occupy a manager's house. It was a specific term of the housing agreement that the house was allocated only to management members and if the primary occupant no longer occupied a management position, the housing agreement would be terminated on 30 days' notice. Mr Oranje's continued occupation of the house was conditional upon him remaining permanently employed as a manager on the farm.

Six months after taking occupation of the farm manager's house, in June 2014, Oranje was declared medically unfit for work and his employment on the farm came to an end. He did not move out of the house. On 1 September 2015, Rouxlandia's management team convened a meeting with Mr Oranje to discuss his continued residence in the house. At the meeting, Oranje was informed that he and his family should move from their managers' house to a smaller house on the farm. He refused to do so. The following day, it was recorded in a letter sent to him that he had been offered alternative accommodation but had refused to participate in the meeting. He was given 30 days' written notice to vacate the manager's house in which he was residing.

In May 2016, Rouxlandia brought an application in the Land Claims Court seeking an order to have Oranje and his family relocated from the managers' house to a smaller house on the same farm. The court granted Rouxlandia's order for relocation.

Oranje appealed. The essential ground of appeal was that the Land Claims Court erred in not appreciating that it had a discretion in terms of section 26(3) of the Constitution to refuse the relocation order based on considerations of equity and justice.

THE DECISION

Oranje contended that, while a relocation is not an eviction in terms of the Extension of Security of Tenure Act (no 62 of 1997) (ESTA), it amounted to an eviction in terms of section 26(3) of the Constitution, which provides that no-one may be evicted from their home, or have their house demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

It is impermissible for a court to bypass legislation specifically enacted to give effect to a constitutional right and to decide the matter on the basis of the constitutional provision that gives effect to the right. ESTA and the Prevention of Illegal Eviction from and F Unlawful Occupation of Land Act (no 19 of 1998) (PIE) were specifically enacted to

protect the most vulnerable sectors from homelessness and lack of security of tenure. Together they form an integral component of the legislative measures designed to achieve the progressive realisation of the right to housing enshrined in s 26 of the Constitution. Accordingly, if it is not shown that the protection provided by ESTA is in some manner deficient, there would be no justification for direct reliance on the Constitution. No deficiency could be identified by Oranje.

The position contended for by Oranje was that sub-sections 5(a) and (d) of ESTA, which provide for the rights to human dignity and privacy, read with section 6(2)(a), which provides for the right to security of tenure, shielded him from any attempt at relocation. The protection afforded by those parts of sub-sections 5 and 6 of ESTA was to ensure that an occupier will not be subjected to inhumane conditions violating human dignity. To this extent, an occupier's right to resist relocation is protected. But these sections do not amount to a blanket prohibition on relocation under any circumstances.

In the present matter, the entitlement of Oranje to reside in the house arose from a housing agreement. Once the housing agreement was terminated his contractual right to reside in that particular house was also terminated. It was on this basis that Rouxlandia sought to have the Oranje family relocated. Because Oranje was a long-term occupier with his right to reside on the land guaranteed in terms of ESTA, Rouxlandia correctly accepted that they had an obligation to provide suitable alternative housing. Rouxlandia had offered alternative accommodation. The criteria for suitability had been fulfilled.

ESTA was not enacted to provide security of tenure to an occupier in the house of his or her choice.

Oranje's long-term security of tenure was not threatened. His continued residency on the farm was not in dispute. His entitlement to the particular house that he wished to occupy was contractually linked to his employment as a manager, which employment had ended due to his ill health. He had been provided with suitable alternative accommodation. In these circumstances any reliance on his right of security of tenure, in terms of section 6(2)(a) read with his right to human dignity in terms of section 5(a) of ESTA was misplaced.

Rouxlandia was entitled to enforce its rights at common law to terminate Oranje's occupancy in that particular house, subject to the proviso that none of Oranje's ESTA rights were infringed.

RESILIENT PROPERTIES (PTY) LTD v ESKOM HOLDINGS SOC LTD

Property

A JUDGMENT BY VAN DER LINDE J
GAUTENG LOCAL DIVISION, JOHANNESBURG
14 SEPTEMBER 2018

2019 (2) SA 577 (GJ)

In determining whether an electricity supplier subject to Electricity Regulation Act (no 4 of 2006) may interrupt he electricity supply, the question to be answered is whether the power to interrupt the electricity supply in the manner proposed is rationally connected to the purpose for which that power was conferred

THE FACTS

Gamagara Local Municipality (GLM) defaulted in making payment to Eskom Holdings Soc Ltd for electricity supplied to it. The parties then reached a compromise and GLM signed an acknowledgment of debt in favour of Eskom. However, GLM defaulted in honouring the acknowledgment of debt and Eskom notified on 13 June 2018 that it would implement a specific interruption of the electricity supply to the entire municipality.

Resilient Properties (Pty) Ltd meticulously paid its electricity account to GLM. When it received notice of Eskom's intention to interrupt the electricity supply, it brought an application for an order (i) that GLM be directed to pay Eskom all amounts falling due in terms of the acknowledgment of debt, (ii) that it be authorised to discharge the debts that it incurred to GLM in respect of the ongoing supply of electricity by making payment directly to Eskom, (iii) that Eskom be interdicted and restrained from implementing its decision to interrupt the bulk electricity supply to the entire Gamagara Municipality.

It sought these orders a review of Eskom's decision, and also pending a determination by the National Energy Regulator of South Africa (NERSA) of the dispute between Resilient and Eskom in accordance with the provisions of the Electricity Regulation Act (no 4 of 2006) (ERA).

Resilient contended that Eskom's decision was inconsistent with its electricity distribution licence because that licence obliged Eskom to supply electricity to all customers, such as GLM, and also end users of customers, such as itself. Resilient contended that the licence did not authorise Eskom to disconnect a municipal customer for failure to pay its electricity accounts. Under clauses 3.1 and 3.2 of the Eskom licence the latter is obliged to supply electricity to all end users of local authorities. This was in contrast, to GLM on which there was no such obligation under clauses 4.1 and 5.1.1 of that licence. Since Eskom could not make selective alternative arrangements for paying customers, as a local authority like GLM could, Eskom's licence did not permit it to discontinue electricity supply to an entire local authority for non-payment. It was limited to either suing the local authority, or referring the complaint to NERSA.

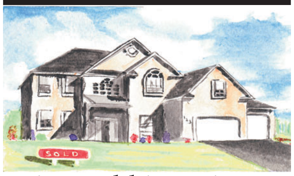
THE DECISION

The real question was whether or not Resilient had established that it had a prima facie right, as against Eskom and GLM.

GLM's conduct was constitutionally unlawful and inconsistent with the Constitution, 'just and equitable' relief under section 172(1)(b) was appropriate. Directing, at the instance of a non-contracting but clearly interested party, that GLM comply with its acknowledgement of debt contractual obligations towards Eskom was comfortably included within the wide reach of that section.

It followed that Resilient's potential case for final relief against GLM had accordingly been sufficiently established at the level required for the interim relief it sought.

As far as Eskom was concerned, Resilient's argument depended for its validity on the premise that the Eskom licence conferred no power on it to interrupt or terminate electricity supply to GLM; that that conclusion



foreclosed the countervailing argument about its power to interrupt or terminate; and that Eskom's contractual entitlements could not override the power source of what is ultimately administrative action. However, in principle Eskom had the power under section 21(5) of the ERA to terminate or interrupt the supply of electricity to GLM, given its contractual default. Given the nature and source of Eskom's power, its exercise is, however, administrative action for the purposes of section 33 of the Constitution and constrained, if not by the requirement of reasonableness, then — at best for Eskom — at least by the baseline standard of rationality.

Was the power to interrupt the electricity supply to GLM in the manner proposed, rationally connected to the purpose for which that power was conferred? That was a fact-driven enquiry. Ordinarily, the power to interrupt or to terminate the supply of electricity would have been intended to prevent Eskom from having to supply electricity when it will not be paid for it. But the power could not have been intended to be exercised in such a manner that it would in a given circumstance result in widespread human catastrophe.

On the facts of the case, a human catastrophe awaited the implementation of Eskom's particular interruption decision. This situation was undoubtedly brought about by GLM's default, conduct which was unlawful.

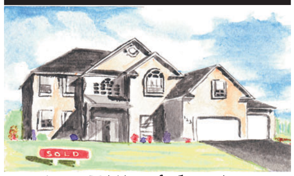
GLM was directed to pay to Eskom all amounts falling due to Eskom in terms of the instalments provided for in the acknowledgement of debt. Eskom was interdicted and restrained from interrupting the electricity supply.

It is difficult to comprehend why at this late stage the response of GLM is to promise to fix up in the future what went wrong in financial year 2018, when already financial year 2017 has shown up the dramatic losses, and nary a word is said about those problems — pre-dating as they do the current problems. It is equally difficult to avoid the conclusion, at prima facie level, that mismanagement is the true source of GLM's failure H to have paid its Eskom bill.

I do not accept that the defence put up by GLM, to the effect that it cannot comply with the terms of the AOD 29 because the full outstanding balance has been triggered, has substance. In truth, all parties, particularly I Eskom, are desirous only of obtaining payment of the instalments due under that AOD. It is no answer for GLM to say that because the full A outstanding balance has been triggered therefore it does not have to pay anything at all.

If then GLM's conduct is constitutionally unlawful and inconsistent with the Constitution, 'just and equitable' relief under s 172(1)(b) is implicated. Directing, at the instance of a non-contracting but clearly interested party, that GLM comply with its AOD contractual obligations towards Eskom seems to me to be comfortably included within the wide reach of that section.

TRUSTEES, SIMCHA TRUST v DA CRUZ



A JUDGMENT BY THERON J (MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J and PETSE AJ concurring)
CONSTITUTIONAL COURT
19 FEBRUARY 2019

2019 (3) SA 78 (CC)

The 'legitimate expectations test' is the appropriate means through which to establish the existence of the disqualifying factors in ss 7(1)(b)(ii)(aa)(aaa) – (ccc) of the National Building Regulations and Building Standards Act (no 103 od 1977).

THE FACTS

The Simcha Trust submitted building plans to the Municipality of Cape Town. The Municipality required that the Trust publish its plans and invite comment on the impact on the heritage of the area. The Municipality also invited the owners of surrounding erven, including Da Cruz, and owner in the Four Seasons sectional title scheme, to comment. The municipality received a number of submissions from the owners of neighbouring properties who were opposed to the Trust's application.

The building control officer recommended that the plans be approved. The head of the Municipality's building development management section approved the plans on the same day. He stated 'I am not satisfied that the area will be disfigured by the additions to the existing building and nor am I satisfied that the building will be unsightly or objectionable.'

Da Cruz and Four Seasons instituted a review in the High Court, under the Promotion of Administrative Justice Act 6 (PAJA), of the municipality's decision to approve the plans. The judge set aside the development approval on the grounds that, in approving the plans, the municipality was materially influenced by an error of law in that he misunderstood the requirements of section 7(1) of the National Building Regulations and Building Standards Act (no 103 od 1977), particularly that it requires a determination which is separate from the application of the zoning scheme, and on the ground that the municipality failed to take into account a relevant consideration: whether the proposed development gave rise to any of the disqualifying factors in section 7(1) of the Act when viewed from the perspective of the neighbouring Four Seasons building.

The Trust and the municipality appealed to the full court. The full court dismissed the appeal. The Trust and the municipality then filed separate applications for leave to appeal in the Constitutional Court. The Chief Justice issued directions requiring the parties to make written submissions on what the proper test for establishing the disqualifying factors in section 7(1)(b)(ii)(aa)(aaa) – (bbb) of the Act ought to be.

In terms of section 7(1)(b)(ii)(aa) of the Act, a local authority must refuse to approve an application if the local authority 'is satisfied that the building to which the application in question relates—
(aa) is to be erected in such manner or will be of such nature or appearance that —
(aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
(bbb) it will probably or in fact be unsightly or objectionable;
(ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties'.

THE DECISION

The question of law was whether the legitimate expectations test applies to all of the disqualifying factors in section 7(1)(b)(ii)(aa). The legitimate expectations test is the means by which a decision-maker determines whether there will be derogation in value sufficient to disqualify a building application under the Act. Simcha contended that the full court erred when it applied the legitimate expectations test to the other disqualifying factors in section 7(1)(b)(ii)(aa) of the Act. It

contended this test is applicable only to the third of three disqualifying factors.

In terms of section 7(1)(b)(ii)(aa) of the Act, the local authority must be 'satisfied' that none of the disqualifying factors are present. Discretionary power is an essential tool in the administration and the legal system that governs it. The legitimate expectations test correctly circumscribes the discretion of the decision maker with the constitutionally mandated requirements of lawfulness, reasonableness and procedural fairness.

The language of legitimate expectations in the context of derogation from value does not refer to an independent right held on behalf of a neighbour to have their opinion heard by the decision maker. The phrase refers to an objective factual inquiry into the legitimate expectations of a party to a hypothetical sale of a neighbouring property. In the context of derogation in value, the decision maker must be positively satisfied that a hypothetical purchaser of a neighbouring property would not harbour legitimate expectations that the proposed development application would be denied because it was so unattractive or intrusive.

When applied to each of the disqualifying factors in section 7(1)(b)(ii)(aa), the legitimate expectations test is an accurate translation of the duties of local authorities under the Act and the Constitution. It requires the decision maker to consider the impact of the proposed development on neighbouring properties, from the perspective of a hypothetical neighbour. This infuses the exercise of the discretionary power under section 7(1)(b)(ii)(aa) with the constitutionally mandated requirements of reasonableness, lawfulness and procedural fairness, informed by the contextual approach mandated by the Act.

The legitimate expectations test is the appropriate means through which to establish the existence of the disqualifying factors in ss 7(1)(b)(ii)(aa)(aaa) – (ccc) of the Act.

The correct formulation of the reasons for the municipality's decision should not have been as stated by the head of the municipality's building development management section but should have been 'I am satisfied that the area will not be disfigured'.

The appeal was dismissed.

GCC ENGINEERING (PTY) LTD v MAROOS

A JUDGMENT BY SERITI JA
(CACHALIA JA, MOLEMELA JA,
SCHIPPERS JA and MOTHLE AJA
SUPREME COURT OF APPEAL
3 DECEMBER 2018

2019 (2) SA 379 (SCA)

Insolvency

In section 131(6) of the Companies Act (no 71 of 2008), the legislature used the word 'suspend' which does not mean termination of the office of the liquidator. The term 'liquidation proceeding' refers only to those actions performed by a liquidator in dealing with the affairs of a company in liquidation in order to bring about its dissolution. What is suspended is the process of winding-up and not the legal consequences of a winding-up order.

THE FACTS

Maroos was the director and the sole shareholder of GCC Engineering (Pty) Ltd. In 2016, due to the company's financial difficulties, a business rescue application was launched and an order was granted. The company was placed in business rescue and a Mr G Vosloo was appointed as the provisional business rescue practitioner.

On 6 April 2017, Vosloo brought an application seeking an order that the business rescue proceedings be terminated and that the company be placed under liquidation in terms of section 141(2)(a)(ii) of the Companies Act (no 71 of 2008). In his founding affidavit in support of his application, Vosloo stated that the proceedings should be terminated as there was no longer a reasonable prospect that the first respondent would be rescued. On 3 May 2017 an order placing the first appellant under a provisional winding-up order in the hands of the Master of the High Court was granted. On 15 May 2017 the Master appointed the provisional joint liquidators. They suspended the company's business for operational reasons on 18 May 2017.

On 30 May 2017, Maroos brought an urgent application seeking an order that Mr Etienne Naude be appointed as manager of GCC to manage the company until date of finalization of a business rescue application for the business rescue of GCC currently pending, and that Naude be ordered to provide the court hearing the business rescue application with a full report of his management of the company over the interim period, with specific reference to the possibility of GCC being rescued as a result of business rescue proceeding.

GCC and the provisional joint liquidators opposed the application , but the court granted the orders sought by Maroos.

GCC and the provisional joint liquidators appealed.

THE DECISION

The court a quo reasoned that since liquidation proceedings that had already commenced were suspended by an application for business rescue in terms of section 131(6) of the Act, the powers of the liquidators were suspended and control of the assets of the company 'falls under the Master in accordance with the provisions of section 131(2)'. If the particular company trades, and the powers of the liquidators are suspended, the Master cannot assume the powers of the previous directors, which then 'are re-vested with the particular directors to control and manage the company pending determination of the pending business rescue application'.

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

The appointment, office and powers of the provisional liquidators are not suspended. In section 131(6) the legislature used the word 'suspend' which does not mean termination of the office of the liquidator. The term 'liquidation proceeding' refers only to those actions performed by a liquidator in dealing with the affairs of a company in

liquidation in order to bring about its dissolution. What is suspended is the process of winding-up and not the legal consequences of a winding-up order.

The order placing the company under winding up is still in place and has not been set aside. On the granting of the winding-up order, the directors of the company cease to function as directors and the property of the company falls under the control of the Master or the appointed liquidators. The directors of the company in liquidation have been stripped of their control and management of the company placed in winding-up by the court. There is no legal provision either statutory or at common law that sanctions the re-vesting of control and management of the company in liquidation to the director of the said company.

The appeal was upheld.

Section 131(6) of the Act does not change the status of the company in liquidation nor does it suspend the court order that placed the company under liquidation in the hands of the Master in terms of s 141(2)(a)(ii) of the Act. The appointed provisional joint liquidators must proceed with their duties and functions to protect the assets of the company for the benefit of all the creditors of the company.

Successful liquidation proceedings constitute a complete process by which a company is brought to an end and the liquidation process culminates in the dissolution of the company up to its deregistration (see Richter v Absa Bank at 60D).

In terms of s 131(6) of the Act, it is liquidation proceedings, not the winding-up order, that is suspended. What is suspended is the process of continuing with the realisation of the assets of the company in liquidation with the aim of ultimately distributing them to the various creditors. The winding-up order is still in place; and prior to the granting or refusal of the business rescue application, the provisional liquidators secure the assets of the company in liquidation for the benefit of the body of creditors.

LOUIS PASTEUR HOLDINGS (PTY) LTD v ABSA BANK LTD

A JUDGMENT BY SWAIN JA (NAVSA ADP, MATHOPO JA, MOCUMIE JA and MATOJANE AJA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2018

2019 (3) SA 97 (SCA)

The effect of section 134(3) of the Companies Act (no 71 of 2008) is that in the absence of consent by the person holding security over property, before it may be disposed of by the company, the proceeds of its disposition must be sufficient to fully discharge the indebtedness of the company to the holder of the security.

THE FACTS

Absa Bank Ltd brought an application for the final liquidation of two related companies, Medical Empowerment Consortium Investments Ltd (MECI) and Medical Review Corporation Ltd (MRC). MECI was the owner of property known as the Kine Centre and MRC was the owner of an adjacent property, Small Street Mall, situated in central Johannesburg. The basis for the application against MECI was the breach of a loan agreement concluded with Absa to re-finance the Kine Centre. As at 25 October 2013, MECI was indebted to Absa in an amount of R98 262 816,17, and MRC was indebted to Absa in an amount of R61m. Any rental income to be received by MECI, in respect of a lease agreement allegedly concluded with the City of Johannesburg in respect of office space within the Kine Centre, had been ceded to Absa in securitatem debiti. The rental income was the only income available to MECI.

Absa also sought orders setting aside resolutions adopted by the directors of MECI and MRC, which had placed these companies under voluntary supervision and in business rescue in terms of section 129(1) of the Companies Act (no 71 of 2008).

Louis Pasteur Holdings (Pty) Ltd, an alleged creditor of both companies, delivered counter-applications in each of the MECI and MRC applications, and sought orders placing both companies under supervision and in business rescue. It was alleged that MRC would receive from the rental income, a monthly payment of R125 000 from MECI, which would enable it to repay its obligations to Absa.

A separated issue was then brought before the court. This was: Having regard to the provisions of section 136 read with section 134 of the Companies Act (no 71 of 2008) would a business rescue practitioner be entitled to utilise the rental income received from the properties without Absa's consent or unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness of the second respondent as protected by Absa's security?

The court gave an order placing the companies in final liquidation. Louis Pasteur appealed.

THE DECISION

The essential question was whether the decision to grant a final liquidation order, instead of deciding the separated issue discretely, should be set aside.

The separated question was whether the business rescue practitioner would be entitled to utilise the rental income, without the consent of Absa. If not, would the business rescue practitioner be entitled to utilise the rental income, if such income was sufficient to fully discharge the indebtedness of MECI to Absa?

Section 134(3) of the Act provides that in the absence of the prior consent of a person holding any security or title interest in property, which the company in business rescue proceedings wishes to dispose of, it may only do so if the proceeds of the disposal of the property will be sufficient to fully discharge the indebtedness protected by that person's security, or title interest. The company is then obliged to promptly pay the proceeds of the disposition to such person, up to the amount of the company's indebtedness.

What the subsection therefore requires, in the absence of consent by the person holding security

over the property, before it may be disposed of by the company, is that the proceeds of its disposition must be sufficient to fully discharge the indebtedness of the company to the holder of the security. If this requirement is not satisfied, the company may not dispose of the property. If this requirement is satisfied, the company must promptly pay the proceeds of the disposition to the security holder. On receipt by the security holder of the proceeds of the disposition, which fully discharges the indebtedness of the company, the property is released from the security.

It was therefore clear that the utilisation by the business rescue practitioner of the rental income, in order to make periodic payments to Absa in reduction of the indebtedness of MECI, with the ultimate goal of discharging such indebtedness, did not satisfy the requirement that the prompt payment of the proceeds of the disposition must fully discharge the indebtedness. Consequently, the answer to the separated question was that the business rescue practitioner could not utilise the rental income without the consent of Absa, even if such rental income might eventually be sufficient to discharge the indebtedness of MECI to Absa.

The appeal failed.

Section 134(3) of the Act provides that in the absence of the prior consent of a person holding any security or title interest in property, which the company in business rescue proceedings wishes to dispose of, it may only do so if the proceeds of the disposal of the property will be sufficient to fully discharge the indebtedness protected by that person's security, or title interest. The company is then obliged to promptly pay the proceeds of the disposition to such person, up to the amount of the company's indebtedness.

What the subsection therefore requires, in the absence of consent by the person holding security over the property, before it may be disposed of by the company, is that the proceeds of its disposition must be sufficient to fully discharge the indebtedness of the company to the holder of the security. If this requirement is not satisfied, the company may not dispose of the property. If this requirement is satisfied, the company must promptly pay the proceeds of the disposition to the security holder. On receipt by the security holder of the proceeds of the disposition, which fully discharges the indebtedness of the company, the property is released from the security

STANDARD BANK OF SOUTH AFRICA LTD v HENDRICKS

A JUDGMENT BY ERASMUS J, DOLAMO J and SAVAGE J
WESTERN CAPE DIVISION, CAPE TOWN
18 DECEMBER 2018

2019 (2) SA 620 (WCC)

Credit Transactions

Aspects concerned with foreclosure.

THE FACTS

After a number of foreclosure matters resulted in applications seeking an order of execution against immovable property which was the primary residence of the judgment debtor, a judge invoked the provisions of section 14(1)(b) of the Superior Courts Act (no 10 of 2013). The matters were postponed and the Judge President referred the matters for hearing before a full bench.

The issues to be decided were:

1. Whether rule 46A introduces substantive legal requirements for obtaining an order for the execution of judgments in mortgage contracts, and, if so, whether such substantive requirements could competently be introduced by the Rules Board or only by the legislature, and whether rule 46A was made ultra vires the powers of the Rules Board and was accordingly invalid.
2. Whether, as was the practice in other divisions of the High Court, personal service by the sheriff was required prior to granting a money judgment for the accelerated full outstanding balance of moneys lent, which moneys were secured by a mortgage bond over immovable property.
3. The circumstances under which it may be appropriate to grant a money judgment for the accelerated full outstanding balance and then postpone the application to declare the property secured by the bond specially executable, given the impact on costs and the potential for attachment and execution of movables in the meantime.
4. Whether the court had a discretion to decline to grant a default money judgment for the accelerated full outstanding balance and whether there were considerations to which regard should be had to ensure uniformity of treatment in this regard.
5. Whether the postponement of the application for the money judgment under certain circumstances was objectionable or desirable.
6. Whether the court had a discretion, when postponing an application for executability, to afford the mortgagor an opportunity to 'remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue' under the National Credit Act 34 of 2005 (NCA).
7. Whether the operation of rule 46A(9), insofar as the setting of a reserve price was concerned, purported to amend the substantive law or not.
8. The circumstances under which a court is to set a reserve price and how this was to be determined in terms of the new Uniform Rule 46A, effective since 22 December 2017.

THE DECISION

1. Rule 46A regulates the procedures for the attachment of and execution against immovable property. Having regard to the stance taken by the parties, it was not necessary to determine this issue at this time. It was therefore assumed that rule 46A was intra vires the powers of the Rules Board.
2. Since rule 46A(3)(d) requires personal service by the sheriff on the debtor, with the proviso that 'the court may order service in any other manner', it is not possible for the court to approach service in the way it has been undertaken in the past. The rule expressly requires that where personal service is not possible, the court must be approached to order service in any other manner and that sufficient

material is required to be placed before the court to allow it to make such an order.

3 & 4. Both the money order and the execution order should be sought simultaneously by the creditor. This is given the nature of the claims; the cost advantages in dealing with both orders at the same time; and the necessity to limit the piecemeal adjudication of such matters. Insofar as this judgment binds single judges of our division, there would be an obvious advantage to a more uniform approach being adopted in such matters. The money judgment should be heard together with the claim for executability.

5. A loan agreement secured by a mortgage bond over the primary residence of the judgment debtor has the potential to impact the right of access to housing, with the money order causally connected to and intrinsically linked to the order of special execution, given the existence of the mortgage bond over the primary residence of the debtor. In the vast majority of cases the satisfaction of the money judgment will not be possible other than through a sale in execution of the immovable property, with a clear distinction therefore existing between a loan agreement secured by a mortgage bond registered over the debtor's immovable property and a loan agreement which does not. Where the immovable property is the primary residence of the debtor, this puts the nature of the entire transaction into a different category, one which, when the application for both orders is considered simultaneously in the manner supported by the banks, engages s 26 of the Constitution. As a result, having regard to the debtor's s 26 right, the money judgment may be postponed together with the order for special execution, where a court, on a proper consideration of the facts before it, considers this to be in the interests of justice.

6. Given the factors to be considered by the court at the time that the order is made, the court should not consider postponing the operation of the order as a matter of course.

7. The setting of a reserve price is a matter of procedural law, in that it is concerned with the manner in which the judgment is executed, and the conduct and procedure of the sale in execution.

8. Our courts have acknowledged that the forced nature of sales in execution necessarily negatively impacts upon the price at which a property can be sold. It is generally accepted that a voluntary sale will realise more than a forced sale. However, the benefits of setting a reserve price in most instances outweigh any prejudice which may arise in doing so. A reserve price will halt the sale of homes at minimal value to the direct prejudice of the judgment debtor. It is therefore only in exceptional circumstances that the court should exercise its discretion not to set a reserve price.

COMPETITION COMMISSION *v* HOSKEN CONSOLIDATED INVESTMENTS LTD

A JUDGMENT BY BASSON AJ (CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J concurring)
CONSTITUTIONAL COURT
1 FEBRUARY 2019

2019 (3) SA 1 (CC)

Competition

Requiring an entity to notify a further transaction in circumstances where it has previously notified a merger for the acquisition of de facto control, merely because the nature of control transmutes to a different form of control, is not only unduly formalistic, it is also burdensome.

THE FACTS

Before 2014 Tsogo Sun Holdings Limited was subject to the joint control of Hosken Consolidated Investments Ltd (HCI) and SABMiller plc. HCI held 39% and SABMiller 41% of the shares in Tsogo. In 2014 SABMiller disinvested its shareholding in Tsogo with the effect that HCI's beneficial shareholding in Tsogo would increase to 47,61%. HCI became the largest shareholder in Tsogo by a considerable margin and the de facto controller of Tsogo.

As a result of the disinvestment of SABMiller, HCI and applied to the Competition Commission for merger approval for the acquisition of sole control of Tsogo. HCI also notified the Commission of its intention in the future to acquire more than 50% of Tsogo's issued share capital within the meaning of section 12(2)(a) of the Competition Act (no 89 of 1998). HCI effectively exerted de facto control over the gaming activities of Tsogo within the meaning of section 12(2)(g) of the Act.

The Commission investigated the large merger as notified and recommended that the merger be approved unconditionally. The Commission specifically recorded in its report that it was the intention of HCI, post-merger, to ultimately increase its shareholding in Tsogo beyond 50% and thus acquire de jure control over Tsogo. The Tribunal unconditionally approved the proposed merger.

In 2016, HCI requested the Commission to provide an advisory opinion to confirm whether the proposed consolidation of all of HCI's gaming interests, other than its sports betting and lottery interests, under Tsogo would constitute a notifiable merger for the purpose of section 12 of the Act.

The Commission concluded that HCI's proposed transaction crossed 'a bright line' by acquiring control in terms of section 12(2)(a). This made it a notifiable transaction as 'the crossing of the bright line has a definite legal implication because it indicates the types of transactions the Legislature deemed should be notified to the Commission'. The upshot of the Commission's advisory opinion was that the requirement to notify a merger is triggered once a transaction falls squarely within section 12(2) of the Act.

Tsogo then applied to the Competition Tribunal for an order declaring that the proposed transaction did not require approval by the competition authorities in terms of the merger control provisions of the Act. HCI considered that it would face a significant risk if it implemented the transaction in the face of the Commission's advisory opinion.

In an appeal, the Competition Appeal Court held that once de facto control has been acquired, a party need not again notify and seek approval from the Commission for the transaction when control is subsequently acquired in one of the other ways. Merger approval is thus a 'once-off affair'. In light of the fact that merger approval had already been granted to HCI in 2014 for the acquisition of sole de facto control over Tsogo consequent upon the increase in shareholding in Tsogo to 47%, the proposed transaction in 2017 did not constitute a notifiable merger. The Competition Appeal Court concluded that the Commission could not require the notification based on the reason that it wished to assess the implications of the 2017 transaction.

In the Constitutional Court, the issues for determination were whether it was appropriate for the Tribunal to grant a declaratory order; and whether the 2017 transaction was notifiable in terms of the Act.

THE DECISION

The control acquired over Tsogo after the merger in 2014 fell within the ambit of section 12(2)(g) of the Act. The Commission also accepted at the time that HCI exercised sole de facto control over Tsogo. So, in 2014 the transaction amounted to a notifiable merger because HCI graduated from shared joint control (with SABMiller) to de facto control. After the 2017 transaction HCI in addition acquired de jure control within section 12(2)(a) of the Act.

The question was whether the transaction was notifiable simply because HCI now acquired de jure control in distinction to a different form of control (de facto control)? Secondly, the question was whether HCI could rely on the once-off principle to avoid having to notify the 2017 transaction?

Requiring an entity to notify a further transaction in circumstances where it has previously notified a merger for the acquisition of de facto control, merely because the nature of control transmutes to a different form of control, is not only unduly formalistic, it is also burdensome. Once control has been acquired there is no need to renotify simply because the quality of control changes from de facto to de jure control. This accords with the once-off principle. At the time the Commission evaluated the merger transaction in 2014, it did so with knowledge of the intended transaction to acquire de jure control.

The Commission retains its wide powers under the Act to investigate any past merger transaction. If HCI and Tsogo, in implementing the 2017 transaction acted in a manner that resulted in adverse effects on employment, for instance, then the Commission could revoke its approval in terms of section 16(3) of the Act.

The Competition Appeal Court did not err in upholding the appeal against the decision of the Competition Tribunal in that HCI and Tsogo were not obliged to notify the 2017 transaction. However, it was always within the power of the Commission to investigate assurances given during the 2014 merger approval proceedings in terms of sections 15 and 16(3).

PEXMART CC v H. MOCKE CONSTRUCTION (PTY) LTD

Competition

JUDGMENT BY NAVSA ADP (LEWIS JA, MOCUMIE JA, MOLEMELA JA AND MAKGOKA JA concurring)
SUPREME COURT OF APPEAL
3 DECEMBER 2018

2019 (3) SA 117 (SCA)

If it is shown that a competitor has used a party's manufacturing process by copying that process and using confidential information associated therewith, the elements of unlawful competition will have been demonstrated, entitling that party to an interdict preventing the competitor from continuing to use that process.

THE FACTS

H. Mocke Construction (Pty) Ltd was a pipeline construction company specialising in lining steel pipes used in the mining industry with a plastic high density polyethylene liner by welding factory manufactured plastic liner pipes together into lengths beyond one kilometre and then lining a one kilometre steel pipe internally with the plastic liner pipe.

Polymeric Pipe Technology Corporation , an American company, sold Mocke the 'exclusive and irrevocable licence to a process known as the 'Polymeric/Sureline Process'. This enabled Mocke Construction to use the intellectual property rights that flowed from the licence. Mocke paid a total of R17m for the deformer machine, an accompanying winch, other equipment and the intellectual property of Polymeric and the knowledge and experience of Gish, Polymeric's owner.

During February 2011, before the Process was refined, a Mr Henn was offered and accepted employment with Mocke Construction. During October 2013, Mr Henn's services with Mocke Construction were terminated. Mr Henn, almost immediately thereafter, took up employment with Pexmart CC.

During the second half of 2014, Mocke became aware that a gold-mining company which Mocke Construction had provided services to, was in advanced negotiations with Pexmart for the completion of a plastic pipe-lining project, in respect of which the existing contractor had defaulted. Mocke contended that the tender by Pexmart was based on the use of the Process. The gold-mining company had opted to use Pexmart CC because its tender was cheaper.

Mocke Construction alleged that Pexmart had reverse-engineered the Polymeric deforming machine and intended to market its services competitively, utilising Mocke's trade secrets, intellectual property and licensed technology. Pexmart refused to accede to its demand to cease using the deforming machine, intellectual property and licensed technology.

Mocke Construction then brought an application for an order that Pexmart be restrained and interdicted from copying, reverse engineering, reproducing, constructing and using the Sureline and/or Polymeric deforming process.

THE DECISION

The were four issues for determination: 1 Whether the deforming processes adopted by Pexmart were dissimilar to the Sureline and/or Polymeric deforming process, 2 Whether the Sureline and/or Polymeric deforming process, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith was protected by the license awarded to Mocke Construction, 3 Whether protectable confidential information existed in respect to the Sureline and/or Polymeric deforming process, its machine(s), intellectual property, techniques, on-site training, technology and the know-how associated therewith, 4 Whether Pexmart was utilizing such protectable confidential information.

The evidence clearly showed that the processes adopted by Pexmart were ssimilar to those employed by Mocke Construction. The photographs presented at trial confirm the similarity between the Polymeric machine The differences were not material. Pexmart's uncertainty

as to whether it was employing a deforming machine or whether it had developed an entirely different process, could be held against it. Furthermore, it failed to produce its new process.

The protectable information was not only that which was developed over decades by Mr Gish through trial-and-error, but also included the refinement of the Process after the Polymeric machine arrived in South Africa. The difficulties overcome were all part of the trade secrets and confidential information.

The application succeeded.

I can find no fault with the reasoning and conclusion of the court below in relation to whether the processes adopted by the appellants are dissimilar to those employed by the respondents. The photographs presented at trial confirm the similarity between the Polymeric machine and the appellants' machine. The differences described above are not material. The appellants' vacillating statements in relation to whether they were employing a deforming machine or whether they had developed an entirely different process by way of suction, could rightly be held against them. Furthermore, they failed to produce their vaunted new process. Instead, what was on display, was a single compression machine that Mr Mocke was adamant could not remotely perform the task. He was adamant that the degree of pressure required to collapse the plastic pipe, as suggested by the appellants, was likely to cause structural damage. This evidence was not contradicted.

STARWAYS TRADING 21 CC (IN LIQUIDATION) v PEARL ISLAND TRADING 714 (PTY) LTD

Competition

JUDGMENT BY VAN DER MERWE JA (LEWIS, WALLIS AND ZONDI JJA AND MATOJANE AJA concurring)
SUPREME COURT OF APPEAL
3 DECEMBER 2018

2019 (2) SA 650 (SCA)

The ordinary meaning of ex warehouse is 'out of or in front of the warehouse'. The term is used simply to indicate where delivery would take place. A reasonable person who is entitled to accept that a contracting party will not perform its duties in terms of the objective and correct interpretation of a contract but would insist on its own incorrect interpretation thereof, is entitled to cancel the contract by acceptance of the repudiation.

THE FACTS

Shoprite Checkers (Pty) Ltd and Pearl Island Trading 714 (Pty) Ltd entered into a agreement in terms of which Shoprite would from time to time place orders for the supply of products by Pearl, which would then warehouse, package and distribute the goods so ordered.

At a later date, Starways Trading 21 CC and Pearl entered into a written agreement in terms of which Starways sold 25 000 metric tonnes of white refined sugar to Pearl. The sugar was destined for Shoprite. The first delivery would be done directly from port to the buyer and the remaining seven would be effected 'ex warehouse'.

Although for reasons of practicality and convenience Shoprite acted as intermediary for Pearl when the contract was negotiated with Starways, Shoprite was not a party to the contract and Pearl onsold the sugar to Shoprite in terms of a separate agreement. In terms of this agreement, Pearl would package the sugar and deliver it to Shoprite at a higher price than the bulk prices specified in the contract between it and Starways.

As an importer, Starways was obliged to pay the import duty imposed on sugar in terms of the Customs and Excise Act 91 of 1964. Section 59(2) of the Act provides that whenever any duty is decreased on any goods, and such goods in pursuance of a contract made before the decrease became effective are thereafter delivered to the purchaser, the purchaser of the goods may, in the absence of agreement to the contrary, if the seller has in respect of those goods had the benefit of the decrease, deduct from the contract price a sum equal to the said duty or decrease.

After conclusion of the agreement between Pearl and Starways, the import duty on sugar was reduced drastically. The import duty decreased from the amount of R2 395 per metric tonne to R318,90 per metric tonne.

Starways contended that the term 'ex warehouse' constituted an agreement to the contrary that entitled it to the benefit of the decrease in import duty. Starway made clear that it expected payment from Pearl of the purchase prices stipulated in the contract, without reduction. Pearl asserted that it was a tacit, alternatively implied term of the contract that should the import duty on sugar be reduced, the purchase price would be reduced accordingly. It further stated that Starways' stated position amounted to a repudiation of the contract and that Pearl accepted the repudiation and cancelled the sugar contract.

Starways contended that Shoprite was contractually obliged to it to pay the purchase prices in terms of the contract to Pearl. Delivery of the first consignment was not tendered, but in fact withheld. Starways expressly denied the existence of a price adjustment term. Starways sought an order directing Pearl to accept delivery in terms of the sugar contract and, upon such delivery, to make payment of the prices stipulated in the sugar contract. Starways applied for final orders enforcing the contract against Pearl and the alleged contractual obligation of Shoprite to make payment to Pearl.

THE DECISION

The ordinary meaning of ex warehouse is 'out of or in front of the warehouse'. The term was used simply to indicate where delivery would take place. It served to distinguish between

delivery directly from the port to Pearl and delivery at Starways' warehouse in Cape Town. There was no reason to find that 'ex warehouse' had a different meaning in the contract.

In consequence, Pearl was entitled to a reduction of price in terms of section 59(2). Starways' interpretation to the contrary was wrong.

By the time Starways brought its application, delivery of the first consignment was already overdue. As delivery of the first consignment was not tendered, but in fact withheld, and Starways expressly denied the existence of a price adjustment term, Starways unequivocally conveyed that it would deliver the sugar only against payment of the full purchase prices reflected in the sugar contract, without any reduction. A reasonable person in the position of Pearl was, in all these circumstances, entitled to accept that Starways would not perform its duties in terms of the objective and correct interpretation of the sugar contract but would insist on its interpretation thereof. Pearl was therefore entitled to cancel the sugar contract by acceptance of the repudiation.

The application brought by Starways was dismissed.

AMARDIEN v REGISTRAR OF DEEDS

A JUDGMENT BY MHLANTLA J (MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, PETSE AJ and THERON J concurring)
CONSTITUTIONAL COURT
28 NOVEMBER 2018

2019 (3) SA 341 (CC)

Contract

Where no additional statutory protection applies, a debt becomes due and payable automatically upon the conclusion of the agreement creating it. But where there is a statutory requirement that an agreement must be recorded, such as in section 26 of the Alienation of Land Act (no 68 of 1981), payments become due and payable only upon recordal of that agreement.

THE FACTS

In 1998, the City of Cape Town established a housing initiative to deliver government subsidised housing to poor members of the Cape Town community. To this end, the Cape Town Community Housing Company (Pty) Ltd was established to receive housing subsidies on behalf of beneficiaries and apply those subsidies towards the construction of new houses. The subsidies were used to reduce the purchase prices of the houses. Amardien and the other appellants (the applicants) were all beneficiaries of government subsidised housing and concluded instalment sale agreements with the housing company as the seller between December 2000 and February 2001.

In terms of clause 4 of these agreement, the applicants were required to make payment in instalments on the last day of each month for a period of four years. Clause 17 set out the steps to be followed by the seller in the event that the purchaser breached the terms of the agreement or failed to comply with the seller's notice to remedy the breach.

In terms of clause 8, the housing company was obliged to record these agreements with the Registrar of Deeds in accordance with the Alienation of Land Act (no 68 of 1981). This obligation arose from section 20 of the Act, which places restrictions on the receipt of consideration by virtue of certain deeds of alienation.

The housing company failed to record the instalment sale agreements. It continued to receive payments from those purchasers who continued paying. It eventually recorded each of the instalment sale agreements with the Registrar of Deeds on 1 April 2014.

On 25 April 2014 the housing company sent notices in terms of section 129(1) of the Act to the applicants, informing them that firstly, they were in arrears in terms of their respective instalment sale agreements and provided them with various options to bring the payments up to date. Secondly, the applicants were threatened with the cancellation of the instalment sale agreements in the event they failed to respond to the notice within 10 days of receipt, and failed to remedy the default of their payment obligations in terms of the instalment sale agreements within 20 days. Lastly, the applicants were informed that their instalment sale agreements had been recorded in terms of section 20 of the Act.

The applicants did not take any steps in response to the notices. On 23 June 2014, the housing company sold the applicants' homes to a Trust. At that stage, the housing company had not cancelled the instalment sale agreements, nor had it submitted an application to the Registrar of Deeds for cancellation of the recording of the instalment sale agreements. It submitted an application for the cancellation of the instalment sale agreements in April 2015. The Registrar of Deeds cancelled the recording of these agreements on 4 May 2015. On 5 May 2015, the properties were transferred to the Trust.

The applicants brought an application in the High Court against the Registrar of Deeds and other respondents. They sought a declarator that the actions of the housing company in cancelling the instalment sale agreements had been unlawful. They also sought the review and setting aside of the cancellation of these

agreements by the Registrar of Deeds; and a declarator that the subsequent sale of the properties was unlawful and hence void.

The issues for determination were (i) what is the legal effect of a late recordal of an instalment sale agreement upon a seller and purchaser in terms of sections 20 and 26 of the Alienation of Land Act? and (ii) must a notice in terms of section 129(1) of the National Credit Act (no 34 of 2005) indicate the amount that a creditor alleges is owed by a debtor?

THE DECISION

In order to determine the effect on the purchaser's obligations, the following legal questions had to be answered: firstly, at what point are the purchaser's obligations, in relation to late recordal of agreements in terms of section 20 of the Act, activated? Secondly, can notice of recordal and cancellation of agreement be provided at the same instance? Thirdly, which provisions of the National Credit Act and Alienation of Land Act govern cancellation as a remedy?

It was established in *Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd* 2018 (1) SA 94 (CC) that where there is no additional statutory protection offered — like the requirement for an agreement to be recorded before payment of any instalment — the debt becomes due and payable automatically upon the conclusion of the agreement. It is only subject to terms of the agreement or being placed in mora for the purposes of the cancellation of the agreement.

But where there is a statutory requirement that an agreement must be recorded, the correct position is that the payments become due and payable only upon recordal of that agreement. In terms of the Alienation of Land Act, section 26 provides a clear textual statutory bar to the seller receiving payments in the event of non-recordal of the agreement, in the form of criminal liability.

The purchaser is under a natural obligation to make payment, but that obligation cannot be enforced until the recordal takes place. Considering that the responsibility to record primarily rests with the seller, in most cases the information relating to the date of registration of the instalment sale agreement would be known by the seller. Therefore, it would be incumbent upon the seller to notify the purchaser when the agreement has been recorded so that the purchaser can make the necessary payments. The seller when making demand for payment must also afford the purchaser an opportunity to pay what is due within a reasonable time.

It is only in the event that the purchaser fails to make payment after the debt becomes due and payable, that the seller will additionally be entitled to claim cancellation of the agreement.

The National Credit Act is a legislative effort to regulate and improve relations between consumers and providers of credit. It was enacted to ensure that credit is available to vulnerable sections of society who would not otherwise be able to afford it. In line with its purpose of providing consumers with adequate knowledge of debt management, this Act affords debtors further protection before cancellation or other legal remedies can be enforced in the courts by creditors.

As the housing company was statutorily barred from accepting payment, the applicants could not have been in breach of the agreements at the time of receipt of the section 129 notice, as they had not been aware of the recordal of the instalment sale agreements before that date. The housing company should have alerted the purchasers to this fact before issuing the notices and claiming cancellation of the agreements. In the proper course of action, the housing company should have advised the applicants of the recordal, therefore signalling that the debt would then be due and payable, and given them a reasonable opportunity to pay, before moving to enforce the agreement and subsequently cancel the agreement.

It followed that the section 129 notices were premature and invalid insofar as it was relied upon as a basis for the cancellation of the instalment sale agreements. The effect of this was that the subsequent cancellation of the instalment sale agreements and the cancellation of the recording of these agreements were invalid.

As far as the second question was concerned, a section 129 notice must specify the default — that is, the actual amount of the arrears. It was essential that the notices set out the amounts in which the applicants were in arrears.

TSHWANE CITY v BLAIR ATHOLL HOMEOWNERS ASSOCIATION

Contract

A JUDGMENT BY NAVSA ADP and MOTHLE AJA (SWAIN JA, DAMBUZA JA and MOKGOHLOA AJA concurring)
SUPREME COURT OF APPEAL
3 DECEMBER 2018

2019 (3) SA 398 (SCA)

Evidence of a person's interpretation of a contract is inadmissible. Evidence of the historical context of the conclusion of a contract is admissible. Evidence of the intention of the parties of their prior negotiations in relation to a contract is inadmissible.

THE FACTS

Wraypex (Pty) Limited, a property developer, wished to develop a township near Lanseria airport. In the course of doing so, it requested the City of Tshwane Metropolitan Municipality to provide water for the township. The City was only prepared to provide water to the area on the basis that Wrayprex fund the construction of a 20 kilometre water pipeline that would enable the water to be supplied to the new development. It also required the developer to construct an internal and external reservoir and a sewage package plant.

In due course, an Engineering Services Agreement was concluded. The agreement gave rise to the incorporation of the Blair Atholl Homeowners Association, which was registered, as a non-profit company, in terms of section 21 of the Companies Act (no 61 of 1973). The Association would take over the developer's rights and obligations. It was also envisaged that it would be responsible for the maintenance of the internal reservoir, the sewage package plant and the internal water reticulation network. That company would then apply for a metered connection from the City and would arrange for individual homeowners within the estate to pay for their water consumption. Internal water reticulation and maintenance thereof would also be tended to by the section 21 company to be formed.

Clause 6.14 of the agreement provided that to enable the Association to maintain the services, it was a requirement that a trust fund was to be created for this purpose, and a fixed amount be deposited by every owner into the fund every month. Clause 6.15 provided that the municipality agreed that the Association could levy a charge on the owners or residents of the township to meet the cost of operating, maintaining, repairing and possible replacement of the infrastructure. Clause 6.16 pro vided that in recognition of the acceptance of responsibility by the Association of the duties normally performed by the municipality, the municipality agreed to 1 Supply water to the Association at the normal rate of the municipality, and 2 Not raise a sewerage charge (basic charge).

The external and internal services as described above were constructed and installed. The housing estate was developed and individual homeowners started taking occupation. Water meters were installed at the housing estate.

The Association took the view that the municipality should charge is according to 'tarrif 6', a tarrif applicable to bulk water supplied to other municipalities. However, the municipality charge the Association according to tarrifs applicable to end consumers of water.

The Association applied for an order declaring that the reference in clause 6.16.1 of the agreement to the 'normal rate of the municipality' was a reference to the normal rate charged for bulk water supply to other municipalities, and directing that the City render accounts to the Association in accordance with the bulk charge rate as provided for in its schedule of tariffs.

THE DECISION

The essential dispute between the parties related to the rate at which the Association was to be billed for its water supply. In essence, the dispute centred on the parties' differing views on the interpretation of clause 6.16 of the agreement. The dispute was

about whether the words ‘normal rate’ was the ‘bulk rate for municipalities’ or one of the other categories on the scale of tariffs.

Witnesses who testified were wrongly asked about how they understood parts of the agreement and, in particular, clause 6.16. They were repeatedly asked to interpret parts of the agreement. Clause 6.16 had to be interpreted in relation to the other material clauses and with regard to the factual matrix underlying its conclusion, including its purpose.

The evidence concerning the history of how the development originated and the manner in which the infrastructure, both externally and internally, came about as well as how the City was persuaded to provide water services, was material.

Insofar as the admissibility of evidence in relation to negotiations was concerned, this court had recently, in *Van Aardt v Galway* 2012 (2) SA 312 (SCA), para 9, with reference to *Van Wyk v Rottcher’s Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 991, reaffirmed that evidence of the intention of the parties of their prior negotiations is inadmissible. Van Aardt and Van Wyk should be followed.

It was true that the introductory words to clause 6.16, namely, ‘in recognition of the acceptance of responsibility by the s 21 company of the duties normally performed by the Municipality. . .’, was superficially problematic for the City. It implied that there was a quid pro quo, and provided some impetus to the contention on behalf of the Association that a reduced rate was such a quid pro quo. This, however, ignored the applicable rules of admissibility of evidence, and that the City did relent to some degree and did not impose a sewage charge.

The reasoning by the court a quo, based on the submissions on behalf of the Association, did not give adequate consideration to the words ‘normal rate of the municipality’. On the contrary, the reasoning and conclusions had the effect of negating those words. Far from the City’s contention on the interpretation of clause 6.16 leading to a non-practical or absurd result, it made sense that one would, in deciding which of the City’s approved rates applied to the development, look to which of the categories within the rate of tariffs was the one that fit: one would look to see which of the categories was factually applicable.

The Association’s main point was that tariff 6 applied because it installed the relevant infrastructure and it was therefore ‘like a municipality’. There was no such category of consumer and to force individual house owners, who are the ultimate consumers, into that category would be a distortion.

The Association’s application failed.

ELAN BOULEVARD PROPRIETARY LIMITED v FNYN INVESTMENTS (PTY) LTD

Contract

A JUDGMENT BY PONNAN JA (DAMBUZA JA, MOCUMIE JA, SCHIPPERS JA AND MOTHLE AJA concurring)
SUPREME COURT OF APPEAL
29 NOVEMBER 2018

2019 (3) SA 441 (SCA)

A foreign judgment may be enforced in respect of a lower amount than was given in that judgment as a reduction of the amount claimed will not be considered to render the foreign judgment not final and conclusive.

THE FACTS

Elan Boulevard Proprietary Limited held a judgment given against the second and third respondents, Mr Farhat Essack and Mrs N Essack, for payment of AU$1 172 614.26. The basis of the judgment against the Essacks was their respective guarantees in respect of a principal debt owed by the Farhat Essack Family Trust arising from contracts which imposed joint and several liability on them. Judgment was granted against each of the Essacks as guarantor for the full amount of the judgment debt. Farhat had bound himself in respect of the entire debt and Nadia, only in respect of AU$597 926.23.

Elan accepted that Nadia could not be held liable for the full amount of the judgment debt in the sum of AU$1 172 614.26. It accordingly sought to enforce the judgment against both Essacks jointly and severally for AU$597 926.23 and Farhat alone for AU$574 688.03. Elan applied in the Gauteng Division of the High Court, Pretoria for an order recognizing and enforcing the judgment.

There was no appeal by the Essacks against the order of the Australian court, nor was there any attempt by them to have the error in respect of quantum corrected.

The Essacks opposed the application on the grounds that since Elan acknowledged that there was an error in respect of the quantum of the liability attributed to Nadia, the judgment was not final and conclusive because it was subject to correction by the Australian court. Their second ground of opposition was that Elan sought to enforce joint and several liability against them, when the liability ex facie the order was joint.

THE DECISION

It is a legal requirement of any action to enforce a foreign judgment in a South African court that the judgment be final and conclusive. The requirement of finality means that the judgment must be final in the particular court which pronounced it.

Even were it to be accepted that insofar as Nadia was concerned, an Australian court could vary its judgment, such variation would not disturb her liability in respect of her personal guarantee. Although notionally the order could have been varied by the Australian Court to rectify the error, such variation would not have related to the merits of the liability in respect of Nadia but merely to the quantum of such liability. The only consequence of a variation order would have been to reduce the amount of the liability to the amount now claimed by Elan. The fact of the liability in such lesser amount would have remained undisturbed.

In the circumstances, the existence of the debt of Nadia flowing from her signature of a personal guarantee could not be disputed and there was no reason why a South African Court should not recognise the judgment even if only to enforce a part thereof, the part which was not disputed. With specific regard to Farhat, it could not be contended that the judgment against him was not final and conclusive.

As far as the second ground of opposition was concerned, it was clear from the contracts, read as a whole, that liability was intended to be joint and several. It could never have been the intention of the Australian Court to have ordered each of the defendants before it to have been liable only for their aliquot share of the

judgment debt. Such a conclusion would fly in the face of the judgment and the provision by the Essacks of guarantees.

Section 1 of the Protection of Businesses Act (no 99 of 1978) did not preclude enforcement of the Australian judgment as it did not cover foreign judgments arising from contractual matters applicable to the Essacks.

Although notionally the order could have been varied by the Australian court to rectify the error, such variation would not have related to the merits of the liability in respect of Nadia but merely to the quantum of such liability. In any event, the only consequence of a variation order would have been to reduce the amount of the liability to the amount now claimed in these proceedings by the appellant. The fact of the liability in such lesser amount would have remained undisturbed. This is particularly relevant given that in the Australian court the Essacks conceded the merits in respect of the appellant's claim and relied only upon the counterclaim asserted by them, which was rejected. In the circumstances, the existence of the debt of Nadia flowing from her signature of a personal guarantee cannot be disputed and there is no reason why a South African court should not, in the circumstances, recognise the judgment even if only to enforce a part thereof; the part in this instance, which is not disputed. Further, and in any event, with specific regard to Farhat, it cannot be contended that the judgment against him is not final and conclusive. He, of course, provided a guarantee in respect of both lots. There was no appeal by the Essacks against the order of the Australian court, nor was there any attempt by them to have the obvious error corrected. It follows, in my view, that reliance by the Essacks on Nouvion v Freeman is misplaced.

FOUR WHEEL DRIVE ACCESSORY DISTRIBUTION CC *v* RATTAN N.O.

Contract

A JUDGMENT BY SCHIPPERS JA (LEWIS JA, ZONDI JA, MOLEMELA JA and MOKGOHLOA AJA concurring)
SUPREME COURT OF APPEAL
26 SEPTEMBER 2018

2019 (3) SA 451 (SCA)

A plaintiff in an action for payment of money must prove it is the party with the right to bring the action. If the documentary evidence shows that the party with the right is a party other than the plaintiff, the plaintiff must show the connection between that party and itself which give it the right to bring the action for payment.

THE FACTS

In terms of a written agreement dated 26 November 2012, Land Rover Experience Rentals CC leased a Land Rover Freelander to Mr I.C. Rattan while his own vehicle was undergoing repairs at Land Rover Umhlanga. On 28 November 2012, Land Rover Experience Rentals CC replaced the Freelander with a Discovery motor vehicle in terms of another similar standard agreement.

Rattan had the use of the Discovery for as long as his own vehicle was undergoing repairs. The Discovery was insured for the first 72 hours. Thereafter Rattan would have had to make arrangements for his own damage insurance or be personally responsible for the vehicle, its rental and other charges. During the initial 72-hour period the deceased was liable only for the excess of R20 000.

On 30 November 2012 Rattan was shot and killed whilst driving the Discovery, which was damaged as a result. Mr L. Rattan was appointed executor in the deceased estate.

Four Wheel Drive Accessory Distribution CC claimed payment of an amount of R559 817,45 as the cost of repairing the Discovery. Land Rover Experience Rentals CC did not exist. Land Rover South Africa owned the Discovery. It made the Discovery available for use while Rattan's vehicle was undergoing repairs.

The executor challenged the locus standi of the plaintiff, firstly on the grounds of its identity, and secondly its interest in the claim.

THE DECISION

On the plaintiff's case there was no vinculum iuris between it and Land Rover SA. It was unclear which entity in the alleged arrangement between the plaintiff and Land Rover SA was the lessor, and which the lessee. It was highly improbable that Land Rover SA, a national motor dealership, would have concluded an oral contract with the plaintiff, a close corporation. It was equally improbable that as owner, Land Rover SA would not have insured the Discovery against loss or damage. The relationship between Land Rover SA, the owner of the Discovery, and the plaintiff, was not at all clear

The agreement itself was not proved. Contrary to the plaintiff's assertion, it was not a lease. The essential terms of such a contract are an undertaking by the lessor that the lessee shall have the use and enjoyment of the thing leased for a limited period of time, in consideration for the payment of a certain or ascertainable rental amount. The agreement did not provide for any rental payable by the deceased. The allegation in the particulars of claim that the deceased 'hired the . . . Discovery from the plaintiff as a replacement for his vehicle', was simply not proved. It was accordingly unnecessary to decide what kind of agreement was concluded between the plaintiff and the deceased. If anything, it was a contract of loan for use.

Further, the evidence disclosed that the agreement was incomplete; that its terms were not discussed with the deceased; and that he did not appreciate that he was concluding a contract with the plaintiff for the hire of the Discovery.

The plaintiff did not prove that it bore any risk in respect of the Discovery. It did not prove an interest in the litigation and consequently failed to establish locus standi. No contract came into being because there was no consensus regarding the terms and nature of the agreement.

The plaintiff's claim was dismissed.

TRIO ENGINEERED PRODUCTS INC *v* PILOT CRUSHTEC INTERNATIONAL (PTY) LTD

Contract

A JUDGMENT BY
UNTERHALTER J
GAUTENG DIVISION,
JOHANNESBURG
22 MARCH 2018

2019 (3) SA 580 (GJ)

If an agreement is silent as to duration, it is terminable on reasonable notice, in the absence of a conclusion that it was intended to continue indefinitely.

THE FACTS

Pilot Crushtec International (Pty) Ltd brought counterclaims against Trio Engineered Products Inc in response to a claim for payment of money brought by Trio. In its second counterclaim it averred that in consequence of an exclusive strategic distribution agreement concluded by the parties, Trio and Pilot developed a mutually beneficial and continuing business relationship in which Pilot enjoyed the sole and exclusive right continuously and indefinitely to sell and distribute the products of Trio, to the parties' mutual benefit. Pilot alleged that Trio breached the agreement, in essence, by replacing Pilot with Weir Minerals (Pty) Ltd as its strategic partner. Trio competed with Pilot through Weir. Trio required Pilot to enter into a new distribution agreement, on terms less favourable than the subsisting exclusive strategic distribution agreement. Pilot declined to enter into the new agreement, treated the requirement to do so as a repudiation of the existing agreement, and claimed damages. Pilot averred also that Trio, by reason of the business relationship with Pilot, obtained knowledge and access to Pilot's confidential information and customer connections. Trio also acquired the territories of Pilot in circumstances where Pilot had developed markets for Trio's products but was dependent upon Trio for the supply of these products.

Pilot pleaded an alternative to its second claim. It averred that the agreement between Trio and Pilot formed the basis of a close commercial and business relationship between the parties. The relationship permitted Trio to obtain confidential information as to the manner in which Pilot conducted its business. Trio and Pilot increased their sales and distribution in the territories allocated to Pilot under the agreement. During 2014 the Weir Group acquired the entire share capital of Trio. Thereafter, Trio engaged in an unlawful stratagem to undermine the position of Pilot and the exclusive strategic distribution agreement by (among other things) interfering with Pilot's goodwill, interfering with Pilot's business opportunities, seeking to offer employment to employees of Pilot, and allowing the Weir Group to transact with Pilot's clients and potential clients. This unlawful conduct caused Pilot to suffer damages because the Weir Group, in essence, usurped the business opportunities that Pilot had developed and enjoyed in the territories.

Trio excepted to these claims on the basis that Pilot had failed to allege how the exclusive dealership agreement could be terminated.

THE DECISION

Pilot pleaded that the agreement was continuous and indefinite. The agreement was therefore not of unspecified duration in the sense that it was silent on the matter of duration. It was specified to be indefinite. Once that averment was made, the agreement had to be understood to endure in perpetuity, and there was no requirement to plead that the agreement was not terminable. There is no presumption that an agreement expressed to be of indefinite duration must be taken to be tacitly subject to termination on reasonable notice. On the contrary, once the agreement is expressed to endure in perpetuity, it is for the party relying on reasonable notice to

make the case for such a construction. No such burden rested upon Pilot.

This conclusion was not at odds with the position that the express language of the agreement stipulated that it was a temporary interim arrangement and hence the intention of the parties could not have been that the agreement continue indefinitely. Where the agreement is silent as to duration, it is terminable on reasonable notice, in the absence of a conclusion that it was intended to continue indefinitely.

Pilot had pleaded an agreement of indefinite duration. It had not pleaded an agreement silent as to duration. There was accordingly an express averment that the agreement was intended to continue indefinitely.

The exception taken by Trio therefore could not succeed. The pleading of Pilot was not silent as to whether the agreement was terminable. It stated that the agreement was of indefinite duration. There was no requirement to go further and say that the agreement was not terminable — this simply followed from the positive averment that the agreement was indefinite. Once it was plain that the pleading of Pilot specified the duration of the agreement, the agreement was not silent on this matter. The agreement could not then be taken to permit termination on reasonable notice.

It follows also that on the pleaded case of Pilot, there is no failure to plead a term that prevented Trio from terminating the agreement. Once the averment is made that the agreement stands in perpetuity, the agreement precludes Trio from terminating it. Furthermore, the complaint that the pleading is defective because no term is pleaded that would prevent Trio from requiring Pilot to enter into a new distribution agreement must also fail. Pilot relies on an agreement that conferred on it rights of exclusive distribution. Absent some clause to the contrary, a party cannot insist that its exclusive distributor must relinquish its existing rights and enter into a new agreement. So to act makes out a cause of action for breach. The injured party is not required to plead that there was no term of the agreement preventing Trio from requiring a new agreement. It is the alleged conduct of Trio in seeking to extinguish the existing rights of Pilot under the agreement that makes out a cause of action for breach.

DE VILLIERS *v* ELSPIEK BOERDERY (PTY) LTD

JUDGMENT BY FOURIE AJA (SHONGWE JA, MAJIEDT JA AND MOCUMIE JA SCHIPPERS AJA concurring)
SUPREME COURT OF APPEAL
9 MARCH 2017

2017 (3) SACLR 140 (SCA)

A contract drawn to record two parties' intentions may be used for purposes other than its original purpose. Agricultural land leased to a tenant which reserves rights of occupation on parts of it to another party is not contrary to section 3(d) and s 3(e)(ii) of the Subdivision of Agricultural Land Act (no 70 of 1970).

THE FACTS

De Villiers was the registered owner of a farm. He let the property to Elspiek Boerdery (Pty) Ltd. The lease subsisted for ten years. During this period, Elspiek farmed on the property. De Villiers was in occupation of the dwelling on the property. This right was provided for in clause 16, which provided that he had the right to reside in the house on the property for as long as he wished and to use the outbuildings in the yard to the extent that they were not required for Elspiek's farming operations.

During 2006, De Villiers and Elspiek, represented by De Kock, decided that De Villiers would sell the property to a company in order to serve as de facto security for the repayment of loans which De Kock and various entities controlled by him had granted to De Villiers. As part of this transaction, De Villiers and De Kock established a trust, which would hold the majority share in the company, representing De Villiers' interest in the property, while the remainder of the shares would be held by a company representing De Kock's interests. Elspiek was acquired for the purpose of purchasing and holding the property.

To facilitate this transaction, a special power of attorney was executed by De Villiers on 13 October 2008, for the purpose of registering rights of pre-emption in favour of his two brothers, who had testamentary rights of pre-emption over the property. The rights of pre-emption that would be registered in favour of the two brothers, would replace the testamentary rights of pre-emption that they enjoyed in the property against De Villiers.

The sale of the property to Elspiek could not be concluded as one brother refused to waive his testamentary pre-emptive right. In view of the failure of the contemplated sale, De Villiers and De Kock then decided to conclude a 99-year lease of the property by Elspiek, which would afford De Kock and his entities the security required for the repayment of the amounts that they had advanced to De Villiers. The parties also intended that De Villiers and his family should have the right to continue living in the house on the property for as long as they might wish.

To facilitate the registration of the 99-year lease, a draft notarial contract of lease was executed in May 2009 and annexed to the power of attorney which had by then not yet been utilised due to the failure of the contemplated sale of the property. The draft mistakenly identified the trust as the lessor and Elspiek as the lessee. It was a mistake to identify the trust as the lessor as it had never been the registered owner of the property.

The lease was notarially executed and registered after the draft annexed to the power of attorney had been amended, to reflect De Villiers and not the trust as lessor.

De Villiers brought an action against Elspiek, claiming that the lease was void, that the registrar of deeds should de-register the lease as well as a subsequent notarial cession thereof, and that Elspiek be evicted from the property. The grounds of the claim were (i) that the agent who purportedly acted on his behalf to conclude the lease lacked authority and (ii) that the lease was void by virtue of the prohibitions contained in s 3(d) and s 3(e)(ii) of the Subdivision of Agricultural Land Act (no 70 of 1970).

THE DECISION

De Villiers contended that as the power of attorney had initially been executed for another purpose, which had not materialised, namely the registration of rights of pre-emption pursuant to the contemplated sale of the property to Elspiek, it had lapsed and could not thereafter serve as authority for the agent to execute the lease.

However, there was no bar to using the power of attorney for a different purpose after it had become clear that the sale of the property would not be concluded. From a practical point of view there was nothing exceptional about such economy of documentation. In any event, it was clear from the wording of the power of attorney that its use was not limited to the initial purpose contemplated by the parties, or indeed to a sole purpose.

In any event, the conduct of De Villiers subsequent to the execution and registration of the lease, unequivocally showed that the registration of the lease was authorised by him personally and that it reflected the parties' common intention.

De Villiers' second ground was based on the contention that clause 16 of the lease resulted in Elspiek leasing only part of the property, and this was prohibited by section 3(d) of the Act.

Upon a proper construction of the lease, this argument could not be supported. It was clear from Adlem v Arlow 2013 (3) SA 1 (SCA) that to succeed with this cause of action , De Villiers had to establish that the right reserved to him to live in the house on the property, resulted in the lease being in respect of only part of the property with reference to its registration in the deeds registry, rather than the whole of the property. This was simply not the case. The lease expressly provided that the property constituted the subject of the lease. The whole of the property was leased by Elspiek as a single economic unit for farming purposes. This included that part of the property upon which the dwelling house and its yard was situated. Clause 16 of the lease merely constituted a temporary and limited restriction of Elspiek's right of use of the property as a whole in terms of the lease.

The claims were dismissed.

It is clear from Adlem at para 13 that, to succeed with this cause of action based on s 3(d) of the Act, De Villiers had to establish that the right reserved to him to live in the house on the property, resulted in the lease being in respect of only part of the property with reference to its registration in the deeds registry, rather than the whole of the property. This was simply not the case. The lease expressly provides that the property, consisting of the four registered land units which make up the entire property, constitutes the subject of the lease. The whole of the property was leased by Elspiek as a single economic unit for farming purposes. This included that part of the property upon which the dwelling house and its yard is situated.
Clause 16 of the lease merely constituted a temporary and limited restriction of Elspiek's right of use of the property as a whole in terms of the lease.

LARRETT *v* COEGA DEVELOPMENT CORPORATION (PTY) LTD

A JUDGMENT BY ROBERSON J
EAST LONDON CIRCUIT LOCAL DIVISION
11 DECEMBER 2018

2019 (3) SA 510 (ECG)

Companies

To interpret section 165 of the Companies Act (no 71 of 2008) so as to allow for the authorisation of the continuation of unauthorised proceedings would allow the avoidance of the requirements of the section and negate its purpose.

THE FACTS

The fourth respondent, a company, was awarded certain road surfacing contracts by Coega Development Corporation (Pty) Ltd. The actual contractor was Asphalt Services CC. Asphalt would do the work and invoice the company, and the company would in turn invoice Coega. The company instructed Coega to make payments into Asphalt's First National Bank account because the company did not yet have its own bank account. On 1 April 2011 a prepayment of R9 400 928,07 was made into Asphalt's bank account. Work to the value of R11 490 092,84 was performed, leaving a balance of R2 089 164,77 which was to be paid into Asphalt's bank account. This amount was not paid into Asphalt's bank account. Sinoku's member, Ms N Gcanga, and a Mr Ndzimela fraudulently arranged for this amount to be paid into Sinoku's account with Standard Bank. The money was then withdrawn from Sinoku's account.

Larrett and Ndzimela were the directors of the company. On 6 September 2013 Larrett instructed her attorney to institute proceedings whereby the company as plaintiff claimed payment of R2 089 002,88 from Coega in terms of the contract concluded between the company and Coega. In the alternative the company claimed, in delict, payment of the same sum from the Standard Bank. At the time the summons was issued the institution of the proceedings had not been authorised because there was no resolution to that effect by the board of directors.

Larrett brought an application for an order authorising her to continue with the proceedings in the name of and on behalf of the company, in terms of section 165(5) of the Companies Act (no 71 of 2008). She had served a demand on the company in accordance with section 165(2) of the Act, and the company had not applied to set it aside in terms of section 165(3) nor had it appointed an independent person or committee to investigate the demand in terms of section 165(4).

THE DECISION

It would simply not be a sensible interpretation of section 165 to allow a person to have instituted unauthorised proceedings, purportedly on behalf of the company, without first complying with the provisions of the section. One cannot bypass the section. The effect of the section is that the institution of a derivative action must be authorised by a court. The logical corollary to this is that the proceedings which are sought to be continued must have been properly authorised at inception.

To interpret section 165 so as to allow for the authorisation of the continuation of unauthorised proceedings would allow the avoidance of the requirements of the section and negate its purpose.

The proceedings in respect of which Larrett sought leave to continue were not proceedings contemplated in terms of section 165(5) of the Act. The application therefore could not succeed.

AQUILA STEEL (SA) LTD v MINISTER OF MINERAL RESOURCES

A JUDGMENT BY CAMERON J A (BASSON AJ, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J and PETSE AJ concurring, THERON J dissenting)
CONSTITUTIONAL COURT
15 FEBRUARY 2019

2019 (3) SA 621 (CC)

Property

If an application for a prospecting right under section 16 of the Mineral and Petroleum Resources Development Act (no 24 of 2008) does not comply with that section and the regulations promulgated under it, then it cannot be properly approved. Any Ministerial approval of such prospecting rights cannot be properly given.

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) (the MPRDA). 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

The Minister's reason for rejecting Aquila's internal appeal against the grant of a prospecting right to ZiZa was that Aquila's own prospecting right application had been unlawfully accepted, processed and granted. This, the Minister said, was because Aquila's application was lodged and processed during the period that afforded exclusivity to ZiZa.

The soundness of the Minister's reasoning depended on (a) whether Aquila's application for a prospecting right and the grant of that right to it rendered the later grant of a prospecting right to ZiZa unlawful; and if so, (b) whether the Department lawfully accepted Aquila's application.

The question then was, was the ZiZa prospecting right lawfully granted? This resolved into the question whether ZiZa's application for a prospecting right complied with section 16 and the regulations? 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 ZiZa application came nowhere near fulfilling the requirements. The quality of its maps was lamentable to the point of being amateurish. In this they thwarted the purpose of the requirements, which was to avoid overlaps. The consequences were severely detrimental for everyone — for the Department, for Aquila and for PAMDC itself. Failure by the regional manager to return an application non-compliant with the regulations constitutes failure to carry out an expressly specified statutory duty. It followed that the malperformance in issue might constitute reviewable administrative action.

The conclusion that ZiZa's application was grossly defective when it was accepted, when it should instead have been returned, meant that it was also defective when the Minister considered it in terms of section 17(1) of the MPRDA. That led to the conclusion that the Minister's grant to ZiZa of a prospecting right was unlawful and should be set aside.

EVERGREEN PROPERTY INVESTMENTS (PTY) LTD v MESSERSCHMIDT

Property

A JUDGMENT BY JANSE VAN NIEUWENHUIZEN J
(BHOOLA AJ concurring)
GAUTENG DIVISION, PRETORIA
10 OCTOBER 2018

2019 (3) SA 481 (GP)

The failure of an owner of property subject to the Housing Development Schemes for Retired Persons Act (no 65 of 1988) to pass on the benefit of a municipal rates rebate to the registered holder of a right of occupation under such a scheme is not a financial issue as contemplated in section 39(1) of that Act. Any dispute concerning such failure cannot therefore be adjudicated in terms of the provisions of section 57 of the Community Schemes Ombud Service Act (no 9 of 2011)

THE FACTS

Evergreen Property Investments (Pty) Ltd was the owner of Evergreen Broadacres Retirement Lifestyle Village. The Village was a sectional-title scheme under the Sectional Titles Act (no 95 of 1986) and was a housing development scheme in terms of the Housing Development Schemes for Retired Persons Act (no 65 of 1988). Messerschmidt resided in the Village and was a life right owner in the scheme.

The City of Johannesburg Metropolitan Municipality granted a 50% rebate to Evergreen in respect of the rates payable for properties in the Scheme. This was provided for in section 7(9)(a) of the City of Johannesburg Property Rates Policy 2016/2017'. It required that the owner of property should pass on the benefit of the rates rebate to the registered holder of a right of occupation in the Scheme. If the owner failed to pass the benefit of the rebate on to the registered holder, the Council could apply the full rating with retrospective effect to the date of commencement of the rebate.

Messerchmidt contended that the rates rebate received by Evergreen from the municipality should have been credited to his levy account. Evergreen disagreed.

The dispute was adjudicated in terms of the provisions of section 57 of the Community Schemes Ombud Service Act (no 9 of 2011), and the adjudicator made an order in favour of Messerschmidt.

Evergreen appealed, inter alia on the grounds that the adjudicator did not have jurisdiction to make the order.

THE DECISION

The payment of rates and taxes in respect of the Scheme fell within the ambit of section 38(1) of the Act. Both parties were in agreement that the dispute in question pertains to finances. Section 39(1) defines financial issues. The question to be answered was whether the order that the rates rebate be repaid to Messerschmidt fell within the scope of that section.

Para 7(9)(a) provided that the owner of the property shall 'pass on the benefit' of the rates rebate to the registered holder of a right of occupation in the Scheme. The policy did not direct the owner of the Scheme to pay the amount of the rebate to the holder of a right of occupation. Consequently, the rates policy did not give Messerschmidt the legal right to claim payment of the rebate. Furthermore, para 7(9)(a) provided for a penalty, in the event that the owner of a scheme failed to pass the benefit on to the holder of a right of occupation in the scheme.

The adjudicator, in granting an order for repayment of the rates rebate, relied on the contents of para 7(9) of the policy. Due to the fact that the policy does not direct an owner to pay the rebate to the holder of a right to occupy, the adjudicator could not order re-payment of the rebate amount. The enabling legislative instrument relied upon by the adjudicator, in ordering that the rates rebate must be repaid to Messerschmidt, did not bestow such power on her.

The rates policy did not specify the manner in which a rates rebate should be 'passed on' to the holder of a right of occupation in the scheme. Furthermore, should the municipality not be satisfied that the rates rebate was

passed on to Messerschmidt as envisaged in para 7(9)(a) of the rates policy, the municipality could invoke the penalty contained in that paragraph.

The adjudicator went beyond the scope of her powers as defined in section 39(1) of the Act.

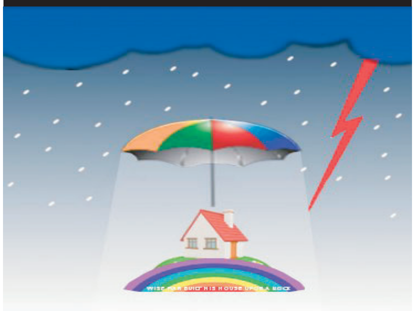
The enabling legislative instrument relied upon by the adjudicator, in ordering that the rates rebate must be repaid to the respondent, does not bestow such power on her.
Similarly and for the same reasons stated supra, the order that all future rebates must be credited to the respondent's levy is not competent.
The rates policy does not specify the manner in which a rates rebate should be 'passed on' to the holder of a right of occupation in the scheme. Furthermore, should the municipality not be satisfied that the rates rebate is passed on to the respondent as envisaged in para 7(9)(a)(i) of the rates policy, the municipality may invoke the penalty contained in para 7(9)(a)(ii).
In the premises, I agree with Mr Van der Merwe SC that the adjudicator went beyond the scope of her powers as defined in s 39(1) of G the Act, in issuing the orders that form the subject-matter of this appeal.

CENTRIQ INSURANCE COMPANY LTD v OOSTHUIZEN

A JUDGMENT BY CACHALIA JA (MBHA JA, MATHOPO JA, DLODLO AJA and ROGERS AJA concurring)
SUPREME COURT OF APPEAL
14 MARCH 2019

2019 (3) SA 387 (SCA)

Insurance



The main purpose of a Professional Indemnity Insurance is to indemnify financial advisors against their liability for negligent financial advice and should be interpreted with this object in mind.

THE FACTS

After her husband's death, Oosthuizen decided to invest R2m, the balance of the payout of a life insurance policy. To this end she sought the advice of Mr Castro, who had previously advised her husband and whom she trusted. He was registered as a financial services provider and a broker in terms of the Financial Advisory and Intermediary Services Act (no 37 of 2002). He advised her to invest the R2m in Sharemax Investments (Pty) Ltd. The investment was in a property development scheme known as 'The Villa Retails Park Holdings'. The Villa was a yet to be completed shopping complex, a fact that he did not draw to Mrs Oosthuizen's attention.

The scheme required investors to transfer their money to Sharemax's chosen company. The company or Sharemax would then pay their investors interest on this investment without the underlying investment — the property development — having earned anything — and where it was unlikely to do so for years, pending the purchase of the land and the construction of a shopping centre. Only upon the completion of the construction centre would rental income be realised. The prospectus however, held out to investors a projected rate of return equal to a 10% after tax dividend from the date of full subscription to the occupation date in September 2011.

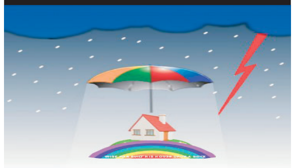
The development failed following a Reserve Bank investigation, which found that Sharemax was contravening the Banks Act (no 94 of 1990) by taking deposits illegally. With no prospect of recovery from Sharemax, Mrs Oosthuizen sued Mr Castro for the loss of her capital sum of R2m. Her claim was that Mr Castro had failed to act honestly and fairly in her interests in recommending the investment; that he had not given her objective financial advice appropriate to her needs; and that he had not exercised the degree of skill, care and diligence expected of an authorised financial services provider.

Castro joined Centriq Insurance Co Ltd as a third party claiming that he was entitled to be indemnified under a policy concluded with Centriq. This was a policy entitled 'Professional Indemnity Insurance for Members of the Financial Intermediaries Association'.

Centriq denied any obligation to indemnify Mr Castro on the ground that Oosthuizen's loss fell within the ambit of the specific exclusion contained in clause 3(ii) of the policy. The clause excluded Centriq from having to indemnify the insured member 'in respect of any third party claim arising from or contributed to by depreciation (or failure to appreciate) in value of any investments, including securities, commodities, currencies, options and futures transactions, or as a result of any actual or alleged representation, guarantee or warranty provided by or on behalf of the Insured as to the performance of any such investments. It is agreed however that this Exclusion shall not apply to any loss due solely to negligence on the part of the Insured . . . in failing to effect a specific investment'.

THE DECISION

The two exclusions were, first, whether the claim was arising from or contributed to by depreciation (or failure to appreciate) of the investment and, secondly, as a result of a representation as to the performance of any such investments.



It was important to bear in mind the commercial object or purpose of the policy.
Its main purpose was to indemnify financial advisors against their liability for negligent financial advice. This was apparent from the heading of the policy.

It was unnecessary to determine whether the investment was worthless or hopeless from the beginning. It was clear that the investment was not a viable proposition.

Depreciation usually refers to the diminishing of value over time and not to an investment that is not capable of generating an appreciable value from the beginning. The question therefore was why the clause referred to depreciation rather than simply to any loss in value. The language used refers to the reduction in value resulting from market or investment forces rather than the type of loss that occurred in the present case. It made perfect commercial sense that insurers would seek to protect themselves from claims arising from market fluctuations of investments instead of any loss from whatever cause.

But even if was accepted that depreciation might refer to simple loss of value and not merely to gradual or partial loss, this part of the clause was ambiguous or unclear because it could also refer to gradual or partial loss from market or investment forces on the one hand or to total loss from whatever cause on the other. That being so, the clause should be construed contra proferentem so as to achieve a commercially sensible result, having regard to the purpose of the contract, which was to indemnify the financial advisor against legal liability.

As to the representation as to performance of the investment Centriq's reliance on the second leg of the exclusion would appear,to rest on a stronger foundation. The argument was that Castro had induced Oosthuizen to make an unsafe investment. But for his representations as to its performance — ie that it was safe and thus would not decline in value — she would not have made the investment. The exclusion was therefore triggered.

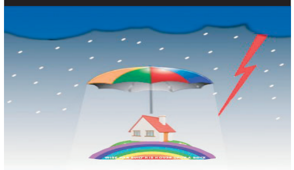
The answer to this was that it may be implicit in the advice regarding the safety of an investment that it will perform in a manner that yields this result. However, for the same reason that 'depreciation' is likely to refer to gradual or partial loss from market or investment forces instead of total loss from whatever cause, 'performance' in the context of this clause should be construed similarly. It was quite clear that Oosthuizen was less concerned with how well the investment would perform but rather with whether it was safe. Her primary concern was that the investment was safe, that she would not lose anything, and that it would yield a consistent return to meet her needs. This was not the bargain she got. Castro did not mislead her regarding the anticipated performance of the investment but regarding its fundamental character.

Centriq ultimately accepted that its interpretation meant that the purpose of the exclusion was to exclude any investment advice. Centriq contended that the policy was not limited to cover based on his business as an investment broker, but that he had in fact been the late Mr Oosthuizen's short-term and long-term insurance and medical broker as well. The policy therefore still indemnified Castro for negligent advice for other aspects of his business. Centriq was therefore entitled, so it argued, to decline to underwrite investment risk of any type, even when the client had done so on the basis of negligent advice or misrepresentation as to the true qualities of the investment.

The answer to this was firstly, the policy was not framed with Castro in mind. Centriq offered this policy to all 'members of the Financial Intermediaries Association', including Castro. Their main business is to offer financial advice. It was difficult to accept that it was the mutual intention of these members and Centriq to exclude all coverage for their investment business. Secondly, if Centriq sought to achieve this type of exclusion, it should have done so with much clearer language. Instead, it chose obscure language. It bore the onus to bring itself within the exclusion, and could not now complain if it was unable to do so.

Castro's claim that he should be indemnified under the policy was upheld.

SYMONS N.O. *v* ROB ROY INVESTMENTS CC



A JUDGMENT BY PLOOS VAN AMSTEL J
KWAZULU NATAL DIVISION, PIETERMARITZBURG
10 DECEMBER 2018

2019 (4) SA 112 (KZP)

A financial services provider does not guarantee either the safety or the success of an investment.

THE FACTS

Symons' financial adviser, a Mr Griffin acting on behalf of Rob Roy Investments CC, informed Symons of an investment known as the Sharemax investment. This was an investment in a shopping mall which was being constructed in Pretoria. Investors would receive 12,5% interest from the date of the investment, and after the occupation date a monthly payment from the rental income, which would escalate every year. Griffin left some documents regarding the scheme with Symons. Griffin received an upfront commission of 6% on any investments made by Symons.

Symons later phoned Griffin and said he had made up his mind and wanted to invest an amount of R2m in Sharemax. Symons signed a number of documents relating to the investment and gave Griffin a cheque for R2m for the investment. Symons later made a further investment of R1m. He received regular interest payments on the two investments, and later invested a further amount of R2m. He received no interest payments in respect of the third investment, and the monthly payments in respect of the first two investments also stopped.

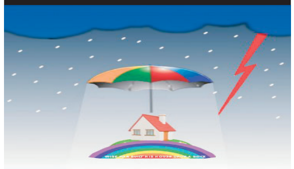
When Griffin made enquiries with Sharemax he was told that the Reserve Bank had raised a problem but that they were dealing with it. It later transpired that the Reserve Bank had intervened as it regarded the funding model as the unlawful taking of deposits from the public, and directed Sharemax to change its funding model. It was not able to do so. As a result it was unable to raise further money, the scheme collapsed and construction on the shopping mall came to a halt. It remained unfinished, and it was not likely to be finished.

Symons claimed damages of R5m. He contended that Rob Roy breached its contractual obligations by advising him to invest in Sharemax in circumstances where the investment carried a substantial risk as the funds were intended for investment in a syndicated property development, by advising that the returns were guaranteed when this was not the case, by failing to properly investigate Sharemax and its business dealings or to properly understand Sharemax's prospectus and proposed business model, by failing to exercise an independent judgment regarding the propriety of the Sharemax business and the contents of its prospectus, and by failing to exercise the requisite level of skill and diligence that it had represented to the plaintiffs that it possessed.

THE DECISION

Symons did not say that he at any time told Griffin that he only wanted low-risk investments. Nor did he say that Griffin represented to him that Sharemax was a low-risk investment. The averment that Rob Roy breached its contractual obligations by advising Symons to invest in Sharemax in circumstances where such an investment carried a substantial risk as the funds invested were intended for investment in a syndicated property development made little sense since Symons understood that he was investing in a syndicated property development.

The allegation that Griffin failed to exercise an independent judgment was based on the fact that he received an upfront commission of 6%. The suggestion was that because this was higher than the norm at the time, he would have recommended this



investment in preference to others. The evidence did not establish that the commission of 6% compromised Griffin's independence.

On the information which had been given to Symons he was able to make an informed decision. He took time to make up his mind, and it was probable that he substantially understood the nature of the investment, and went into it with his eyes open. He knew about the upfront commission; he knew the mall was in the process of being constructed; he knew further prospectuses would be issued in order to finance the completion of the mall; and he knew there would only be a rental income once the mall was occupied by tenants.

A financial services provider does not guarantee either the safety or the success of an investment. This was obvious. It could not be said that Griffin breached his contractual obligations to Symons. In any event, the loss suffered by Symons was not linked sufficiently closely or directly to any failure on Griffin's part to explain the risks of the investment to Symons. Those risks had nothing to do with the intervention by the Reserve Bank, an event which Symons did not contend should have been foreseen by Griffin.

The claim failed.

The allegation that Griffin failed to exercise an independent judgment can be easily disposed of. It was based on the fact that he received an upfront commission of 6%. The suggestion was that because this was higher than the norm at the time, he would have recommended this investment in preference to others. Griffin accepted that the commission may have been somewhat higher than in the case of other lump-sum investments, but said he could have earned more commission by selling investments in unit trusts or annuities. Neither Cohen nor Swanepoel regarded the commission as excessive. I do not consider that the evidence justifies a finding that the commission of 6% compromised Griffin's independence.

KAKNIS v ABSA BANK LIMITED

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

2017 (3) SACLR 121 (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.

ATWEALTH (PTY) LTD v KERNICK

A JUDGMENT BY DAVIS AJA
DAVIS AJA (WALLIS JA, ZONDI JA, DAMBUZA JA and ROGERS AJA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2019

2019 (4) SA 420 (SCA)

Contract

In order to lay a foundation for an attack on a financial advisor's advice, it is essential to establish what the financial adviser said in regard to investments. Evidence on behalf of the investors to identify what a reasonably skilled financial services provider would know about products in the marketplace is also required, as well as what due diligence they would have done before making a presentation to a prospective client and what sources of information they would have consulted.

THE FACTS

In 2009, Moolman on behalf of Atwealth (Pty) Ltd received a telephone call from Kernick requesting a meeting. At the meeting, Kernick and his wife requested advice on how best to invest some of their money. Moolman made a presentation to the Kernicks, including a description of Abante Capital (Pty) Ltd as 'a South African hedge fund management company: Abante's funds each focus on the core strategy of quantitative arbitrage'. She introduced them to two specific products, named RVAF (Relative Value Arbitrage Fund) and a product described as Bridgefin

Following this meeting, the Kernicks made an investment of £50 000. They later submitted an application to invest R550 000. Three further investments were then made by the Kernicks, being R700 000 on 28 October 2011, £50 000 on 1 February 2012 and £150 000 on 1 March 2012.

The Kernicks sued Atwealth on the basis that Moolman, who, at the relevant times, was either in the employ of Atwealth or another company, Vaidro (Pty) Ltd, had failed to comply with the legal duties which she owed to them and had given negligent advice. This failure had caused them significant financial loss as the investment companies in which they invested did not produce positive investment returns but paid returns out of investor funds. On the basis that their investments had been entirely lost, they said that Kernick suffered damages in the amount of £50 000 as a result of the negligence of Atwealth and Moolman, and damages in the amount of £150 000 as a result of the negligence of Vaidro and Moolman. The Kernicks additionally suffered damages to be paid by Vaidro and Ms Moolman in the amounts of £365 000 and R700 000.

The Kernick's case was based on the allegation that Moolman on behalf of Atwealth and Vaidro was in breach of the Financial Advisory and Intermediary Services Act (no 37 of 2002) (the FAIS Act) and the Code promulgated under it.

THE DECISION

The legal implications of the 2009 meeting were critical to the disposition of this case. The question to be decided was whether Moolman give negligent financial advice to the Kernicks at that meeting such that it induced the Kernicks to invest?

Central to Atwealth's case was whether Moolman provided advice to the Kernicks and, if so, whether this advice failed to comply with Ms Moolman's legal duties and caused the Kernicks to invest in ill-fated products. Both parties focussed their arguments on whether Moolman breached the provisions of the FAIS Act, read with the Code. The provisions of the FAIS Act and the Code mirror the legal duties of a financial advisor under our law governing liability for negligent acts.

A finding that Moolman gave financial advice gave rise to the further question as to whether she complied with her legal duties to the Kernicks and, hence, whether in terms thereof she acted wrongfully and negligently. The answer depended on both the level of skill and knowledge required of an advisor in the position of Moolman and whether someone with the requisite skill and knowledge would have advised the Kernicks differently in the context of the present dispute.

In order to lay a foundation for

an attack on Moolman's abilities as a financial advisor and on the advice she gave, it was essential to establish as clearly as possible what she told the Kernicks in regard to these investments. That was not done and the topic was not explored with Moolman because of the cross-examiner's exclusive reliance on the FAIS Act and the Code. Secondly, it called for evidence on behalf of the Kernicks to identify what a reasonably skilled financial services provider would know about products in the marketplace; what due diligence they would have done before making a presentation to a prospective client and what sources of information they would have consulted. This too was not done.

The limited evidence concerning the contents of the critical meeting of 2009, which induced the Kernicks to invest, could not be employed to assess what a reasonable advisor would have counselled during the relevant period. The failure to produce any expert evidence concerning what advice would reasonably have been given in 2009 concerning RVAF meant that it was not possible to find in favour of the Kernicks. It is they who bore the onus to show that a reasonable financial advisor, dispensing financial advice to respondents in 2009 concerning RVAF and related investments, would have sounded warnings of a kind that would have caused them to refrain from investing in hedge funds operated by Abante Capital.

Because of the lack of evidence, any claim against Atwealth could not succeed.

Central to the appellants' case was whether Ms Moolman provided advice to the Kernicks and, if so, whether this advice failed to comply with Ms Moolman's legal duties and caused the Kernicks to invest in ill-fated products. Before the court a quo and again in this court, counsel for both parties focused their arguments on whether Ms Moolman breached the provisions of the FAIS Act, read together with the General Code of Conduct for Authorised Financial Service Providers and Representatives (the Code). There was some debate before us in regard to the applicability of these provisions as hedge funds were not regulated by the Financial Services Board until 1 April 2015, when they were declared to be collective investment schemes in terms of s 63 of the Collective Investment Schemes Control Act 45 of 2002. Ultimately, however, nothing turned on this, as the provisions of the FAIS Act and the Code referred to hereafter mirror, for present purposes, the legal duties of a financial advisor under our law governing liability for negligent acts.

AVNET SOUTH AFRICA (PTY) LTD v LESIRA MANUFACTURING (PTY) LTD

Contract

A JUDGMENT BY BUDLENDER AJ
GAUTENG DIVISION,
JOHANNESBURG
4 MARCH 2019

2019 (4) SA 541 (GJ)

Unless there is a dispute between parties which has been brought before court, a court cannot make any settlement agreement concluded between them an order of court.

THE FACTS

Avnet South Africa (Pty) Ltd supplied and sold electronic components throughout South Africa. Lesira Manufacturing (Pty) Ltd was involved in manufacturing smart metering units and goods. In terms of an agreement between the parties, Avnet supplied Lesira with goods to the value of R23,59m.

In order to make arrangements for the payment of the debt, the parties entered into a settlement agreement in terms of which the debt would be settled in a series of monthly instalments from October 2018 to January 2020. The parties agreed to have the settlement agreement made an order of court.

No litigation preceded the conclusion of the settlement agreement.

When the court was asked to make the settlement agreement an order of court, the question was raised whether it could competently do so.

THE DECISION

The approach taken in Eke v Parsons 2016 (3) SA 37 (CC) and PL v YL, 2013 (6) SA 28 (ECG) was correct. The practice of making a settlement agreement an order of court had a long history in common law. However, this invariably appeared to have taken place where the settlement agreement was reached between parties which were already engaged in litigation.

The primary function of the courts is to determine disputes between parties. The basis upon which a court makes a settlement agreement an order of court is therefore that there is a dispute between the parties which is already before the court which it is called upon to adjudicate. When the parties resolve the dispute that is before the court, the court may then make the settlement agreement an order of court. Such an order of court becomes an order of court 'like any other'. There is no difference between such an order and one granted by the court after dealing with the merits of the dispute. This is a coherent and consistent approach to the manner in which courts adjudicate and give orders in the disputes before them.

It is quite a different matter to allow parties who are not engaged in any litigation before the court to transform their agreement into a court order of this type. The very point of the application before court in the present case was that the parties were not in dispute or a state of uncertainty about the existence of their agreement. It is on this basis that the court was asked to enforce the agreement via court order. In this case section 21 of the Superior Courts Act did not provide the court with the necessary jurisdiction to make the settlement agreement an order of court.

The court had no power to make the present settlement agreement an order of court.

BARLOWORLD LOGISTICS AFRICA (PTY) LTD *v* FORD

Contract

A JUDGMENT BY VAN DER LINDE J
GAUTENG LOCAL DIVISION, JOHANNESBURG
29 MAY 2019

2019 (5) SA 133 (GJ)

The allegation that a party has overstated operating profit giving rise to economic loss requires particularity as to what operating profit is.

THE FACTS

Barloworld Logistics (Pty) Ltd employed Ford and two other defendants as chief executive officer, financial director and executive.

Barloworld brought an action against the defendants. Its particulars of claim asserted that they made 'relevant representations' and that these were, to their knowledge, false. Particulars of the alleged falsehoods were then asserted to be in the amounts of R16m, R3,1m and R5,3m. The particulars asserted that the relevant representations were material and made with the intention of overstating Barloworld's operating profit for the 2016 financial year, and to induce Barloworld to pay inflated incentives to, amongst others, the defendants. Pursuant to the fraud, the first defendant paid the inflated incentives in the 2016 financial year totalling R4 525 221. These assertions give rise to the various claims for repayment.

The defendants excepted to the particulars of claim on the grounds that they were vague and embarrassing on two grounds. The first ground related to the assertions concerning the operating profit, the generally accepted accounting practice, and profit shares. Two reasons were advanced for the proposition that the particulars of claim were vague and embarrassing in that regard.

The first reason was that the particulars of claim did not explain what 'operating profit' meant, or how this was to be calculated. It was alleged that according to the Oxford English Dictionary 'operating profit' means 'a gross profit before deduction of expenses', and that on that definition the profit shares would have formed part of the gross profit and would as a natural consequence have been included in the calculation of operating profit.

The second reason was that the particulars of claim did not set out which principles of 'generally accepted accounting practice' were offended by the inclusion of the profit shares in the calculation of operating profit.

THE DECISION

Without an identification of the particular accounting practice which was being offended by the accounting treatment asserted in the particulars of claim, the particulars of claim were rendered vague and embarrassing. This related not simply to one paragraph of the particulars of claim. The lack of particularity of the concept of 'operating profit' as well as the lack of particularity of the concept of 'incentive bonus' gave rise to vagueness and embarrassment which affected the whole cause of action.

An exception that a pleading is vague and embarrassing involves a twofold consideration: first whether the pleading lacks particularity to the extent that it is vague; and second whether the vagueness causes embarrassment to such an extent that the excipient is prejudiced. The pleading in the present case failed on both scores. It was vague and embarrassing because of the lack of particularity referred to above. The excipient was prejudiced because, although it would be able to fashion a plea in the form of a meaningless denial, it would not have been able to address the material merits of the fraud cause of action which Barloworld was pressing against the defendants.

The exception was upheld.

BEIERSDORF AG v KONI MULTINATIONAL BRANDS (PTY) LTD

A JUDGMENT BY FISHER J
GAUTENG LOCAL DIVISION, JOHANNESBURG
12 FEBRUARY 2019

2019 (4) SA 553 (GJ)

Competition

When one is concerned with alleged passing-off by imitation of get-up, one assumes the consumer as neither overly careful nor overly cautious, but an average purchaser, who has a general idea in his mind's eye of what he means to get but not an exact and accurate representation of it.

THE FACTS

In 1986 Beiersdorf AG launched a skin-care range, aimed exclusively at men, under the trademark Nivea Men. Its men's range developed over the years until it included a wide range of creams, shampoos, styling products, shower product, and facial-care products. The Nivea brand developed into a significant reputation in the market in South Africa and worldwide.

Koni Multinational Brands (Pty) Ltd claimed that its brand, Connie, was also a trusted brand in South Africa. It stated that after 'extensive research', and due to it discovering that there was a demand for men's products, it launched its men's range in October 2015.

Beiersdorf's products bore various logos and get-ups over time. These logos and get-ups as they related to the men's shower-gel range consistently used a blue, white and silver colour scheme. Beiersdorf contended that these get-ups were each distinctive in their own right and also had features in common which had become associated with itself and its products.

One of the logos was the 'wave label'. Beiersdorf made extensive use of this label since 2006. The second logo was a rectangular label which was launched by Beiersdorf in 2012. It employed the same colour scheme and distinctive, white block-letter format of 'NIVEA' against a blue background and a silver border. At the bottom part of the rectangle was a thicker silver portion which bore the words 'FOR MEN' in blue block capitals. The third logo was a round Nivea logo which was reminiscent of the simple round, blue, flat tin design in which the Nivea crème was produced in the 1920's.

The Connie get-up had features which also appeared in the three Nivea get-ups. These were: (i) a wave label that had a similar colour as the background, a silver border, and the name 'CONNIE' in white block-capital characters; (ii) the prominent use of blue, white and silver in the get-up generally, including the use of a deep-blue plastic container of a similar hue to that of the deep blues used in the Nivea products, and the use of a silver lid; (iii the prominent use of bright-green lettering in the word 'ACTIVE', which was similar to the use of bright-green lettering on the Nivea products in words such as 'MAXIMUM HYDRATION' and 'ENERGY', which words also appeared on some of the range in the current get-up in orange lettering; (iv) the use of a splash/wave-like graphic representation, which had rounded features and which was of a similar size, appearance and position on the get-up; (v) the use of a container of a similar height, width and volume as the latest get-up of Nivea shower gel.

Beiersdorf contended that it did not matter that it had ceased using its wave label at the time that Koni adopted a similar wave label. It contended that the Connie get-up had borrowed from its stable of distinctive logos and features, both past and present, so as to create a composite which was deceptive to the average consumer. It contended that the fact that there were references to features which might no longer be used in the Nivea get-up did not detract from the confusion to consumers.

It submitted an affidavit from a consumer who purchased the Connie shower gel thinking it to be a Nivea product.

Beiersdorf brought an application to interdict Koni from

passing off its shower gel as being that Beiersdorf or being connected to, or associated with, its products by using the get-up complained of.

THE DECISION

When one is concerned with alleged passing-off by imitation of get-up, one assumes the consumer as neither overly careful nor overly cautious, but an average purchaser, who has a general idea in his mind's eye of what he means to get but not an exact and accurate representation of it.

A certain measure of copying is permissible. It is accepted that there can be no monopoly on get-up. But the moment a party copies, it must I make it 'perfectly clear' to the consumer that the articles which it is selling are not the other manufacturer's, but its own articles, so that there is no probability of any ordinary purchaser being deceived.

In relation to the differing names 'NIVEA' and 'CONNIE', it has been held that the use of different names in otherwise similar get-ups does not necessarily exclude the probability of deception. There were manifest differences between the Nivea get-up which was in use at an earlier time and the current Nivea get-up. However, this did not alter the fact that there was potential for confusion between the products of Beiersdorf and Koni. A shower gel is of the nature of products that are often the subject of an 'impulse buy'. This has the effect that the chances of error are enhanced. In grabbing at a relatively small purchase, a consumer would be less likely to be overly exacting or discerning in relation to brand and more likely to succumb to immediate impressions. E

The strength of the Nivea brand operated against Koni. Koni's product's get-up exhibited all the signs of a 'straining [of] every nerve' to evoke the product of Beiersdorf.

The interdict was granted.

To my mind, the strength of the Nivea brand operates against the respondent in this case. The hallmarks in get-up and logo have the potential to retain reputation through changes and rebrands. Indeed, it is not unusual for historical brandings to be revisited in the market in order to invoke nostalgia and a sense of staying power. This device is currently being employed by the applicant in the retrospective reference to its blue, circular, flat tin Nivea cream container, which was one of its first brandings. A feature-by-feature deconstructionist analysis of the products is unhelpful in this context. The memory in the marketplace of past get-ups can, in some circumstances, create associations which endure and which can outlive changes in get-up and rebranding. The complaint here is that a more complex type of copying which has resort to past features has taken place.

BENSON v STANDARD BANK OF SOUTH AFRICA (PTY) LTD

JUDGMENT BY UNTERHALTER J (MAKHANYA J and TSOKA J concurring)
GAUTENG LOCAL DIVISION, JOHANNESBURG
21 FEBRUARY 2019

2019 (5) SA 152 (GJ)

Credit Transactions

The inclusion of an erroneous location in an address to which notice of default is given in terms of section 129 of the National Credit Act (no 34 of 2005) does not result in invalidity of the notice.

THE FACTS

Default judgment was obtained by the Standard Bank of South Africa Limited against Benson, in respect of loans made by the Standard Bank to him. The default judgment granted against him was for the payment of the amount of R290 942,14

Benson contended that rescission of the default judgment was warranted because the notice required in terms of section 129 of the National Credit Act (no 34 of 2005) had not been properly sent to him prior to the Standard Bank bringing its action against him. He alleged that the letter sent by the Standard Bank's attorneys to him was addressed to '74 Kent Street, Montclare, Randburg 2092', whereas the address chosen by him in the loan agreement with Standard Bank was '74 Kent Street, Montclair 2092'. This was an address in Johannesburg, and not in Randburg. Accordingly, proper notice was not given in terms of section 129 of the Act, and the application that was brought by Standard Bank for the default judgment was a nullity. The default judgment was to be rescinded because it was erroneously sought and granted.

The evidence showed both the registered-letter tracking-and-tracing slip, as also the parcel-tracking results of the registered letter addressed to Benson. The slip did include the reference to Randburg, but it also contained the postal code which Benson accepted was correct. The parcel-tracking results in respect of the registered letter sent by Standard Bank show that the letter arrived at the Cresta branch of the Post Office on 26 May 2011 and there the following entry appears, 'First notification to recipient'. As the results are so ordered that the first entry records the last action in time, it appeared that while earlier actions within the postal system did not result in notification to Benson, notification did take place on 26 May 2011.

THE DECISION

The question was whether the inclusion of the reference to Randburg gave rise to a failure to deliver notice to the appellants as required by section129(5)(a) of the Act.

Since the very point of registered mail is to trace and track a registered letter, there was no reason to doubt what the tracking result reflected. There was, in consequence, notification to the recipient at the address indicated on the tracking-and-tracing slip. On the strength of the parcel-tracking results and the absence of an address other than that of Benson to which notification could have been given, Benson had failed to make out a case that the registered letter containing the section 129 notice was not delivered to his chosen address. Benson had thus failed to show that the notice was not delivered in compliance with section 129(5).

Benson obtained actual notice of his rights as required in terms of section 129. That being so, no further steps were required to give notice under the section to Benson.

Rescission of judgment was refused.

NATIONAL CREDIT REGULATOR *v* SOUTHERN AFRICAN FRAUD PREVENTION SERVICES NPC

Credit Transactions

A JUDGMENT BY WALLIS JA and SCHIPPERS JA (SALDULKER JA, ZONDI JA and EKSTEEN AJA concurring)
SUPREME COURT OF APPEAL
3 JUNE 2019

2019 (5) SA 103 (SCA)

Fraud information held in a database by a credit bureau is not subject to expungement after one year as provided for in regulation 17(1) of the regulations promulgated in terms of the National Credit Act (no 34 of 2005)
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THE FACTS

Southern African Fraud Prevention Services NPC (SAFP) held a database of information indicating fraud committed by persons, as reported to it by its members. Included in the database was a category defined as ‘Adverse classifications of consumer behaviour’.

Regulation 17(1) of the regulations promulgated in terms of the National Credit Act (no 34 of 2005) provides that the consumer credit information as per the table to the regulation ‘must be displayed and used for purposes of credit scoring or credit assessment for a maximum period from the date of the event, as indicated’. That period is ‘1 year or within the period prescribed in section 71A’.

The National Credit Regulator (NCR) alleged that the SAFP’s database included consumer credit information and that the SAFP has failed to expunge that information within the one-year period referred to in the regulation.

The NCR sought a declaratory order that SAFP had contravened regulation 17(1) by retaining the fraud information in its database for longer than one year.

THE DECISION

The fraud information held by SAFPS was not subject to the time limit, even if it constitutes consumer credit information, because it is not consumer credit information within any of the prescribed categories in regulation 17.

the NCA and the regulations made under it expressly recognise certain categories of information that credit bureaux are allowed to keep under s 70(3)(a) that are not included in the various categories in regulation 17(1). Regulation 18(6) prescribes that ‘other’ information, ie the information other than consumer credit information that a credit bureau may keep on record.

Sections 18(6)(b) and 70(2)(g) of the ACt expressly recognise that recording and making available fraud information is a proper function of a credit bureau. There is nothing in the various categories in regulation 17(1) to suggest that any of them include fraud information or that it is required to be retained only for a limited period. Fraud information is information of a type that should not be subject to expungement by way of regulation.

The declaratory order was refused.

CDH INVEST NV v PETROTANK SOUTH AFRICA (PTY) LTD

JUDGMENT BY CARELSE AJA (PONNAN JA, SALDULKER JA, DAVIS AJA and ROGERS AJA concurring)
SUPREME COURT OF APPEAL
1 APRIL 2019

2019 (4) SA 436 (SCA)

Companies

The proviso to section 74 of the Companies Act (no 71 of 2008) requiring notice is to ensure that directors know what is being decided in a round robin resolution. The purpose of the notice is not only to inform directors of the date of the meeting but the reason therefor. Failure to do so could amount to misrepresentation by a director proposing the resolution.

THE FACTS

In 2013 CDH Invest NV, a Belgium company, and Amabubesi Investments (Pty) Ltd incorporated Petrotank South Africa (Pty) Ltd. A shareholders' agreement provided that there would be five directors, three appointed by CDH and two by Amabubesi. The directors appointed by CDH were Messrs D'Hondt, Mabale and Stadler as managing director. The directors appointed by Amabubesi were Messrs Moyo and Ntsaluba.

Due to an error on the part of the person responsible for the incorporation of Petrotank, its Memorandum of Incorporation recorded that it had authorised shares of 1 000 ordinary no par value shares rather than 100 000. At the time CDH and Amabubesi were unaware of this error.

In March 2014, Stadler sent an email message to his fellow Petrotank directors in which he stated that it had come to his attention that Petrotank was in breach of the Companies Act (no 71 of 2008), in that more shares were in issue than had been authorised. In order to rectify this position, he attached various documents, including a directors' resolution aimed at putting the company on the 'right side of the Companies Act'. He requested the recipients to sign and return the resolution.

Attached to this email message was a directors round robin resolution in terms of section 74 of the Act. The recorded that it be resolved that, in terms of sections 36(2)(b) and 36(3) of the Act, the board increased the company's number of authorised shares to such an extent that the company was authorised to issue no more than 1 000 000 (one million) ordinary no par value shares, and that, in terms of section 16(1) (b) of the Act, the Company's Memorandum of Incorporation be amended so as to delete and replace the existing wording of clause 2.1(1) (but specifically excluding its sub-clauses (a) to (c) which remained) of the Memorandum of Incorporation with the following wording: 'The Company is authorised to issue no more than 1 000 000 (one million) ordinary no par value shares ...'

On the same day, Ntsaluba sent an email to all the directors stating that he would propose an investigation before signing the documents and that all his rights were reserved. On 31 March 2014, the three CDH directors signed the round robin resolution. On 4 April 2014, Mr Sontshaka, a legal advisor to Amabubesi, sent an email to Stadler that was copied to Moyo and Ntsaluba stating that the current resolution requiring that the authorised shares be increased to 1 000 000 was incorrect and needed to be amended accordingly. The asserted error in the resolution was the fact that it increased the number of authorised shares to 1 000 000 instead of to 100 000 as agreed in the MOU. Amabubesi's nominees on Petrotank's board were unaware at this stage that CDH's nominees had already signed the impugned resolution. Both emails were ignored.

Notwithstanding Amabubesi's emails pointing out the error, in June 2014 D'Hondt, purporting to be duly authorised by Petrotank, applied to the CIPC to register the amendment to Petrotank's MOI to increase its authorised shares to 1 000 000. In July 2014 the CIPC gave notice that the amendment had been accepted and placed on file.

CDH sought an order in terms of section 61(12) of the Act directing the board of Petrotank to convene a shareholders meeting in terms

of s 61(3) of the Act for the purpose of considering and passing five resolutions, the fifth of which remained in contention between the parties. It was that the board be ordered to consider a pro rata rights offer of 98 835 ordinary no par value shares. Amabubesi brought a counter–application to invalidate the director's round robin resolution, the consequence of which would be that there would be no additional authorised shares that could be utilised to conduct a rights offer.

THE DECISION

Section 74 of the Act enables 'a majority of the directors to pass a round robin resolution in order to avoid a formal meeting of directors provided that, if this is to happen 'each director has received notice of the matter to be decided'. The proviso enables directors to make an informed decision on the subject matter contained in the resolution. Stadler decided to invoke the provisions of section 74 of the Act. No reason and in particular no motivation was given for an increase of the authorised shares to 1 000 000. The justification did not rationally extend beyond an increase to 100 000 shares.

The proviso to section 74 requiring notice is to ensure that directors know what is being decided. The purpose of the notice is not only to inform directors of the date of the meeting but the reason therefore.

CDH's directors knew on 28 March 2014 that the round robin resolution upon which the directors were called to vote was contrary to the proclaimed purpose. They also knew that it was contrary to the shareholders's agreement. Nonetheless on 31 March 2014 they signed the resolution. The egregious conduct on the part of CDH's directors was compounded when, on 4 April 2014, CDH's directors were reminded that the resolution was contrary to the express purpose as contained in the preamble to the resolution.

What was surprising was that CDH never sought to explain the reason as to why, in supposedly 'correcting' the patent error in the MOI, its nominees on Petrotank's board resolved to pass a resolution to increase the authorised shares to 1 000 000 rather than 100 000. The only inference to be drawn was that, in passing the resolution contrary to the stated purpose, CDH's nominees on Petrotank's board misrepresented 'the matter to be decided'; ie the purpose they had in mind when introducing the resolution was different from that which appeared in the preamble and in the email of Stadler of 28 March 2014. They failed to provide any reasons for the actual resolution passed.

These actions of the directors of Petrotank, who were appointed by CDH, amounted to a misrepresentation of the real purpose behind the introduction of the resolution. By their actions and their continued refusal to provide a justification for the need to increase the authorised shares to 1 000 000, they committed a misrepresentation, which at the very least was designed to obfuscate the real purpose behind the resolution. Their conduct did not comport to the standard of good faith required of directors in terms of section 76(3) of the Act.

Accordingly, the round robin resolution signed on 31 March 2014 was invalid. It followed that the demand for a shareholders meeting to consider a rights issue rested on the unsustainable foundation of this resolution and that there was no basis to compel a shareholders meeting.

DIENER N.O. v MINISTER OF JUSTICE

Companies

A JUDGMENT BY KHAMPEPE J (MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, MHLANTLA J, PETSE AJ and THERON J concurring)
CONSTITUTIONAL COURT
29 NOVEMBER 2018

2019 (4) SA 374 (CC)

Sections 135(4) and 143(5) of the Companies Act (no 71 of 2008), whether taken individually or together, do not create a 'super-preference' in favour of a business rescue practitioner's claim against a company in liquidation. Section 135(4) provides to the business rescue practitioner, after the conversion of business rescue proceedings into liquidation proceedings, no more than a preference in respect of his or her remuneration to claim against the free residue after the costs of liquidation but before claims of employees for post-commencement wages, of those who have provided other post-commencement finance, whether those claims were secured or not, and of any other unsecured creditors.

THE FACTS

On 13 June 2012, the members of JD Bester Labour Brokers CC passed a resolution placing it voluntarily in business rescue, in terms of section 129(1) of the Companies Act (no 71 of 2008). On 20 June 2012, Diener was appointed as the business rescue practitioner (BRP) to JD Bester.

On 14 June 2012, a firm of attorneys, Cawood Attorneys, was instructed by JD Bester to bring an urgent application against FirstRand Bank, a secured creditor, to stay the sale in execution of JD Bester' s immovable property, its only asset of any value. An order to this effect was granted on 14 June 2012.

Cawood Attorneys later submitted its account for this work to Diener. Diener stated that these expenses to JD Bester were incurred with his 'knowledge and consent and after the commencement of the business rescue proceedings'. From this, he concluded that these expenses 'represent expenses in business rescue as defined in section 143 of the Companies Act, or at the very least, these services and expenses represent unsecured post commencement finance as defined in section 135 of the Companies Act'. He claimed that the account of Cawood Attorneys only became due after his appointment . . . and after the Close Corporation had already been placed under supervision. As a result, he claimed that these expenses were expenses in the business rescue proceedings.

During August 2012, Diener decided that JD Bester could not be rescued. He instructed Cawood Attorneys to bring an application in terms of section 141(2)(a) of the Act, to convert the business rescue proceedings into liquidation proceedings. On 27 August 2012, a court ordered that the business rescue proceedings with regard to JD Bester was terminated and that it be placed under liquidation in the hands of the Master and that the costs be costs in the liquidation. Joint liquidators were appointed.

Diener did not prove a claim for his remuneration and expenses as BRP. Diener stated that the accounts of Cawood Attorneys for the services provided to the Close Corporation and him after the commencement of business rescue proceedings were provided to the joint liquidators. They could not agree on how the fees and expenses of Diener and of Cawood Attorneys should be dealt with. The matter was referred to the Master, who took the view that Diener had failed to prove a claim in terms of section 44 of the Insolvency Act (no 24 of 1936) and that Cawood Attorneys was an unsecured creditor which was required to make a contribution in terms of section 106 of the Insolvency Act.

Diener objected to the liquidation, distribution and contribution account that had been finalised on the basis of the Master's decision. The Master informed Diener that the objection had not succeeded, and stated that he confirmed the liquidation, distribution and contribution account.

Diener brought an application for an order that the decision of the Master to accept the First and Final Liquidation, Distribution and Contribution Account be reviewed and set aside, and that the court provide direction regarding the manner in which the First and Final Liquidation, Distribution and Contribution Account should provide for the cost of a business Rescue Practitioner as engaged in lawful business rescue proceedings, the

cost of service providers who provided services to a lawfully appointed business rescue practitioner in finalising business rescue proceedings, and the cost of service providers who provided services to the Close Corporation after the commencement of the business rescue proceedings.

THE DECISION

The question was whether the preference articulated in section 143(5) applies when business rescue converts to liquidation. Section 143(5) states that a BRP's claim for remuneration and expenses 'will rank in priority before the claims of all other secured and unsecured creditors'.

The opposing respondents argued that Diener's interpretation of the Companies Act had the effect of diluting the protection given to secured creditors during business rescue. Section 134(3) 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 (a) 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 (b) promptly (i) 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 or (ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person. A plain reading of the provision suggests an interpretation in line with the opposing respondents' contentions. The provision simply ranks the practitioner's remuneration and expenses before post-commencement financing and unsecured assets and subjects the practitioner's payment to liquidation.

Read alone, section 135 applies simply to post-commencement financing. Section 135(4) provides the practitioner, after the conversion of business rescue proceedings into liquidation proceedings, with no more than a preference to claim remuneration against the free residue after the costs of liquidation. However, the legislature had clearly granted a preference for the claims of a practitioner over secured creditors in terms of section 143. The question was how far this extended. What kept the preference articulated in section 143(5) for the payment of remuneration and expenses of a practitioner before all creditors, whether secured or unsecured, from applying during liquidation?

When these provisions were read together, section 143 of the Companies Act did not allow for the claims of practitioners to usurp the claims of all creditors, whether secured or not, in liquidation. Importantly, the preferences listed in the relevant provisions for secured creditors were tied to the security.

The question was which interpretation upheld the purpose of business rescue while balancing the rights of all stakeholders. The 'super preference' interpretation put forward by Diener undoubtedly favoured practitioners and did not achieve a balance of the rights of all interested parties.

If the 'super preference' approach was taken, and a practitioner was appointed by the time a section 130 objection to a resolution to place a company in business rescue is made, then even if that resolution were to be set aside by a court, a secured creditor would have to foot the bill for the practitioner's report out of the encumbered assets. This would upset the balance of interests and the consultative process envisaged in business rescue. Ordinarily, creditors and other stakeholders have a say when it comes to matters that affect their rights. Yet the 'super preference' would result in a situation where a secured creditor's security was diluted without them being able to do anything.

HLUMISA INVESTMENT HOLDINGS RF LTD v KIRKINIS

A JUDGMENT BY MOLOPA-SETHOSA J
GAUTENG LOCAL DIVISION, PRETORIA
31 AUGUST 2018

2019 (4) SA 569 (GP)

Since in law, a company has a legal personality distinct from its shareholders, a loss to the company which causes a fall in its share price is not a loss to the shareholder. A shareholder cannot be said to have suffered a loss as a result of a breach of duties owed to the company simply because 'as a result' its share price has fallen.

THE FACTS

Hlumisa Investment Holdings Rf Ltd was a shareholder in African Bank Investment Ltd. Kirkinis and the other defendants were directors of the bank.

Hlumisa claimed payment of R721 384 512, basing its claim on the provisions of section 218(2), read with sections 76(3) and 22(1), of the Companies Act (no 71 of 2008). They alleged that the devaluation of their shares in the bank qualified as 'any loss or damage' contemplated by section 218(2), and that the directors' conduct set constituted a breach of section 22(1) and a breach of section 76(3). This entitled it to recover the devaluation of its shares directly from the directors.

Section 218(2) provides that 'any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.'

Section 22(1) provides that 'a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose.'

Section 76(3) provides that 'subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director (a) in good faith and for proper purpose, (b) in the best interests of the company, and (c) with the degree of care, skill and diligence that may reasonably be expected of a person (i) carrying out the same functions in relation to the company as those carried out by that director, and (ii) having the general knowledge, skill and experience of that director.'

Hlumisa alleged that during the period December 2012 to December 2014 the directors conducted the businesses of the bank recklessly in contravention of section 22(1) of the Companies Act and in breach of section 76(3) of the Companies Act. It alleged that the breach of these provisions resulted in significant losses on the part of the bank, which in turn caused the share price to drop so that it suffered a diminution in value of its shares. In terms of section 218(2) of the Companies Act the directors were liable to compensate it for the loss suffered as a result of diminution in value of the shares.

The directors excepted to the claim. They contended that Hlumisa relied on the conduct of the directors having caused losses to the bank, which in turn caused the share price to drop. No allegation of conduct by the directors against Hlumisa was made, the loss claimed being the reduction in the value of the shares. This loss reflected the loss suffered by the bank, and not a loss suffered by Hlumisa.

In the alternative, the directors excepted to the claim based on section 218(2) which requires that a party has contravened a provision of the Act. The only provisions of the Act identified by Hlumisa were sections 76(3) and 22(1). But Hlumisa had not alleged that the damages claimed to have been suffered were a result of a contravention of these sections, but had alleged that the damages suffered were the diminution in the value of the shares.

THE DECISION

The liability of a director for a breach of section 76(3) is dealt with in section 77 of the Companies Act. It provides that a director of a company may be held liable in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or

costs sustained by the company as a consequence of any breach by the director of a duty contemplated in sections 75, 76(2) or 76(3)(a) or (b). Therefore, a claim that alleges that directors are liable for damages as a result of a breach of section 76(3) must be brought in terms of section 77(2), which specifically creates the liability for a breach of s 76(3).

Even if Hlumisa could advance a claim for a breach of section 76(3) under s 218(2), it would have to show that section 218(2) altered the common law to allow a reflective loss. This would be a drastic departure from a core principle of company law. The result of the reference to the common law in section 77(2) is that a reflective-loss claim cannot be brought under section 77(2), because the common law does not permit such a claim. But Hlumisa's argument involved is a finding that the Companies Act allows a reflective-loss claim which the common law prohibits if the clam is brought under section 76(3).This anomalous result was untenable and demonstrated why Hlumisa's position could not be sustained.

Section 77(3)(b) dealt explicitly with losses suffered by the company as a consequence of a director having acquiesced in a breach of section 22(1). Such a loss may only be recovered by the company since it is a loss to the company. To the extent, therefore, that Hlumisa in its action sought to hold the directors liable because their conduct resulted in a breach by the bank of sections 22(1) and 77(3)(b) such action was not available.

Since in law, a company has a legal personality distinct from its shareholders, a loss to the company which causes a fall in its share price is not a loss to the shareholder. A shareholder cannot be said to have suffered a loss as a result of a breach of duties owed to the company simply because 'as a result' its share price has fallen. There is an insufficient causal link between harm suffered by a company as a result of a breach of a duty owed to it and any loss suffered by its shareholders in consequence of a fall in the company's share price. There is no reason to suppose that the legislature intended, by enacting section 218, to depart from that judicially sanctioned approach.

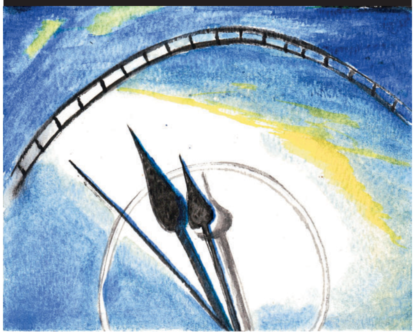
Hlumisa's reliance on section 218(2) of the Act to found a reflective-loss claim did not establish a claim that could be sustained in law, and did not avoid the exception brought by the directors.

DE LANGE N.O. v MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

A JUDGMENT BY LEACH JA and MOKGOHLOA AJA (NAVSA AP, MOCUMIE JA and DLODLO AJA concurring)
SUPREME COURT OF APPEAL
17 APRIL 2018

2019 (4) SA 445 (SCA)

Prescription



A right created by statute may not create a debt as one arising from contract, but may still prescribe within three years if the conditions which must be fulfilled for the subsistence of that right are not fulfilled.

THE FACTS

De Lange was the executor in a deceased estate whose assets included a farm lying downstream of a dam situated within the area of the Rhenoster River Government Water Scheme established in terms of section 73 of the Water Act (no 54 of 1956). The Minister of Water and Environmental Affairs, was responsible for and had authority over the nation's water resources and their use, including the equitable allocation of water for its beneficial use and its redistribution. The deceased had enjoyed an existing lawful water use as envisaged by the National Water Act (no 36 of 1998).

By the year 2003 irrigation on the farm had ceased. During 2002 the area in which the deceased farmed started to experience drought. On 20 January 2003 water restrictions were imposed on water users within the Scheme and, during the course of that year, the operation and maintenance of the irrigation canals ceased. As a result, during the course of that year they reached such a state of dilapidation that they could no longer be used to supply water to the deceased's farm. At the same time the drought tightened its grip, and from 2004 – 2005 no water was, in any event, available in the Koppies Dam to be supplied to the deceased's farm, even had the Scheme been operating.

The drought continued until end of January 2005. It started to rain during February 2005. The Minister did not resume water supply to the property, despite the fact that the dam was approximately half-full. By that stage the Scheme had for all practical purposes come to an end. Even though there was water available, it was not being used for purposes of the Scheme. The irrigation canals were so dilapidated that they could not be used and the deceased and other members of the Scheme appeared to have abandoned the Scheme.
This was duly done by 6 October 2010. The deceased fail to pay any water charges during the period 2007 – 2010, and did not attempt to obtain water during this period.

Shortly thereafter, the deceased claimed damages allegedly sustained as a result of the Minister not having supplied water to the farm from 2007 – 2010. In his particulars of claim the deceased claimed, amongst others, that during 2003 the officials of the Minister had suspended water supply, to his farm, thereby infringing his water use rights; and that he, as a result could not irrigate the farm and had therefore suffered damages in the amount of R250 000.

The Minister contended that the claim had prescribed before the issue of summons. Although the damages were calculated within three years of the summons, the Minister contended that the cause of action, namely the neglect of the irrigation canals which the Minister had been obliged to maintain, had arisen by 2003 as they were by then not capable of being used.

De Lange contended that the deceased's claim had been to enforce a right which was an incident of ownership, namely a riparian owner's right to abstract water, limited though it was by statute. As a real or statutory right, and not a mere personal right it was a right which did not prescribe. Accordingly, there had been an ongoing or continuous breach of the deceased's such right during the period 2007 –

2010 and his claim for loss suffered during that period was not susceptible to prescription.

THE DECISION

It could be accepted that the water use right held by the deceased did not constitute a mere contractual right to abstract water, and that a failure to exercise such right did not lead to it becoming prescribed. However, it was also clear that, whatever its precise nature may have been, such right to use water was not unconditional. Rather it was dependent upon the deceased complying with the various preconditions that entitled him to receive water, including, in particular, him applying for water as prescribed and paying the charges that were levied. Not only did the deceased fail to pay any water charges during the period 2007 – 2010 to which his claim related, but he also never sought to abstract water during that period either. Both he and the authorities treated the Scheme effectively as a thing of the past and his water use right as dormant and non-existent. In the light of this, De Lange's submission that the Minister bore an ongoing statutory duty to maintain the canal and distribute water, and that its failure to do so was an ongoing wrong, so that the deceased's claim had not prescribed, had to be rejected.

It would in these circumstances be irrational to accept that the deceased became entitled to recover damages for a breach of a right to use water, whatever the nature of that right might be, which he had not in any way purported to exercise during the years in question. There was no merit in the suggestion of an actionable ongoing breach of the deceased's water use right, and the deceased's claim in that regard had to fail.

Consequently, there was a claim for damages flowing from an omission on the part of the Minister to maintain the water canal which had rendered it inoperative by 2003. Even if it was assumed that such omission was negligent, any claim for damages caused thereby - which would constitute a 'debt' as envisaged by the Prescription Act - had arisen by 2003, and had prescribed.

The claim was dismissed.

Indeed, it would in these circumstances be irrational to accept that the deceased became entitled to recover damages for a breach of a right to use water, whatever the nature of that right might be, which he had not in any way purported to exercise during the years in question. For these reasons we are of the view that there is no merit in the suggestion of an actionable ongoing breach of the deceased's water use right, and the deceased's claim in that regard must fail.

Consequently, and at best for the deceased, there is a claim for damages flowing from an omission on the part of the respondent to maintain the water canal which had rendered it inoperative by 2003. For present purposes (but without deciding the issue), even if it is assumed that such omission was negligent, any claim for damages caused thereby (which would constitute a 'debt' as envisaged by the Prescription Act) had arisen by 2003

ETHEKWINI MUNICIPALITY v MOUNTHAVEN (PTY) LTD

A JUDGMENT BY FRONEMAN J (MOGOENG CJ, BASSON AJ, CAMERON J, DLODLO AJ, GOLIATH AJ, KHAMPEPE J, MHLANTLA J, PETSE AJ and THERON J concurring)
CONSTITUTIONAL COURT
31 OCTOBER 2018

2019 (4) SA 394 (CC)

The test to determine whether or not a right is a real right is:(1) the person who created the right must have intended the present owner as well as successors in title to be bound; and (2) the right must result in a subtraction from the dominium of the land against which it is registered. An obligation created in an agreement constituting a personal right in favour of one party against another is a debt as defined in the Prescription Act (no 68 of 1969) and as such will prescribe within three years of the date on which the debt arose, even if the obligation is recorded in a deed of transfer and registered as such.

THE FACTS

The Ethekwini Municipality sold immovable property to Mounthaven (Pty) Ltd for R60 000.00. The sale agreement contained two special terms in favour of the Town Council of the Borough of Verulam as Local Authority.

These were (1) that Mounthaven was to erect on the property buildings to the value of not less than R100 000, 00, (2) if at the expiry of a period of three years from the date of sale Mounthaven had failed to complete the construction of the buildings on the property, ownership of the property would revert to the municipality which would be entitled to demand re-transfer thereof to it from Mounthaven. The terms were recorded in the Deed of Transfer.

Mounthaven failed to develop the land within three years and it remained undeveloped. On 23 May 2012, the municipality wrote a letter to Mounthaven in which it invoked the terms of the conditions in clause 2 of the Deed of Transfer and demanded re-transfer of the property. Mounthaven failed to comply with the demand and on 19 February 2014 the municipality brought an application invoking the conditions and claiming re-transfer of the property.

Mounthaven took the point that the claim to re-transfer constituted a debt as contemplated in the Prescription Act and that it had prescribed. The municipality submitted that the Prescription Act was not applicable as the claim was based on the reversionary right under the deed of transfer. As a limited real right in the property, it did not constitute a debt and so was not subject to prescription of ordinary debts.

THE DECISION

The Supreme Court of Appeal has endorsed a test to determine whether a right is real, as opposed to being personal. Two requirements must be met: (1) the person who created the right must have intended the present owner as well as successors in title to be bound; and (2) the right must result in a subtraction from the dominium of the land against which it is registered. The municipality's position foundered on the facts at the first hurdle: clause 2 contained no provision that it was binding on successors in title, unlike the express provision to that effect in clause 1.

Registration of clause 2 under the Deeds Registries Act made no difference.

The clause created a reversionary right for the municipality. That a reversionary right had the effect of restricting the landowner's exercise or full enjoyment of its right of ownership, like keeping it undeveloped as long as it so wished or building a structure worth R100 000, did not in any way detract from its true character as a personal but not a real right.

It followed that though registrable, a reversionary right is not by mere reason of registration in any way elevated from a personal right to a real right. The reversionary clause in 2 created a personal obligation on Mounthaven to complete buildings to a certain value within a limited time. The clause was not of a kind that created a real burden on the property itself.

DENNEGEUR ESTATE HOMEOWNERS ASSOCIATION v TELKOM SA SOC LTD

A JUDGMENT BY EKSTEEN AJA (LEWIS ADP, PONNAN JA, ZONDI JA and DLODLO AJA concurring)
SUPREME COURT OF APPEAL
29 MARCH 2019

2019 (4) SA 451 (SCA)

Property

Quasi-possession of an asserted servitutal right enjoys protection under the mandament van spolie to the extent that it is evidenced by the actual or factual exercise of the professed right. If such exercise is not affected, then no rights under the mandament exist.

THE FACTS

Dennegeur Estate Homeowners Association was a homeowners association (HOA) of the Dennegeur residential estate situated in Somerset West. Telecommunications infrastructure was built and installed by the developer at the estate in consultation with and under the auspices of Telkom. Telkom provided the plans indicating the positions of the required pipes and pipe junction boxes and specification drawings for the construction thereof. It appointed a contract representative to monitor and oversee the progress and to ensure compliance with the infrastructure plan and specifications. Telkom envisaged that the infrastructure would be for its exclusive use.

Upon completion of the infrastructure and during 2000, Telkom installed the cables in the infrastructure, thereby creating a telecommunications network. Thereafter, Telkom had enjoyed access to the network and maintained it.

Both Telkom and Vodacom were licensed electronic communications network service providers in terms of the Electronic Communications Act (no 36 of 2005). The HOA entered into negotiation with Vodacom to install an optic fibre network in the infrastructure at Dennegeur which was the property of the HOA. Vodacom agreed to do so. Vodacom proceeded early in 2016, at the instance of the HOA, to install its optic fibre network in the infrastructure on Dennegeur. On 18 February 2016, during the process of installation, one of Telkom's cables was damaged. The damaged cable was repaired by Telkom on 24 February 2016 and the service reinstated.

On 2 March 2016 Telkom became aware that the HOA had granted permission to Vodacom to install its optic fibre network at Dennegeur. Telkom did not lodge any formal protest either to the HOA or to Vodacom and Vodacom continued with its installation which was completed by early-May 2016.

Telkom brought a spoliation application against the HOA on 10 November 2016.

THE DECISION

The right which Telkom asserted was based on section 22 of the Act. The section provides that an electronic communications network service licensee may (a) enter upon any land, (b) construct and maintain an electronic communications network on any land, and (c) alter or remove its electronic communications network or electronic communications facilities.

The rights afforded by section 22 are by their nature servitutal. Telkom enjoyed the right to enter the property of a landowner in order to construct, maintain, alter or remove electronic communication networks or facilities. Quasi-possession of an asserted servitutal right enjoys protection under the mandament van spolie to the extent that it is evidenced by the actual or factual exercise of the professed right.

By installing the cables into the ducts forming part of the infrastructure in order to deliver its telephone and ADSL internet services, Telkom, by its use of the cables and the space occupied by the cables, exercised the right which it enjoyed in terms of section 22 of the Act. To that extent it enjoyed quasi-possession of the servitutal right under that section

Whatever the range of rights given to Telkom by the section, Telkom could only enjoy quasi-

possession of such rights for purposes of the mandament to the extent that it actually exercised such rights in accordance with the professed servitude. In accordance with *Nienaber v Stuckey 1946* AD 1049 'a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored'.

The extent to which Telkom in fact exercised a servitutal right to the airspace in the ducts under section 22 prior to the alleged act of spoliation was limited to the use of the space actually occupied by the cables in the infrastructure across Dennegeur. A reservation of airspace for possible future use did not give quasi-possession thereof to Telkom. In these circumstances Telkom was not in quasi-possession of the entire infrastructure and particularly it was not in possession of unused vacant space in the ducts in which Vodacom installed its optic fibre cables.

Notwithstanding the installation by Vodacom of its optic fibre network in the same ducts as the cables, Telkom's actual use of the ducts, cables and its service to its customers remained undisturbed. It had not lost possession of anything. It remained entitled to enter into Dennegeur for the purposes set out in section 22 and its network remained fully functional.

The application was dismissed.

Spoliation of a servitutal right occurs where the quasi-possession of the alleged right, as evidenced by the actual exercise of the professed right prior to the offending act, is disturbed. In this case there was a brief interruption of Telkom's use when a cable was accidentally damaged in the course of Vodacom's installation of its optic fibre network. The damage was promptly repaired. This did not constitute an impediment to Telkom's continued exercise of its right to the use of the ducts for the accommodation of the cables and it had been fully restored long before the launch of the application.

MINEUR v BAYDUNES BODY CORPORATE

A JUDGMENT BY CLOETE J
WESTERN CAPE DIVISION, CAPE TOWN
24 MAY 2019

2019 (5) SA 260 (WCC)

The proper interpretation to be placed on section 13(1)(g) of the Sectional Titles Schemes Management Act (no 8 of 2011) is that, where an owner intends to use a section for a use other than its purpose as shown expressly or by implication on a registered sectional plan, and such intended use will materially affect the other owners in the scheme, the consent of all owners in the scheme is required.

THE FACTS

Baydunes Body Corporate was the body corporate of a sectional title scheme. Mineur was an owner of a section in the scheme. In this scheme, each individual section depicted on the plan was comprised of two subsections, one for living quarters and the other for parking. In terms of the local authority's zoning scheme by-law, parking areas had to be used for the parking of vehicles and parking areas had to be maintained in a state suitable for the parking and movement of vehicles, and each section in the scheme was required to have two off-street parking bays available to it.

In 2017 Mineur received a notice and agenda for the annual general meeting of the body corporate. The agenda included the deliberation and voting in respect of proposed special resolutions 1 and 3.

Special resolution 1 proposed, in terms of management rule 29(2), 'to approve the alterations and improvements to parts of sections and the common property which had already been done by owners of sections to enable their garages which are registered as part of their residential sections to be converted into habitable space and to authorise all other owners who have not so altered their garages to make alterations and improvements to their sections and the common property to enable their garages to be converted into habitable space.'

Special resolution 3 proposed that the members of the body corporate 'approve the attached Conduct Rule 10 conferring exclusive use areas (yards) to members of the body corporate in terms of s 10(7) . . . . The trustees are hereby authorised and instructed to amend the Pro-plan (plan to scale of the exclusive use areas), if necessary. The trustees are hereby authorised and instructed to submit the Conduct Rule 10 to the chief ombud for approval. The trustees are further authorised to make such reasonable amendments to the Conduct Rule as may be required by the chief ombud.'

These resolutions were passed at the annual general meeting by a majority of 84,48% despite the objections of Mineur and certain other owners.

Mineur sought an order declaring that section 13(1)(g) of the Sectional Titles Schemes Management Act (no 8 of 2011) applied to the conversion of garages to living quarters in the Baydunes Sectional Title Scheme, that the adoption at the annual general meeting, of conduct rule 10 for the Scheme was unlawful, invalid and should be set aside, and that special resolutions 1 and 3 taken at the same meeting were unlawful, invalid and should be set aside.

THE DECISION

Section 13(1)(g) provides that an owner must — when the purpose for which a section or exclusive use area is intended to be used is shown expressly or by implication on or by a registered sectional plan — not use nor permit such section or exclusive use area to be used for any other purpose, provided that with the written consent of all owners such section or exclusive use area may be used for that purpose as consented to.

The definition of 'section' in the Act itself is specifically made dependent upon the applicable sectional title plan in each instance. In respect of the Baydunes Scheme, each individual section depicted on the plan is comprised, by necessary implication, of two subsections,

one for living quarters and the other for parking. It was obvious from the construction, layout and available amenities of the scheme itself that this had to be the case.

The classification of use of a section into 'primary' or 'utility' in the management rules envisaged the possibility of two subsections of one composite section in a sectional title scheme. They were given separate and distinct meanings, and merely because a utility section was defined as being designed to be used as an accessory to a primary section, this did not mean that its separate and distinct purpose was subsumed into or under the purpose of the primary section.

The local authority's zoning scheme by-law also indicated that parking bays were to be maintained as such, and not converted. The absence of any alternative designated parking bays supported Mineur's contention that the garages of sections must be used for their intended purpose, ie as parking for a vehicle. A garage was self-evidently not suitable to be used as living quarters.

It was evident that one of the purposes of section 13(1)(g) was to restrict owners from effecting changes to the use of their sections where such change of use might have a negative impact on other owners; hence the requirement of unanimous written consent before such a change may be implemented. Changing a section's garage into living quarters had the effect of depriving that unit of a parking area for the occupants' vehicle(s), requiring the occupants to find parking elsewhere — in this case on the common property. This directly impacted negatively upon other owners in the scheme because they were deprived of the free use and enjoyment of part of the common property, and it was likely to increase congestion in the scheme — particularly where all owners were to be permitted to convert their garages to living quarters. This was clearly the type of scenario that section 13(1)(g) envisaged would require consent from all the owners before it could be implemented.

The proper interpretation to be placed on section 13(1)(g) of the Act was that, where an owner intends to use a section for a use other than its purpose as shown expressly or by implication on a registered sectional plan, and such intended use will materially affect the other owners in the scheme, the consent of all owners in the scheme was required. It followed that special resolution 1had to be declared unlawful, invalid and set aside.

As far as special resolution 3 was concerned, and the consequent adoption of conduct rule 10, the adoption of conduct rule 10 did not comply with section 10(8)(a)(ii) of the Management Act in that the layout plan did not clearly indicate the purpose for which such parts of the common property could be used. In any event, special resolution 3 and conduct rule 10 were unlawful because the manner in which the new, exclusive use areas had been allocated had resulted in certain sections being deprived of any off-street parking, rendering the allocation of the exclusive use areas in contravention of the applicable bylaw.

It followed that special resolution 3 and conduct rule 10 had also be declared unlawful, invalid and set aside.

TRUSTEES, OREGON UNIT TRUST v BEADICA 231 CC

A JUDGMENT BY LEWIS ADP (CACHALIA JA, SALDULKER JA, MBHA JA and SCHIPPERS JA concurring)
SUPREME COURT OF APPEAL
28 MARCH 2019

2019 (4) SA 517 (SCA)

Contract

The strict terms and conditions of a lease may be enforced in circumstances where there is no indication that to apply such terms and conditions would be contrary to public policy.

THE FACTS

Beadica 231 CC and the other respondents (Beadica) concluded lease agreements providing for a lease of premises owned by the Oregon Unit Trust. The commencement date was 1 August 2011. The lease was for an initial period of five years, terminating on 31 July 2016, with a right to renew the lease for a further five years, provided the lessee gave notice of its exercise of the option of the renewal at least six months prior to the initial termination date of 31 July 2016.

The lease agreements obliged Beadica to give notice of the exercise of the renewal option by no later than 31 January 2016. The lease agreement ran parallel to a franchise agreement in terms of which franchise rights were granted to Beadica respectively for an initial period of ten years, thus corresponding with the initial five-year period of the lease agreement together with a renewal period for a further five years. The agreements had been concluded as part of a black economic empowerment initiative.

Beadica did not renew the leases by 31 January 2016.

On 29 March 2016, by way of a letter, Beadica requested Oregon to propose a renewal of the lease agreement with the option to purchase. On 15 March 2016, the third respondent requested consideration of an offer to purchase the leased premises and in the interim requested Oregon to forward a draft to the renewal of the leased premises. The other respondents addressed Oregon in similar terms.

Oregon did not respond to these requests, nor did it reject the contents thereof. Beadica received no further correspondence concerning the renewal of the lease agreements. It and the other respondents then received termination letters approximately one week before the termination date. The termination was stated to be made in terms of clause 20 of the leases which had given the right to extend the lease period for a further five years, provided that written notice of intention to do so was given.

On 29 July 2016, two days before the initial termination date, termination letters were also delivered to second and fourth respondents. It was also stated that Oregon was amenable to meet and discuss the possibility of concluding a new agreement for the lease of the premises for a fixed period. In the interim Oregon was amenable to lease the premises on a month-to-month basis.

Oregon sought to evict the respondents from the premises. Beadica contended that the lease agreements were essential to the survival of the businesses. The franchise agreements clearly contemplated that the business would operate from the premises from which they presently operate.

Beadica and the other respondents sought an order that the option to renew had been validly exercised. Oregon appealed an order which was given to this effect.

THE DECISION

The notion, that a sanction for breach, or failure to comply with the terms, of a contract, agreed on by the parties, is disproportionate and therefore unenforceable, is entirely alien to South African contract law. To recognise it would be to undermine the principle of legality. That does not mean that a sanction that is contrary to public policy, or that is

unconscionable in the circumstances, is to be enforced. The question is really one that centres on policy — the legal convictions of the community, rooted now in the Constitution. The question was what policy considerations were at play in the present matter?

There was nothing inherently offensive in the renewal clauses in the leases. The leases would have terminated had the lessees not been given the option to renew them. The only limitation on that right was that it had to be exercised in a particular manner and by a particular date. The requirement of six months' notice was eminently reasonable, given that the lessees and Oregon Trust would have to agree on the rental to be paid, or appoint an expert to determine the future rental of all the premises. In the absence of agreement, Oregon Trust would have to find new tenants. It was open to the lessees to renew timeously and by giving proper notice. The leases may not have been between Oregon Trust and sophisticated businesspeople, but the representatives of the lessees had all operated franchises, and had previously been store or regional managers. They were not ignorant individuals. They may not have fully appreciated the niceties of the law, but they knew that they had to give notice — they attempted to do so after the notice period had elapsed.

As in Barkhuizen v Napier 2007 (5) SA 323 (CC), there was no indication from the aggrieved party, the lessees, why they did not give notice of their intention to renew the leases by 31 January 2016. If they had advanced reasons why they did not comply, the court would have been able to assess whether enforcement of the renewal clauses was, in the circumstances, unconscionable.

Oregon Trust correctly argued that the effect of the orders of the High Court to permit the lessees to occupy the premises for a further period of five years was that new contracts were made for the parties by the court. This approach should not be endorsed. No consideration of public policy permits the making of contracts for parties by a court.

The lessees argued that termination of the leases was not favoured by public policy because it would result in the collapse of the franchised businesses and that would derail an empowerment initiative for previously disadvantaged individuals. The termination of the leases appeared to have no benefit for the lessor since the lessees had paid their rental and had not defaulted. And Oregon Trust had not indicated that any of the premises was available for hiring by other lessees.

That argument ignored the fact that it was the lessees, through non-compliance with the renewal clause, who jeopardised their businesses. If they had at least attempted to explain why they had failed to give notice timeously, policy considerations might have been relevant.

The option to renew had not be validly exercised. The appeal succeeded.

ATLANTIS PROPERTY HOLDINGS CC v ATLANTIS EXEL SERVICE STATION CC

Contract

A JUDGMENT BY OPPERMAN J (WINDELL J concurring, VALLY J dissenting)
GAUTENG DIVISION, PRETORIA
11 APRIL 2019

2019 (5) SA 443 (GP)

A provision in a lease agreement entitling either party to terminate the lease by giving notice may be applied at any time by either party, irrespective of breach of the lease, and whether or not the lease is still running within a fixed period.

THE FACTS

Atlantis Exel Service Station CC (Exel) let from Atlantis Property Holdings CC (Property) certain immovable property with effect from 1 March 2016. In terms of the agreement Exel occupied the property for a period of six months (the initial period) after which the lease was extended for a period of three years (the renewal period), subject to Exel having maintained its rental payments during the initial period.

During the renewal period, Property terminated the agreement in terms of clause 22.1. That clause provided that the agreement could be terminated by either party serving the other notice of its intention to cancel the lease upon thirty calendar days' notice. The cancellation notice alleged that Exel had committed various breaches of the lease, and required Exel to vacate the property on or before 31 July 2017.

Exel refused to vacate. Property brought an application for eviction on 25 October 2017. It contended that it had been entitled to cancel the lease in terms of clause 22.1 irrespective of whether or not Exel had breached the agreement. Exel contended that this clause could not be applied within the three year renewal period.

THE DECISION

The language used in clause 22 was unambiguous and clear. The parties recorded that they 'expressly and irrevocably' agreed that the agreement could be terminated by either party giving thirty days' notice. Clause 22.1 was a standard termination-on-notice clause commonly found in commercial contracts. It afforded the right to both parties to cancel the agreement by giving thirty days' notice.

It is not uncommon for parties to agree to combine characteristics of a fixed period lease with those of a periodical lease. This is known as a hybrid lease. It has been noted that in this way the parties have the security of a fixed term lease if the relationship is successful but, if the circumstances change, the parties have the contractual flexibility to terminate the lease early. Both Property and Exel clearly elected to introduce into their commercial relationship the flexibility that termination on notice would afford, and there was no part of the language in clause 22.1 that did not communicate the unmistakable intention that both parties sought to preserve for themselves a right of termination on thirty days' notice.

Clause 22.1 clearly provided Property with an alternative option to evict Exel, and Property was entitled to rely on clause 22.1. Property had given the requisite notice and had terminated the agreement.

An order of eviction was granted.

CLOETE *v* EDEL INVESTMENTS (PTY) LTD

A JUDGMENT BY GAMBLE J
WESTERN CAPE DIVISION, CAPE TOWN
5 MARCH 2019

2019 (5) SA 486 (WCC)

It is permissible to claim loss of profits as a delictual claim, consequent to a misrepresentation having been made as to the suitability of leased premises.

THE FACTS

Cloete rented from Edel Investments (Pty) Ltd a site at commercial premises known as Racing Park, Milnerton, for a period of two years from 1 November 2014 until 31 October 2016. It was an express term of the lease that the plaintiff would use the premises for the purposes of scrap-metal processing and exporting. The agreement provided for a renewal of the lease for a further three years.

Cloete took occupation of the premises on 1 November 2014 and thereafter conducted the scrap-metal business through a private company. In June 2015, during the currency of the initial lease, Cloete exercised the option and extended the lease from 1 November 2016 to 31 October 2019.

Unbeknown to Cloete, the premises could not be used for scrap-metal business as this conflicted with the constitution of the Racing Park Development Owners Association. When Cloete continued conducting the business, on 25 August 2015 the Association obtained an interdict precluding him from conducting the business after 1 January 2016. In light of that order, Cloete eventually vacated the premises on 1 October 2016.

Cloete claimed damages from Edel as a consequence of the premature termination of the lease. He claimed 1.Loss of profit that he allegedly would have received from his company for the period 1 November 2015 to 31 October 2016 in the sum of R702 805,44, and 2. Loss of profit, alternatively for the period 1 November 2016 to 31 October 2019 in the sum of R2 108 416,32.

Edel excepted to the claim on the grounds that claim was for 'positive interesse', ie to be placed in the position Cloete would have been in had the misrepresentation as to the suitability of the premises been true. Edel contended that, in a claim founded in delict, the plaintiff is not entitled to claim damages in the form of positive interesse.

THE DECISION

In *Transnet Ltd v Sechaba Photoscan* (Pty) Ltd 2005 (1) SA 299 (SCA), it was held that there was no practical value in observing the distinction between positive and negative interesse in determining delictual damages. It was held to be a distinction that tended to obscure rather than clarify.

There was nothing in principle to prevent a claimant from being placed in the position it would have been in but for its having been fraudulently deprived of that to which it was entitled. In the present case, this meant that Cloete was entitled to claim loss of profits.

The exception was dismissed.

ROAD TRAFFIC MANAGEMENT CORPORATION v WAYMARK INFOTECH (PTY) LTD

Contract

A JUDGMENT BY PETSE AJ (BASSON AJ, CAMERON J, DLODLO AJ, FRONEMAN J, GOLIATH AJ, KHAMPEPE J, MHLANTLA J and THERON J concurring)
SUPREME COURT OF APPEAL
2 APRIL 2019

2019 (5) SA 29 (CC)

Section 66 of the Public Finance Management Act (no 1 of 1999) does not apply to procurement contracts that follow upon a proper process, and that do not embody loans, guarantees or the giving of security, even though they extend beyond one fiscal year.

THE FACTS

Waymark Infotech (Pty) Ltd and the Road Traffic Management Corporation concluded a contract for the provision of professional services — to develop and install an 'Enterprise Resource Planning System'. The RTMC was an entity listed in sch 3 to the Public Finance Management Act (no 1 of 1999) and was thus bound by the provisions of the Act.

The contract made provision for various services to be rendered over a three-year period, and included a schedule for the payment of remuneration, the full contract sum being some R33,7m.

Waymark commenced rendering the services in 2009, but in February 2010 the RTMC advised it that some of its services were suspended. Waymark tendered its services and when the RTMC failed to perform its obligations, despite demand, Waymark considered that the contract had been repudiated. It instituted an action for damages in an amount exceeding R6,7m.

RTMC delivered a counterclaim for an order declaring that the contract was not binding on it, since it did not comply with the provisions of section 66(3)(c) of the Act, in that it had not been authorised by the Minister of Finance and was accordingly void in terms of section 68 of the Act.

THE DECISION

There is no reason why interpreting section 66 to cover only transactions similar to credit or security arrangements frustrates the purpose of the Act. The procurement of significant assets still requires executive approval under section 54(2) of the Act. The agreement in question fell outside section 66's reach as it was essentially a procurement contract.

Section 216 of the Constitution, headed 'Treasury control', requires that national legislation must establish a national treasury and prescribe measures 'to ensure both transparency and expenditure control in each sphere of government by introducing' a variety of measures and practices, and enforcing compliance with them. Section 217(1) provides that 'when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'.

Section 66(1) of the Public Finance Management Act provides that an institution to which the Act applies 'may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction' is authorised in terms of the Act.

Section 66(3)(c) determines the authority required for the transactions entered into by public entities. These transactions must be authorised by the Minister of Finance and, in the case of 'the issue of a guarantee, indemnity or security, the Cabinet member who is the executive authority responsible for that public entity, acting with the concurrence' of the Minister of Finance.

Section 54(2) provides that before a public entity concludes any of specifically listed transactions, the accounting authority for the public entity

must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction. In contradistinction, chapter 8 of the Act—which includes sections 66 and 68—seeks to regulate certain kinds of transactions entered into by public entities.

In interpreting ss 66 and 68 of the Act a court should consider what each section is designed to achieve. Looked at together, and with section 51, within the framework of the Act itself, each section serves a different purpose. Section 51 regulates procurement by public entities. It states who bears responsibility for effective, efficient and transparent financial systems of financial and risk management, and how this must be achieved. It does not deal with loans, guarantees and future financial commitments. Section 66 does that and section 68 prescribes the consequences of failing to comply with section 66. It does not deal with the consequences of procurement decisions that are not made properly under PAJA. This approach does not require the words of the sections to be stretched or words to be read in.

The sections require no elaboration. If one looks to their design and purpose, it is plain that section 66 does not apply to procurement contracts that follow upon a proper process, and that do not embody loans, guarantees or the giving of security, even though they extend beyond one fiscal year. The contract in question did not amount to 'any transaction that binds or may bind that institution . . . to a future financial commitment': it was a present commitment to pay for professional services as they were rendered, albeit over a three-year period.

A contextual reading of ss 66 and 68, given the chapter in which they are located, and the relation of that chapter to other chapters of the PFMA, lends itself to the interpretation that the phrase 'any other transaction that binds or may bind that public entity to any future financial commitment' as referred to in s 66, must mean a transaction that is somehow similar to a credit or security agreement. This accords with and respects the generality of an accounting official's duty for financial oversight. An overly broad interpretation of s 66 would detract from the accounting officer's powers and place more of a burden on the Minister. This narrower reading, moreover, avoids requiring transactions that fall under s 54(2) also to need ministerial approval under s 66, thus, in effect, requiring two separate approvals. This double check, which is not spelt out in express or necessarily implicit terms, would be a significant administrative burden on public entities. Rather, the context and structure of the PFMA impel the view that 'any other transaction' must be similar to a loan and security, and distinct from most other transactions (especially those in s 54(2)).

BEIJERS v HARLEQUIN DUCK PROPERTIES 231 (PTY) LTD

Contract

A JUDGMENT BY MOCUMIE JA (CACHALIA, MAJIEDT AND ZONDI JJA AND GORVEN AJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2019

2019 SACLR 312 (SCA)

Evidence of a term of a written contract at variance with that term is inadmissible.

THE FACTS

Beijers and Harlequin Duck Properties 231 (Pty) Ltd entered into a written contract in terms of which Harlequin employed Beijers as a commercial property broker on commission only. It was agreed, that in the event that Beijers was the 'effective cause' of a sale of any property, Harlequin would pay Beijers commission on the terms set out in clause 5.1 of the contract. It provided that Beijers would be remunerated on a commission only basis. Commission would be calculated at 50% of total commission earned by Harlequin from Completed Deals effected by Beijers.

The contract also included a non-variation clause, clause 20, which provided that no variation of the contract would have any effect unless reduced to writing and signed by both parties thereto. Any indulgence or waiver of the any of the terms of this contract would in no way affect the right of any party thereto in enforcing any provision thereof.

Clause 21 provided that the contract constituted the sole agreement between the parties and no representation not contained in the agreement would be of any force or effect between the parties.

Clause 23 provided that prior drafts of the contract would not be admissible in any proceedings as evidence in any matter relating to any negotiation preceding the signature of the contract.

Beijers claimed that she had been the effective cause of two deals and had not been paid commission as provided for in the agreement.

Harlequin accepted that Beijers had been effective in concluding the transactions, but claimed that she was 'not the effective cause on her own.' It contended firstly that on construction of clause 5.1, unless the Beijers was the sole effective cause of a transaction, she would not be entitled to full commission. In that instance, the practice of Harlequin would govern how much commission would be paid by way of a tacit term. Secondly, it contended that an oral agreement concerning commission in those circumstances was admissible; this was that an agent would share her 50 per cent commission with an agent who provided assistance.

THE DECISION

Harlequin contended that the words in clause 5.1 'effected by yourself' meant 'effected by you alone'. The clause could not bear that construction. The plain meaning of the clause was that commission was to be paid on all transactions effected by Beijers.

Furthermore, the entitlement to commission was expressly dealt with in the contract. Any additional term would amount to a variation of the express terms. This was excluded by clause 20 of the contract. It could not be said that evidence of an additional terms would amount to evidence of context or surrounding circumstances. It is evidence which is at odds with the written contract. Any such evidence therefore had to be excluded.

The only way in which evidence contrary to the terms of the contract could have been led was in support of a claim for rectification of the written contract. Rectification is a well-established common-law right that provides an equitable remedy designed to correct the failure of a written contract to reflect the true agreement between the parties to the contract. It thereby enables effect to be given to the parties' actual agreement. However, Harlequin did not invoke rectification.

RATLOU v MAN FINANCIAL SERVICES SA (PTY) LTD

A JUDGMENT BY DAMBUZA JA (LEWIS ADP, SWAIN JA, CARELSE AJA and MATOJANE AJA concurring)
SUPREME COURT OF APPEAL
1 APRIL 2019

2019 (5) SA 117 (SCA)

Credit Transactions

In determining whether a settlement agreement which replaces a credit agreement not subject to the National Credit Act (no 34 of 2005) is subject to the Act, the purpose of the Act must be considered. The purpose of the Act is not to govern such an agreement.

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, Ratlou, 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 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 Ratlou were liable jointly and severally for the debt therein described.

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 provided for payment of the amount owed in deferred instalments, and interest was payable in terms thereof. On a literal interpretation the settlement agreement met the definition of a credit transaction. This was so, even though the underlying lease agreements did not constitute credit agreements. Further, on a literal interpretation of section 8(4)(f) of the Act, a settlement agreement concluded in relation to a delictual claim would immediately fall within the ambit of the Act.

Man contended that a literal interpretation could never have been the intention of the legislature. The consequence would be absurd for agreements of settlement in respect of non-contractual claims.

The purposes of the Act are set out in section 3 of that Act. Section 2 thereof provides that the Act must be interpreted in a manner that gives effect to such purposes. Under section 3 the purposes of the Act are 'to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers'. Therefore the Act is concerned with the advancement of money or granting of credit, in the main, to individual consumers.

The conclusion to be drawn from this, as also indicated in judgments such as that given in *Ribeiro v Slip Knot Investments 777 (Pty) Ltd* 2011 (1) SA 575 (SCA) is that the Act was not designed to regulate settlement agreements where the underlying agreements, or cause, would not have been considered by the Act.

A purposive approach in determining whether the Act is applicable to a settlement agreements, is appropriate. In the present case, the purpose of the Act was not applicable to the settlement agreement.c

NPGS PROTECTION AND SECURITY SERVICES CC v FIRSTRAND BANK LIMITED

A JUDGMENT BY DAVIS AJA
(NAVSA ADP, MBHA JA and
MOKGOHLOA JA concurring,
MAKGOKA JA dissenting)
SUPREME COURT OF APPEAL
6 JUNE 2019

2019 SACLR 270 (SCA)

A represented defendant is obliged to set out facts showing that an order declaring his residence specially executable would be contrary to his rights as provided for in section 26 of the Constitution if such an order is to be avoided.

THE FACTS

First National Bank and NPGS Protection and Security Services CC concluded a written credit facility agreement in terms of which the bank advanced an amount of R250 000 to NPGS as 'working capital'. The second appellant bound himself as surety and co-principal debtor on behalf of NPGS in favour of the bank for payment of all amounts due by NPGS to the bank.

The loan under the credit facility was further secured by a covering mortgage bond registered by the second appellant over his immovable property, in favour of the bank. At the time that the credit facility was advanced to NPGS, the second appellant had already registered a mortgage bond in favour of the bank in the sum of R2 000 000, over his immovable property.

On 4 May 2017 the bank issued combined summons against the appellants for payment of an amount of R649 197.39. It alleged that NPGS had defaulted on its repayment obligations in terms of the credit facility and had been in default for more than 20 days. The bank invoked the suretyship signed by the second appellant in its favour, as well as the mortgage bond registered in its favour over the immovable property of the second appellant. It accordingly, sought judgment against the appellants, jointly and severally, for payment of the claimed amount, interest, costs and an order declaring the immovable property of the second appellant specially executable.

In the summons, in compliance with the order in *Standard Bank of South Africa Limited v Saunderson* 2006 (2) SA 264 (SCA), the appellants' attention was drawn to the provisions of section 26 of the Constitution, and to rule 46(1) of the Uniform Rules. They were invited to place facts before the court, if they wished to contend that the right enshrined in section 26 would be implicated, and that the second appellant would be rendered homeless by the order of execution against his home.

NPGS resisted summary judgment on the grounds that the bank had failed to attach a certificate of balance to its particulars of claim, and had failed to demonstrate how the claimed amount was made up. It was submitted that the alleged failure by the bank to explain how the claimed amount was made up, rendered the bank's particulars of claim excipiable as failing to disclose material facts on which the appellants could reasonably be expected to plead.

In the affidavit resisting summary judgment, the second appellant did not deal at all with the prayer for the execution against his immovable property. However, during argument before the court a quo, counsel for the appellants submitted from the bar that the immovable property was the primary residence of the second appellant.

The appellants appealed an order granting judgment for the bank and declaring the property executable.

THE DECISION

Having taken the point from the bar concerning the loss of a primary residence, it could not have escaped the second appellant or his legal representatives that certain basic information had to be provided. The failure to do so, led to the compelling conclusion that the point was raised as a stratagem to avoid the consequences of failing to fulfil his obligations in respect of a commercial loan. The

impression created was that the second appellant was unable to attest to that which could have avoided the execution order. It was unlikely that the second appellant would have put his primary residence at risk purely to secure a commercial loan. There was already an existing bond in place, which was then used for the further purpose of securing the loan.

The duty of a court to investigate a debtor's position may well be different if it involved an unrepresented litigant, the loan was not exclusively of a commercial nature or where, at least, some evidence suggests that the execution was in respect of a debtor's primary residence. However, in this case, the complete failure by the second appellant to avail himself of rights which were expressly drawn to his attention in the summons issued by the bank gives ground for making a constitutionally justified order for execution. In imposing an obligation upon a court in this case when one vague and unspecified mention of a personal residence without more suffices as a defence or even a justification for remitting a case back to the court a quo, would cause significant uncertainty, and arguably serious damage to the efficient provision of credit in the economy.

The second appellant was afforded a number of opportunities to lodge an objection to the application to execute.

As far as the other defences were concerned, the majority concurred in the judgment of Makgoka JA: the appellants did not assert that any repayment of these monies lent and advanced, had been made. Their silence led ineluctably to the conclusion that they were unable to meet the bank's allegations.

The appeal failed.

The determinative test is whether the judgment debtor is likely to be deprived of the right to access to adequate housing should the immovable property in question be executed against. The court's oversight role is triggered as long as the loan is secured by an immovable property which is the primary home of a judgment debtor, and there is an application to declare that property specially executable. Accordingly, I conclude that it is immaterial to the court's oversight role whether the loan was obtained to finance the purchase of a home or to finance a business venture. Apart from being at odds with the general thrust of s 26(3), it is doubtful whether the differentiation sought to be made would be compatible with the equality provisions of s 9 of the Constitution.

SPILHAUS PROPERTY HOLDINGS (PTY) LTD v MOBILE TELEPHONE NETWORKS (PTY) LTD

A JUDGMENT BY JAFTA J (CAMERON J, FRONEMAN J, LEDWABA AJ, MADLANGA J, MHLANTLA J, NICHOLLS AJ and THERON J concurring)
CONSTITUTIONAL COURT
24 AUGUST 2019

2019 (4) SA 406 (CC)

Property

An owner of property subject to a sectional title scheme is not obliged to follow the course provided for in section 41 of the Sectional Titles Act (no 95 of 1986) and section 9 of the Sectional Titles Schemes Management Act (no 8 of 2011) when the owner seeks to enforce a right not referred to by that section.

THE FACTS

Prior to the subdivision and coming into existence of a sectional title scheme, MTN Mobile Telephone Networks (Pty) Ltd and Alphen Farm Estate in Constantia (Pty) Ltd concluded agreements of lease pursuant to which 2G cellular antennae were installed on a rooftop of one of the buildings situated on the property owned by Alphen. When the sectional title scheme was introduced, the building was located within a precinct which remained owned by Alphen, the historic precinct. On the other precinct, the residential precinct, were located seventeen sections, owned by Spilhaus Property Holdings (Pty) Ltd and the other applicants.

On 10 October 2012 one of the historic precinct trustees sought the consent of the two residential precinct trustees, for MTN to upgrade its existing cellular installations. This consent was granted on the same day. In November 2013, the upgraded antenna was erected, by the installation of a fake chimney some five metres in height. The base station equipment was also upgraded.

The following month, the City of Cape Town served a notice on Alphen to the effect that the base station had been erected in contravention of the National Building Regulations and Building Standards Act (no 103 of 1977) as no prior written approval for the erection of such building had been obtained from the city. Alphen was ordered to obtain written approval for the said unauthorised building work, by submitting and having building plans approved within 60 days.

At a meeting of the trustees of the scheme on 19 February 2014 the residential precinct trustees confirmed that they were withdrawing their consent to the upgrade on the grounds that significant new issues had come to the fore, which they were not aware of at the time. On 14 May 2014 the attorney for the residential precinct owners wrote to Alphen asserting that the cell-phone mast installation, which had been installed on the common property, was illegal. The letter also pointed out that Alphen's application to the City for land use approval was made without the consent of all owners in the scheme and that this rendered the application defective.

The residential precinct owners, Spilhaus and the other applicants, applied for an order directing MTN to remove the cellular network base transceiver station together with associated infrastructure, and directing Alphen to co-operate to the extent necessary in the removal of the installation. MTN and Alphen opposed the application.

THE DECISION

Section 41 of the Sectional Titles Act (no 95 of 1986)*, provides that when an owner is of the opinion that he and the body corporate have suffered damages or loss or have been deprived of any benefit in respect of the matter mentioned in section 36(6), and the body corporate has not instituted proceedings for the recovery of such damages, loss or benefit, or where the body corporate does not take steps against an owner who does not comply with the rules, the owner may initiate proceedings on behalf of the body corporate in the manner prescribed.

* Re-enacted in section 9 of the Sectional Titles Schemes Management Act (no 8 of 2011).

The issue that arose for determination was whether s 41 of the Act denied the applicants standing to seek the mandatory interdict, and restricted them to a claim for the appointment of a curator.

A zoning scheme is passed in the interests of the property owners who hold property in the area where the scheme applies. The applicants, being owners of units in a sectional title scheme to which the relevant zoning scheme applied, were entitled to institute proceedings to enforce the zoning scheme unless section 41 of the Act precluded them from doing so.

The language of the provision is primarily that it empowers individual owners of units in a sectional title scheme to institute proceedings not in their own interest but for and on behalf of the body corporate. It is quite plain from the reading of section 41 that its purpose is to protect the body corporate from unmeritorious legal proceedings by owners. The section is not there for the protection or regulation of claims of individual owners. Instead, its focus is directed at the body corporate. Therefore, the object of the section is not to determine the legal standing of individual owners.

In this matter the claim pursued by the applicants did not arise from section 36(6) of the Act. They sought to enforce the zoning scheme that was passed in their interests as owners of property where this scheme applied. That they were entitled to do so is plain from established authority. That section 36(6) read with section 37(1) of the Act empowered a body corporate to enforce laws and other rules did not alter the fact that the genesis of the applicants' claim was not the Act. The right they sought to enforce arose from the fact that they are part of the broader class in whose interest the relevant zoning scheme was passed. Their cause of action had nothing to do with these section. It was a self-standing claim. In these circumstances section 41 did not apply.

The order sought by the applicants was granted.

It is quite plain from the reading of s 41 that its purpose is to protect the body corporate from unmeritorious legal proceedings by owners. The section is not there for the protection or regulation of claims of individual owners. Instead, its focus is directed at the body corporate.
[33] Therefore, the object of the section is not to determine the legal standing of individual owners. A question that may arise in appropriate proceedings is whether the individual owners retain standing to institute proceedings in their own names in respect of matters mentioned in s 36(6) of the Act. It is not necessary to answer that question here because it does not arise.
[34] In this matter the claim pursued by the applicants does not arise from s 36(6) of the Act. They seek to enforce the zoning scheme that was passed in their interests as owners of property where this scheme applies. That they are entitled to do so is plain from established authority.

NATIONAL HOME BUILDERS' REGISTRATION COUNCIL v XANTHA PROPERTIES 18 (PTY) LTD

Property

A JUDGMENT BY LEACH JA (SALDULKER JA, VAN DER MERWE JA, GORVEN AJA AND WEINER AJA concurring)
SUPREME COURT OF APPEAL
21 JUNE 2019

2019 SACLR 319 (SCA)

The provisions of section 14, read with the definition of 'home' and 'housing consumer' in section 1 of the Housing Consumers Protection Measures Act (no 95 of 1998) require the enrolment of a proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

THE FACTS

Xantha Properties 18 (Pty) Ltd owned fixed property in Cape Town. It was in the process of developing 223 residential apartments, as well as two ground-floor retail shops, on the property. Xantha stated that it would not be selling any of the residential apartments to third parties but would retain ownership of the entire building, including the residential apartments. It also stated that it intended to earn rental income from these residential apartments by renting them out upon completion.

During February 2017 Mr Smith, a director of Xantha, made enquiries with the National Home Builders Registration Council about the requirement for the enrolment of the residential apartments. Employees of the Council, advised him that the Council required every construction project undertaken by a registered home builder to be enrolled, irrespective of whether or not there was a third-party housing consumer involved. In addition to this, the Council's legal advisor telephonically advised Xantha that it would not be able to apply for exemption under section 29 of the Housing Consumers Protection Measures Act (no 95 of 1998).

Smith submitted the application for enrolment of the residential apartments to the Council on 22 February 2017. An employee of the Council advised him on 14 March 2017 that the application was incomplete. She requested him to submit a schedule of prices in respect of all the residential apartments, as well as a completed form. In response Smith advised the employee that there were no individual schedules of prices in respect of the residential apartments as Xantha did not intend selling them. Smith also pointed to the fact that the Council did not have forms designed for the enrolment of the type of residential apartments under construction. The Council did not respond to the issues raised by Smith, but on 6 April 2017 forwarded a 'pro forma' invoice to him requiring payment of the enrolment fee in the sum of R1 583 143,90. Xantha paid the enrolment fee on 11 April 2017.

In enrolling the residential apartments, Xantha did so without prejudice to its right to challenge the lawfulness of the requirement for the enrolment of the apartments.

Xantha challenged the lawfulness of the requirement to register the residential apartments on the basis that, properly interpreted, the relevant provisions of the Act, read with the relevant provisions of the Regulations, did not require the enrolment of the residential apartments under construction. The Council and the Minister of Human Settlements contended that the relevant provisions of the Act and Regulations required the enrolment of the residential apartments.

Xantha sought an order declaring that the provisions of section 14 of the Act, read with the relevant provisions of sections 1, 10 and 10A of the Act, and regulations 1(2) and 1(4) of the Regulations, do not require the enrolment of the proposed construction of a home in circumstances where the home builder is constructing such home solely for the purposes of leasing or renting out.

THE DECISION

Crucial to the decision in this case were the definitions in

section 1 of 'home builder' and 'business of a home builder'. A home builder is defined, inter alia, as meaning 'a person who carries on the business of a home builder'. Such business is defined as meaning: (a) to construct or to undertake to construct a home or to cause a home to be constructed for any person, (b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home, (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal, or (d) to conduct any other activity that may be prescribed by the Minister.

Section 14(1) of the Act provides that a home builder shall not commence the construction of a home unless the home builder has submitted the prescribed documents, information and fee to the Council in the prescribed manner, the Council has accepted the submission , and the Council has issued a certificate of proof of enrolment.

These provisions provide for a person who wishes to construct a home for the purposes of 'leasing, renting out' and thereby carry on the 'business of a home builder' as defined, to first register as a home builder. This will entail showing that the proposed building specification will not be sub-standard and will meet the necessary specifications.

The Act was designed to afford adequate housing for residents by ensuring that their homes were constructed by competent builders to approved standards. These objectives were sought to be achieved, first, by section 10 (to ensure that homes are constructed by persons having the necessary competence) and, secondly, by section 14 (to enrol such homes and ensure that they are built to a prescribed level of structural and technical quality). These provisions are supplemented by section 19 of the Act

Without homes being enrolled under section 14, inspectors would be unable to identify them or to fulfil their duties or obligations under this section. In itself this is a clear indication that it was intended that all homes were to be enrolled.

In the light of this, and the fact that the fundamental underlying premise of the Act is to guard against builders constructing sub-standard homes and that the definition of a home builder's business was amended to specifically include building homes for purposes of being let or rented out, there was no reason why the legislature would have intended to treat homes built for leasing purposes any differently from those constructed for sale. There was certainly nothing in the structure of the Act which indicated that to be the case.

On the contrary, there was every reason to think that the legislature would have wished homes built for sale to be treated the same way as homes built for lease. Circumstances often change, and it would take little imagination to envisage how a home being constructed for rental purposes might end up being sold rather than let. Requiring both categories of home to be enrolled would not only avoid a sub-standard home being sold in those circumstances, but would also serve to mitigate against the abuse of unscrupulous developers building inferior homes allegedly for leasing purposes, then professing to change their minds and selling them.

Taking all of this into account, it was clear that section 14(1) applies to homes being built for lease and rental purposes. In these circumstances the order sought by Xantha had to be refused.

WILD & MARR (PTY) LTD v INTRATEK PROPERTIES (PTY) LTD

A JUDGMENT BY SUTHERLAND J
GAUTENG LOCAL DIVISION, JOHANNESBURG
20 MAY 2019

2019 (5) SA 310 (GJ)

Companies

A court having territorial jurisdiction over the principal place of business of a company has jurisdiction to entertain an application for the winding up of that company, even if the registered office of the company is not within that court's area of jurisdiction.

THE FACTS

Wild & Marr (Pty) Ltd brought an application for the winding up of Intratek Properties (Pty) Ltd. Service of the winding-up application was effected at Intratek's principal place of business at 136 10th Street, Parkmore, Johannesburg. This address was within this court's territorial jurisdiction. Intratek's registered address was at 21 Van Rensburg Street, Nelspruit. That address was not within this court's territorial jurisdiction, but in the province of Mpumalanga.

Intratek contended that the only address at which effective service of a winding-up application could take place was at the registered office. If that contention was correct, only the Mpumalanga court could entertain the application.

The court considered this question.

THE DECISION

Section 12(1) of the Companies Act (no 71 of 1973 Act) provided: 'The court which has jurisdiction under this Act in respect of any company or other body corporate, shall be any provisional or local division of the High Court of South Africa within the area of jurisdiction whereof the registered office of the company or other body corporate *or the main place of business of the company or other body corporate is situate*.'

Section 23(3) of the Companies Act (no 71 of 2008 Act) provides: 'Each company or external company must —

(a) continuously maintain at least one office in the Republic; and

(b) register the address of its office, or its principal office if it has more than one office —

(i) D initially in the case of —

(aa) a company, by providing the required information on its Notice of Incorporation; or

(bb) an external company, by providing the required information when filing its registration in terms of subsection (1) and

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.'

Intratek contended that because the 2008 Act requires the main place of business to be identical to the registered address, applications for liquidation must be brought exclusively in that court which exercises territorial jurisdiction over the registered address. The opportunity to serve on either one of two addresses under the 1973 Act is extinguished.

This contention could not be accepted.

The notion that the court's jurisdiction is ousted is exaggerated. The jurisdiction of the court is conferred by statute in respect of a juristic entity which, by a fiction, is said to be at a place; if the reforming statute creates a different arrangement that is merely more restrictive about the place where the fiction resides, it does not follow that the rearrangement infringes on the court's jurisdiction or inhibits reasonable access to a court by any litigant. No threat is created by this procedural provision to the court's basic functioning nor to litigants' constitutional rights of access to justice.

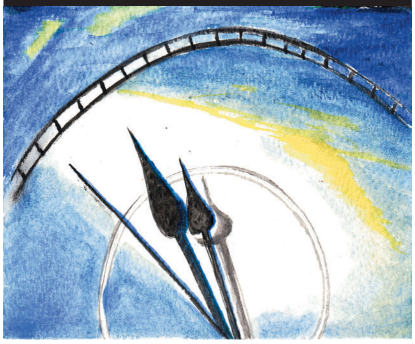
Intratek's contention was rejected.

HABIB *v* ETHEKWINI MUNICIPALITY

A JUDGMENT BY PLOOS VAN AMSTEL J
KWAZULU NATAL LOCAL DIVISION, DURBAN
20 MARCH 2019

2019 SACLR 252 (KZD)

Prescription



It is not necessary for a plaintiff to aver that its claim has not prescribed, even if the plaintiff's claim makes averments which might establish that the claim has in fact prescribed.

FACTS

Habib as trustee of the Ismail Habib Family Trust paid R3 781 107 to the Ethekwini Municipality in respect of rates and penalties owed by a previous owner of an immovable property which the trust purchased. He claimed this amount from the municipality on the grounds that he was not liable to the municipality for the amount paid, but made the payment after threats by it regarding the discontinuation of services and legal action.

Habib alleged that the trust only became aware that it was not liable to make the payment to the municipality after a judgment of the Constitutional Court on 29 August 2017, which was to the effect that it is not permissible for a local authority to compel the new owner of immovable property to pay the rates owed by a previous owner.

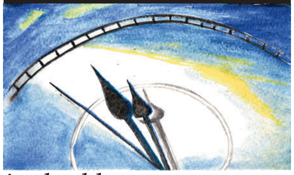
The trust's particulars of claim stated that it was a condition of the transfer that the rates for a period of two years prior to the transfer had to be paid by the trust. This amount was duly paid and the transfer was registered on 29 March 2005. After transfer the municipality demanded that the trust pay the debt of a previous owner in respect of rates in an amount set out in a statement dated 8 August 2006. Under compulsion and threat of discontinuation of services and legal action, the trust made payment to the municipality in respect of this debt in a total amount of R3 781 107. The date on which the payment was made was not stated. The statement of account annexed to the particulars of claim was accompanied by a letter of demand dated 25 January 2013, referring to arrears in the sum of R3 302 121, and an acknowledgement of debt signed by the first plaintiff, dated 2 May 2013, which referred to an amount outstanding of R1 668 756 and instalments of R278 126. The dates on which those payments were made was not stated.

The municipality raised an exception to the particulars of claim on the basis that the facts pleaded did not disclose a cause of action. Its objection was that the averments did not establish that the plaintiffs' claim had not become prescribed. The plaintiffs delivered a notice in terms of uniform rule 30(2)(b), claiming that the notice of exception was an irregular proceeding.

THE DECISION

Prescription, in trial proceedings, should be raised by way of a plea or special plea. An exception which invokes prescription is not an irregular step, but an exception based on prescription will usually fail because the contention that the particulars of claim lack averments necessary to sustain an action is incorrect. This is because the plaintiff is not required to aver that his claim has not become prescribed.

Uniform rule 23 provides for the delivery of an exception where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be. The exception in the present matter was based on the contention that the facts pleaded in the particulars of claim do not disclose a cause of action. Such an exception is provided for in uniform rule 23. Whether or not the exception should succeed depends on whether or not the particulars of claim disclose a cause of action. If they do, the exception fails. But an exception which is without substance on its



merits, even if it is hopeless, is not an irregular step. It is a bad exception.

The application under Rule 30(2)(b) was dismissed.

It did not appear from the particulars of claim whether or not the claim had become prescribed. However, it did not follow that they lacked averments necessary to sustain an action.

The exception was dismissed.

I am not aware of a case where an exception was set aside as an irregular step in terms of uniform rule 30. In Cassimjee a number of exceptions were upheld on the basis that the plaintiff's claims as set out in the declaration had become prescribed. It appears from the judgment that some of the issues were matters of law. Nevertheless, it is an example of a matter where prescription was dealt with on exception.

Where therefore an exception is taken on the basis of prescription, the correct approach in my view is not to set it aside as an irregular proceeding, or to dismiss it on the basis that the incorrect procedure has been followed, but to consider whether the particulars of claim lack averments which are necessary to sustain an action. In most cases the answer will be that the particulars of claim are not excipiable, because the plaintiff is not required to aver that his claim has not prescribed.

MOSS v KMSA DISTRIBUTORS (PTY) LTD

A JUDGMENT BY DAMBUZA JA (WALLIS AND MAKGOKA JJA AND PLASKET AND WEINER AJJA concurring)
SUPREME COURT OF APPEAL
31 MAY 2019

2019 SACLR 261 (SCA)

Suretyship

A suretyship agreement should be interpreted with reference to the principal agreement which creates the principal obligation. The extent of the surety's liability will be determined by the extent of the princicpal debtor's liability.

THE FACTS

KMSA Distributors (Pty) Ltd sold to Express Motor Trading 284 (Pty) Ltd a business known as the 'Mean Machines'. The sale agreement did not come into existence because none of the suspensive conditions therein were ever fulfilled About nine months thereafter, the two companies concluded a second agreement, known as 'the dealer agreement', in terms of which KMSA, as the distributor, appointed EMT (the dealer), as an independent retail outlet of its products. Clause 17 of the dealer agreement provided that the sureties interposed and bound themselves as sureties to KSMA for fulfilment of any of the dealer's obligations under that agreement. Annexed to the dealer agreement was a deed of suretyship executed by Moss and the other appellant in favour of KMSA, and a document which embodied the terms and conditions of payment.

In April 2013 KMSA instituted arbitration proceedings against EMT through the Arbitration Foundation of Southern Africa, claiming an amount of R11 824 221.60 which consisted of various amounts relating to unpaid rental in respect of the premises from which the business to which the sale agreement related, was conducted. Whilst the arbitration proceedings were pending, on 10 December 2013, EMT was placed under voluntary liquidation at the instance of the appellants. The claim in the arbitration proceedings was settled, with the liquidators of EMT admitting liability in the amount of R3m. An arbitration award was made an order of court.

In July 2015, KMSA brought an application in the high court against Moss for payment of the amount of R3m in terms of the deed of suretyship.

Moss contended that the suretyship related only to the sale agreement and not the dealer agreement and thus did not cover the debt.

THE DECISION

Clause 17 of the principal contract expressed the clear intention of the parties in relation to the suretyship. The high court isolated the deed of suretyship, treating the undertakings given thereunder as independent commitments that were enforceable, either on their own or by being attached to any transaction between the parties. This was untenable. A suretyship is, by its nature, an accessory contract. For there to be a valid suretyship there has to be a valid principal agreement. The suretyship in this case could therefore not be independent of the dealer agreement. This entailed identifying from the wording of the composite agreement the principal obligations to which the suretyship related.

The words 'under this agreement' in clause 17 of the agreement were a clear expression of the parties' intention to limit the application of the suretyship to any indebtedness arising under the dealer agreement. The suretyship only covered obligations arising under the dealer agreement.